CONSTITUTIONAL
INTERPRETATION

Volume II
Rights of the Individual

NINTH EDITION
In memory of

Harold W. Chase
1922–1982

teacher, scholar, mentor, publishing partner, friend, and
"the very model of a modern Major-General"

Though all the winds of doctrine were let loose to play upon the earth, so
Truth be in the field, we do injuriously, by licensing and prohibiting, to
misdoubt her strength. Let her and Falsehood grapple; who ever knew the
Truth put to the worse, in a free and open encounter?

—John Milton, AREOPAGITICA
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This is the ninth edition of Constitutional Interpretation and its component paperback volumes, subtitled Powers of Government (Chapter 1–7) and Rights of the Individual (Chapters 8–14). The title of the book was taken from the undergraduate course once taught at Princeton by Edward S. Corwin. As explained by Hal Chase and me in the preface to the first edition, which appeared 33 years ago, we rejected the perennial favorite among casebook titles, “Constitutional Law,” because the purpose of an undergraduate course is not so much to teach discrete rules of law but to examine the principles and methods by which Justices of the United States Supreme Court give meaning to provisions of the Constitution in the context of specific problems and concrete cases. This edition of Constitutional Interpretation covers noteworthy decisions through June 2007.

The ninth edition retains the same structure, order of chapters, and appendices as those preceding it, although material has been condensed and updated throughout. Because a casebook that traverses more than two hundred years of constitutional change must make choices about priorities and currency, the section on the Chief Executive’s pardoning power has been eliminated. It has been supplanted by an entirely new section, “George W. Bush and the Concept of the Unilateral Presidency.”

Unlike previous editions in which footnotes penned by the Justices were numbered while those written by me were lettered, all footnotes in the current edition are numbered. Footnotes that are not mine are followed by a bracketed attribution identifying the author. Because the language of law is unique and precise, this edition continues to include a convenient glossary following the appendices. Edited portions of judicial opinions usually include many ellipses (* * *). When an ellipsis is centered on the page or in a column, it indicates that a paragraph or more has been left out; when the sequence of three asterisks appears within a paragraph, it means that part of a sentence or more has been deleted. Letters, words, or punctuation marks appearing in brackets within the text of an opinion or an excerpt have been added by me, either to save space or to clarify meaning.

As with its earlier editions, Constitutional Interpretation will be updated by cumulative annual supplements. Starting in August 2008, the supplement will be accessible from the publisher’s website. As in the past, the supplement throughout will be keyed to the main text by insert statements indicating exactly where new material belongs. The cutoff date for each annual supplement will be the date on which the Supreme Court releases its final decision of its most recent complete Term.

While there are many people I have thanked over the years for their helpful suggestions in producing past editions of Constitutional Interpretation, there are five individuals in particular to whom I owe special debts of gratitude in the preparation of this edition. My
thanks to Karen Judd and Michael Lepera at Wadsworth Publishing for guiding the production of this book. I am indebted to Patrick Voisine for his patience and forbearance, not just during the year and a half this project took but for the years spent revising many of its predecessors. I also appreciate the valuable assistance of James Tucker, whose eagle eye and sound advice made this a much better book. And I am grateful, most of all, to my transplant donor, whose name I do not know, and who made possible not only this edition but the rest of my life.

Craig R. Ducat
DeKalb, Illinois
January 2008
INTRODUCTION

Although the chapters that follow focus on the development of doctrines pertaining to civil rights and liberties, rather than those affecting governmental structures and institutions, it might be useful at the beginning to summarize some of the most basic principles and procedures governing the consideration of constitutional cases by the federal courts—especially the Supreme Court. This summary is intended primarily for students who have not read Chapter 1. For students who are already familiar with those portions of constitutional law relating to the judicial process, the separation of powers, and federalism, this introduction will serve as a refresher.

At the core of constitutional law lies the concept of judicial review, the authority of courts—ultimately, the U.S. Supreme Court—to pass upon the constitutionality of actions taken by other branches of the federal government and the states (and their political subdivisions). This power, which is not explicitly granted to the courts in the Constitution, is primarily justified on the grounds that the American system is a constitutional—rather than a parliamentary—system. That means that the Constitution is supreme and all governmental bodies must operate in conformity with it. We know this because the Supremacy Clause (Art. VI, ¶ 2) of the Constitution says so and because it binds all governmental officeholders to recognize and comply with it. In parliamentary systems, by contrast, the national legislature is supreme and may alter the constitution by simply passing a law. Theoretically, the most recently passed law sits on the same plane and has the same legal weight as any other element of the constitution in a parliamentary system. Any part of the constitution can be altered at will; that is what makes parliament supreme. It also goes a long way toward explaining why judicial review has not been exercised in the British system: If courts became the ultimate arbiters of what was constitutional, then parliament would not be supreme.

The argument for judicial review in the American system, as set out by Chief Justice John Marshall in Marbury v. Madison (1803), was based on the notion that the Constitution, not Congress or any other legislative body, was supreme. As the Supremacy Clause plainly implies, rules contained in laws passed by Congress (and other legislative bodies) are inferior to the Constitution. When there is a conflict between an inferior rule (one passed by a legislature) and a superior rule (one contained in the Constitution or a treaty), it is the inferior rule that must give way. The concept of judicial review is based on this notion of constitutional supremacy because of what it means for judges to exercise judicial power. Judges exercise judicial power when they decide cases, and they do so by applying rules to facts. When there is a conflict between the rules judges are supposed to apply, they must first
decide what the law is before they can apply it to the facts. They are bound by the Supremacy Clause and their oath to apply the rule that is constitutional. Of necessity, then, in a constitutional system, judges properly exercise the power of judicial review.

As is discussed in the essay “Modes of Constitutional Interpretation” at the back of this volume, one of the many problems with this argument is that, in its most important respects, the Constitution is not a collection of rules at all, but a set of principles. And principles, such as “equal protection,” “due process,” “cruel and unusual punishment,” “freedom of speech,” and “unreasonable searches and seizures,” unlike rules, are open to many interpretations. Since judges, like other government officeholders, are heavily influenced by their political values and attitudes—something that may have been an important factor determining their selection in the first place—their interpretation of constitutional principles will vary. That is why the best single explanation for patterns and changes in the development of constitutional law by the Supreme Court (and other courts as well) is the political composition of the court. If it is largely true, as Charles Evans Hughes once said, that “We are under a Constitution, but the Constitution is what the judges say it is,” then the study of constitutional law is not so much the study of the Constitution as it is the study of constitutional doctrines (such as the “clear and present danger” test used in free speech cases) created and articulated by the judges to give meaning to its otherwise ambiguous provisions. Because the provisions of the Bill of Rights protecting civil rights and liberties are written almost entirely in terms of general principles, awareness of the Justices’ political attitudes and values is particularly important to understanding the specific parameters of those constitutional provisions.

For judges to exercise judicial power, a court must first have jurisdiction; that is, the authority to hear a case. The jurisdiction of courts, whether federal or state, is not defined by judges but by the respective federal or state constitution or a statute passed by a legislative body. Jurisdiction is also restricted by the principle of federalism. The Supreme Court, like all federal courts, is limited to deciding cases that present a federal question; that is, a claim arising under a provision of the U.S. Constitution or a law passed by Congress. Federal courts have no jurisdiction to decide cases involving only claims under a state constitution or state statute. In these matters, state courts exercise jurisdiction and the decision of the appropriate state supreme court is final. Cases coming before state courts may involve federal questions and such courts may rule upon them, but the U.S. Supreme Court has the last word in all matters of federal constitutional interpretation. Although the U.S. Constitution may be amended according to the procedure spelled out in Article VI or the Supreme Court may alter its previous interpretation of a constitutional provision (responding to political pressure applied to it by Congress or because of the appointment of new Justices), formally speaking, the ultimate authority in federal constitutional interpretation is the U.S. Supreme Court.

Courts may exercise original or appellate jurisdiction. Original jurisdiction is the authority of a court to hear a case in the first instance. Courts where cases are heard initially are known as trial courts. In formal and somewhat simplistic terms, it is generally expected that trial courts apply existing rules to the facts of a case rather than create rules or legal doctrines. Courts that hear cases that have first been decided elsewhere are known as appellate courts. Stated in equally formal and perhaps deceptively simple terms, their function is to clarify the application and interpretation of rules by trial courts, not to engage in the determination of facts. The function of appellate courts, therefore, is to review (and correct) errors by trial judges. The task of the Supreme Court is to settle disagreements about the rules with finality.

As the chart on page xx shows, one of the features of federalism (that is, the concept of two distinct sovereigns operating over the same geographical territory) is the fact that there
is a dual system of courts. The federal judicial system is a triple-tier structure comprised of trial courts at the bottom, known as U.S. District Courts, and extending upwards to include intermediate appellate courts, known as the U.S. Courts of Appeals, and at the top, the U.S. Supreme Court. As shown on page xxi, there are 94 federal district courts. Sometimes a state constitutes a federal judicial district by itself; sometimes a state may be divided into two, three, or four federal judicial districts. But the boundary of a federal judicial district never crosses a state line. Overlaying the district courts are 12 federal courts of appeals—11, comprised of three or more states, are designated by numbered circuits. The twelfth is the U.S. Court of Appeals for the District of Columbia Circuit. It is the function of these intermediate appellate courts to hear appeals in cases initially decided by the district courts. In turn, there is the possibility of further review by the U.S. Supreme Court. There are other federal trial and appeals courts, but the ones just identified are the usual focus of attention in cases on civil rights and liberties.

Except for those that still remain very rural, most states have a comparable three-level structure in which cases are usually routed as they are in the federal judicial system: from a trial court, to intermediate appellate court, to state supreme court. In cases that only raise claims or questions arising under the state constitution or a law passed by the state legislature, the state supreme court has the final word. When it comes to civil rights and liberties, this is especially worth noting because of a phenomenon known as “judicial federalism.” With the end of the Warren Court era (1953–1969) and its succession by the Burger Court (1970–1986) and then the Rehnquist Court (1986–2005), the Supreme Court generally reduced the breadth of its interpretation of constitutional provisions pertaining to civil rights and liberties. To be sure, there was growth in some areas of federal constitutional rights—the right of privacy, commercial speech, corporate speech, and property rights are examples—but many constitutional rights that experienced growth and expansion during the Warren Court era (such as the rights of individuals accused of crimes) were trimmed or jettisoned in the conservative periods that followed. Although the U.S. Supreme Court’s interpretation of federal rights binds both the national government and the states to respect them, states may give their citizens more rights, but not fewer rights, than the U.S. Constitution provides. When a state supreme court reads that state’s constitution so as to give its citizens more than the U.S. Constitution requires, the state supreme court rests its decision on an independent state ground—its interpretation of state law. Since this does not constitute a federal question, but a state question, the state supreme court has the last word. In the wake of cutting back on federal constitutional rights by the Burger and Rehnquist Courts, some state supreme courts have repeatedly invoked this independent state ground as the basis for maintaining the civil rights and liberties of their citizens. Although this was the case in numerous instances that involved the rights of criminal defendants, perhaps the most famous example was the effort of many state supreme courts to equalize the funding of public schools and overcome substantial disparities in school district wealth. When the U.S. Supreme Court denied poorer school district’s the relief they sought under the Fourteenth Amendment, state supreme courts from California to New Hampshire rested their favorable decisions on the equal protection clauses or education provisions of their state constitutions.

Since 1925, when Congress radically reduced the number of cases the Justices were legally required to hear, the Court has obtained virtually complete control of its docket. Today, the Court hears only those cases it decides to hear. It grants review in a case when four Justices vote to grant a writ of certiorari (or “cert.” for short), which is a court order directing a lower court to send up the record in a case. The losing party in the court below must petition the Court to grant the writ. To do this, the party seeking review files a petition with the Court setting out the question(s) it wants the Court to address; in
## The Flow of Cases to the U.S. Supreme Court

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<thead>
<tr>
<th>State Supreme Court (Court of Appeals in Maryland and New York)</th>
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<tbody>
<tr>
<td>Foreign Intelligence Surveillance Court of Review*</td>
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<tr>
<td>Intermediate Appellate Court</td>
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<td>Trial Court</td>
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<tr>
<th>Federal Judicial System</th>
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<tr>
<td>UNITED STATES SUPREME COURT</td>
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<tr>
<td>Court of Appeals for the Armed Forces</td>
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<tr>
<td>Court of Appeals (in D.C. and 11 numbered circuits)</td>
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<tr>
<td>Court of Appeals for the Federal Circuit</td>
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<td>Foreign Intelligence Surveillance Court of Review*</td>
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<th>State Judicial System</th>
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<td>Lower Military Courts</td>
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<td>Independent Commissions and Regulatory Agencies</td>
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<td>District Court</td>
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<td>Tax Court</td>
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<td>Court of Claims</td>
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<tr>
<td>Court of International Trade</td>
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<tr>
<td>Foreign Intelligence Surveillance Court*</td>
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(Some courts and routes used less often have been omitted from this chart.)

*The Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) operate in secret; the dockets, hearings, and decisions of those courts are not open to the public, and declassified opinions have been released on only two occasions. See, In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 2002 WL 1949262 (FISC, 2002); 2002 WL 1949263 (FISC, 2002). The FISC is comprised of 11 federal district judges, selected by the Chief Justice from seven circuits, who individually hear and rule upon applications for electronic surveillance by the FBI. If the government is dissatisfied with a decision, it may appeal to the FISCR, a three-judge body whose members are selected by the Chief Justice from among federal appeals and district judges, one of whom is designated to preside. See Chapter 9, section D.)
response to the petitioner’s brief, the respondent (the winning party in the court below) files a reply brief. The significance of granting the writ is that the Court will hear the case; that is, usually it will give the case plenary consideration. It will be scheduled for oral argument; following that, it will be discussed in a conference among the Justices; and finally a tentative vote will be taken. If the Chief Justice is in the majority, he may either write the Opinion of the Court himself or assign it to another Justice. After the opinion is drafted, it is circulated to other members of the Court, as are any concurring or dissenting opinions. After any revisions and possible vote-switching, a final vote is taken and the decision is publicly announced from the Bench when the Court next meets.

The Supreme Court begins its annual Term the first Monday in October and continues until the last week in June, when the Justices depart for the summer recess. The Term cycles through seven two-week sessions of oral argument in which on Mondays, Tuesdays, and Wednesdays the Justices hear argument in four cases per day, with an hour usually allotted to each case (half an hour to each side). The Court meets in conference Wednesday afternoons and Fridays to discuss the cases that have been argued; On Fridays it makes decisions on granting cert. Roughly a month intervenes between each session of oral argument, which provides time to draft and revise opinions, prepare for oral argument in future cases, and review pending petitions for cert.

As previously indicated, the basis upon which Justices will be considering the petition for cert. is whether the case presents a substantial federal question. According to Rule 10 of the Supreme Court’s Rules, what the Justices will focus on is the importance of the issue, not whether they think the decision below was unjust in the case of these litigants. The Court does not exist to do personal justice because the demands of its caseload are overwhelming, so heavy that adequate time to do this in every case—and all litigants are entitled to be treated similarly under the applicable standard—is impossible. The Justices therefore make their determination on the basis of how important the legal issue is, not whether there has been a miscarriage of justice in a given case. Rule 10 identifies several measures by which a case may be deemed to present an important federal question, whether of constitutional or statutory interpretation: whether a federal appeals court or state supreme court has decided an important question of federal law that has not been, but should be, settled by th[e] [U.S. Supreme] Court,” or whether a federal appeals court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of th[e] [Supreme] Court’s supervisory power.” The odds of obtaining cert. from the Supreme Court are extremely low; less than 1% of the parties petitioning for review have their request granted. As Justice Frankfurter emphasized decades ago, “[S]uch a denial carries with it no implication whatever regarding the Court’s view on the merits of a case which it has declined to review.” However, the legal consequence of denying cert. in a given case is clear—the decision of the highest ranking lower court stands. In light of the especially long odds that cert. will be granted in a case, it is only realistic to say that the decision of a federal appeals court or a state court of last resort effectively ends a case.

When at least four Justices vote to grant cert., full-dress consideration of the case normally follows, as described previously. In the end, the judgment of the Court can take any one of several forms: if a majority of the Justices agrees with the decision of the court below, the Court affirms that judgment; if a majority disagrees with the outcome below, it has several options. The Court may reverse the judgment below, in which case the decision now goes to the party that lost below; or the Court can vacate, the judgment below, in which case the previous decision is set aside and no outcome is specified by the Court, either because none is
necessary or because a court below must conduct further proceedings. If a case is sent back—whether or not the outcome is specified by the Supreme Court—we say it is remanded. On remand, a lower court is instructed to act “in a manner not inconsistent” with what the Supreme Court has held. On rare occasions following oral argument, the writ of certiorari may be dismissed “as improvidently granted,” which means that, upon argument and reflection, there was less to the case than initially caught the Court’s eye. The effect in such a case is the same as if cert. had not been granted in the first place.

In relatively few cases, often less than two dozen a Term, the Court simply announces its judgment—affirmed, reversed, vacated, or one of these coupled with remanded. In the 75 or so cases given plenary consideration, there will be one or more formal statement(s) of the Justices’ reasoning. If the reasons supporting the judgment are agreed to by a majority of those Justices participating in the decision, the opinion becomes the Opinion of the Court. Opinions not only provide reasons for the decision but, in doing so, state the policy of the Justices on a legal matter. Only an Opinion of the Court can bind the Court as an institution to a particular statement of policy. As a matter of convention, where the Chief Justice is in the majority, he may elect to write the Opinion of the Court himself or assign it to another Justice voting in the majority. Justices who vote with the majority, but do so for reasons different from or in addition to those stated in the Opinion of the Court, pen a concurring opinion. A dissenting opinion may be filed by one or more Justices who vote for the losing party and it provides reasons for reaching a different outcome in the case. Just as it is possible for a judgment to be mixed, since the Court may affirm part of a lower court decision but reverse another part, so there may be opinions in which Justices concur in part and dissent in part. Sometimes the views of the Justices in a given case are so fragmented that no one can speak for a majority. In such cases, a Justice will announce the judgment of the Court in a plurality opinion—one that speaks for a number of Justices short of a majority. When this happens, the vote and content of a concurring opinion by another Justice will be critical to explaining why the Court ruled as it did, although nothing less than an Opinion of the Court can bind the Court.

The varieties of opinions just described are known as signed opinions because they identify their authors and those other members of the Court who agree with them. From time to time, however, the Court speaks through what are called per curiam, or unsigned, opinions. These opinions are so labeled and speak for the Court; although they are written by one or more members of the Court, the authors are not designated. Sometimes they are used where the result in the case seems obvious and little discussion is necessary. At other times, they are used in the very opposite of circumstances—where the Court is so fragmented nobody much agrees with anybody else. In those instances, a per curiam opinion—usually in little more than a paragraph—simply announces the outcome in a case. This is then often followed by a parade of concurring (and possibly dissenting) opinions.

Decisions of the U.S. Supreme Court are available from three different published sources, each with the complete and identical text of the Justices’ opinions. The Court’s decisions are officially printed as the United States Reports, published by the Government Printing Office, and are also available in the Supreme Court Reporter, published by West Publishing Group since the 1880s, and the Supreme Court Reports, Lawyers’ Edition, published by the Lawyers Cooperative Publishing Company and including the full run of Supreme Court decisions from the beginning. In the citation of a case, these different reports are respectively abbreviated U.S., S.Ct., and L.Ed, or L.Ed.2d, depending on whether it is in the first or second series of reported decisions. In a case citation, this abbreviation of the reporter is preceded by the volume number and followed by the page number on which the decision begins. A complete case citation also includes the year of the decision in parenthesis at the end.
In terms of the cases you will encounter in this casebook, lower federal court cases are reported in two reporters: Decisions of the courts of appeals appear in the Federal Reporter, abbreviated F., F.2d, or F.3d, depending upon whether the series referred to is the first, second, or third series of reports; decisions of the federal district courts are reported in the Federal Supplement, abbreviated F.Supp. or F.Supp.2d, again depending upon whether it is the first or second series. Decisions of state courts of last resort and inferior state courts are reported in what are called the Regional Reporters, with the states lumped together in various regions, although the states included in the particular regions may strike you as odd. Decisions of the courts in California and New York are also reported in separate reporters. As with any case, a complete citation includes the year of the decision in parenthesis at the end, and in lower federal court cases or state cases, an identification of the particular district, circuit, or state court rendering the decision. You can track down information on these and other legal source materials at the Wadsworth website.

The text of decisions presented in this casebook have been edited, sometimes severely because of space limitations. You can find the complete text to any decision referred to in this volume by going to a law library and using the citation to track down the appropriate volume in the reporter series. Access to some of the decisions—particularly those of the Supreme Court—may also be available online; see Appendix E.

Although most state and local judges in this country are elected to office, federal judges—including the Chief Justice and Associate Justices of the Supreme Court—are nominated by the President and must be confirmed by the Senate, as provided by Art. II, §2, ¶ 2 of the Constitution. Once appointed, tenure in office is for life, practically speaking, since vacancies can be created only through resignation, retirement, or impeachment and removal. The size of the Court as well as the structure of the rest of the federal judiciary is set by statute. Life tenure is one of three distinguishing constitutional characteristics designed to promote judicial independence, that is to reduce the susceptibility of federal judges to political pressure. The Constitution also provides that the salary of a federal judge may not be reduced during his or her tenure and federal judges are restricted to deciding only “real cases and controversies.” This last feature bears explanation.

Federal courts are restricted only to deciding cases that arise out of, and are configured by, the distinctive features of the adversary process. Some state supreme courts—that of Massachusetts, for example—and some foreign courts—like the Supreme Court of Canada—may, on the request of the legislative or executive branches, give advice on the constitutionality of a statute (or a proposed statute) without a lawsuit having been filed first or in advance of any injury being done or alleged. All federal courts in the U.S. are constitutionally barred from rendering such advisory opinions. Their decisions and opinions must be a consequence of deciding “real cases and controversies.” Although it may be difficult at first to understand this notion in the abstract, it is meant to connote a dispute in which the party bringing the suit (the plaintiff) alleges that an identifiable, particular injury has been done to his or her interests by the defendant. This injury must be actual, not abstract, imagined, or hypothetical. The interests of the party bringing the suit and those of the party defending must be adverse, so collusive suits are barred as well. The interests need not be tangible, such as suffering bodily injury; the injury done could be, say, denying someone the right to vote or refusing to serve someone in a place of public accommodation on the basis of race, but the interests nonetheless must be real. The dispute must also be live; that is, the injury must not have already been ended by settlement or the passage of time, or resolved by some sort of governmental or other action.

Federal courts have also required that disputes be ripe for adjudication, that is that the facts in a legal action be sufficiently developed so that the injury and interests are clear, so that judges do not have to guess about the existence of necessary facts. Guessing about
things that have not yet happened, but whose existence is essential to an informed decision, subjects a court’s decision to unnecessary risk of error. Nor will federal courts attempt to decide “political questions.” These are controversies more properly decided by other branches of the government because (1) the text of the Constitution clearly commits the decision of such matters to another institution of government; (2) there are no manageable standards courts can rely upon to measure the interests or injury alleged; or (3) prudence or wisdom dictates that the decision be made by overtly political officials of the government officials (because the policy choices turn on purely political calculations or strategy, like recognizing foreign governments or conducting a war).

Finally, the party bringing the suit must have standing to do so—he or she must be personally affected by the injury alleged. Standing, then, is the concept that connects the identity of the plaintiff to the interests he or she is asserting. Federal courts will not entertain suits brought by plaintiffs who only assert some general injury indistinguishable from that shared by people generally. Nor will courts hear suits brought by third parties or bystanders in a controversy. In other words, the party bringing suit must allege direct personal injury to a legally recognized interest. Together, these requirements, imposed so that the adversary system can operate effectively and without infringing the separation of powers, collectively characterize the “justiciability” of a case, that is its suitability for adjudication.

The Supreme Court functions as both constitutional and statutory court, which means that the cases it chooses to hear, call for interpretation of a constitutional provision or require the interpretation of a law passed by Congress. Until the 1960s, the Supreme Court was overwhelmingly a court concerned with the interpretation of federal statutes. During the 1960s and 1970s, this changed dramatically. Under Chief Justice Earl Warren, the Court became a tribunal focusing largely (two-thirds of the time at its peak) on the interpretation of the Constitution, especially provisions of the Bill of Rights. Since the 1970s, the Court increasingly has reverted to its pre-Warren Court role as mainly a statutory Court. Today, approximately 40% of the cases the Court hears are disputes requiring constitutional interpretation, but most of these involve civil rights and liberties, the subject of this volume. Because the criteria for granting cert. practically ensure that matters coming before the Court will be controversial, the proportion of nonunanimous cases is relatively high, although the dissent rate on some state supreme courts—especially those in some of the more urban states—is probably higher. Usually, the percentage of split decisions per annual Term of the Court falls between the mid-50s and the mid-60s.

In addition to operating within the constraints imposed by jurisdiction and justiciability, there are some other basic principles that guide and limit the Justices. Foremost among these, perhaps, is respect for stare decisis, the principle of adhering to cases already decided. As with other judicial systems rooted in English jurisprudence, American judges are expected to justify their decisions by adhering to lines of decision already established in previous cases, injecting creativity or promoting change only when really necessary. Deciding the case at hand by stressing its similarity to an earlier case or precedent is done to promote stability, to treat those parties with fairness that have in good faith relied upon the existing rules, to profit from the wisdom of experience, to process disputes with greater efficiency, and to recognize the essential moral and legal equality of all individuals (for, unless one can give a good reason why seemingly similar cases are not treated alike, it would suggest that the negatively affected party is morally or legally inferior). Departure from precedent, while occasionally necessary and well-justified, is therefore expected to be both relatively rare and thoroughly explained.

Judges conventionally observe other basic principles too. Cases should be decided on the narrowest possible ground, which means that judges should decide only that which they have to decide in order to dispose of the case at hand. Straying beyond necessity heightens
the potential for mistake in deciding the case at hand and may well telegraph an inaccurate signal of law to future parties who may find to their detriment that they have relied on an inaccurate statement about their rights and responsibilities, which courts will then have to retract.

In keeping with these principles, the Justices should not decide constitutional questions if they can dispose of the case on statutory grounds. If constitutional questions are unavoidable, then they should seek to save a statute from being declared unconstitutional, if it can be done. In other words, if a statute challenged as unconstitutional can be saved by interpreting it in a narrower or clearer way, they must attempt to do so. Only as a last resort, should a statute be declared unconstitutional.

As the essay “Modes of Constitutional Interpretation” appearing at the end of this volume explains, the Supreme Court’s involvement with the provisions of the Bill of Rights — especially as applied to the states—is overwhelmingly a post-World War I development. Consequently, the cases presented in the chapters that follow are generally of more recent vintage than those in Volume I. For the most part, the theme of constitutional interpretation in the first volume was the triumph of interest balancing over constitutional absolutism. By contrast, the conflict underlying judicial politics in the cases that follow reflects a more contemporary debate among the Justices—that between judicial self-restraint and strict scrutiny.
Chapter 8

Due Process of Law

Despite the popularity of federalism when it came to experimentation, flexibility, and democratic accountability in the making of public policy generally, decentralization was seen as much less desirable when the preservation of fundamental rights and the administration of law were at stake. Deference to state legislatures in matters of economic regulation was one thing, but protecting civil liberties and doing justice were another. Justice, after all, is a concept that is not commonly thought to have geographic borders; it is usually regarded as a universal concept. In the search for minimal constitutional safeguards capable of transcending state boundaries, attention naturally focused on the Bill of Rights.

A. Due Process and the Federal System: The Selective Incorporation of the Bill of Rights into the Fourteenth Amendment

The Bill of Rights Before Incorporation

In 1833, when it first encountered the argument that the Bill of Rights applied to limit acts of the states as well as those of the national government, the Supreme Court emphatically rejected the overture. Speaking for a unanimous Court in Barron v. The Mayor and City Council of Baltimore (p. 471), Chief Justice Marshall held that it was clear from the wording and intent in passage of the amendments that their provisions were directed against infringement by the national government only. For reliance on the protection of basic liberties at the state level, one had to look to the provisions of the individual state constitutions. Moreover, this position remained unchallenged until the ratification of the Fourteenth Amendment in 1868 reopened the possibility of circumscribing the reserved powers of the states with basic constitutional guarantees.
Mr. Chief Justice MARSHALL delivered the opinion of the court:

***

The question * * * 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 powers [the people] conferred on [the federal] 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 [federal] government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as * * * they deemed most proper for themselves. * * *

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 * * * [the federal] government. In 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. * * *

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,” etc. 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.

* * *

If the original Constitution, in the ninth and tenth sections of the first article, draws the plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; 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.

* * * 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.

* * * 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.

* * * These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.* * *

This court, therefore, has no jurisdiction of the cause, and is dismissed.

The Fourteenth Amendment presented two significant possibilities for altering the existing balance of the federal system by enlarging substantive limitations on the exercise of state power. Both of these opportunities were contained in consecutive clauses of section 1 of the amendment, which provides: “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 * * *.” It is impossible to say definitively what the framers of the amendment meant by “privileges and immunities of citizens of the United States” because there are plenty of indications that they themselves were not sure what they meant. It appears they meant the phrase as a sort of catchall intended to protect fundamental human rights from state infringement, including the right to travel freely between states. Given the political low point hit by both the Presidency under Andrew Johnson and the post–Civil War Supreme Court, it should not go unsaid that there is substantial evidence the amendment’s framers meant to give Congress broad legislative authority to protect important personal freedoms.

The post–Civil War Court, however, unenthusiastic about the potential for radically changing the federal system, took a narrow view of these provisions. To begin with, its 1873 decision in Butchers’ Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co. (The Slaughterhouse Cases), which follows, virtually emasculated the Privileges and Immunities Clause. Invited to recognize the existence of certain substantive national rights, among them the right to practice one’s lawful occupation, the majority emerged from its reading of the amendment with a remarkably conservative interpretation. Speaking for five of the Justices, Justice Miller ascribed a narrow purpose to the post-war amendments—the guarantee of freedom for blacks (and presumably for other minorities as well) within the existing federal context. He emphatically rejected the proposition that the
Privileges and Immunities Clause was intended to impose specific substantive rights as a concomitance of state as well as national citizenship. Instead, the clause was perceived as maintaining the phenomenon of dual citizenship with the proviso that a given state not discriminate among any of the people coming within its borders whatever their place of residence, a view quite compatible with the Court's dual federalist orientation, something that would be even more apparent by the end of the century.

**Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.**  
[The Slaughterhouse Cases]  
Supreme Court of the United States, 1873  
83 U.S. (16 Wall.) 36, 21 L.Ed. 394

**BACKGROUND & FACTS** In the face of a faltering response to the problem by the New Orleans city government, the Louisiana legislature passed an act in 1869 to clean up the Mississippi River. The cause of the pollution and resulting contamination of the city’s water supply (which was producing a mounting incidence of cholera) was the dumping of refuse into the river from the many small independent slaughterhouses. What feeble ordinances the city council had managed to enact were ignored or were evaded by the movement of butchering facilities north of the city on the river beyond its jurisdiction. In the act, the legislature prohibited all landing and slaughtering of livestock in the city or surrounding parishes except at one large slaughterhouse, which was granted an exclusive franchise for 25 years. Aside from laying out the usual corporate specifications, the act also established maximum rates to be charged for the landing and slaughtering of livestock.

The Butchers' Benevolent Association, a group of the small independent slaughterers who had been displaced by the legislation, challenged the act on the grounds that it violated the Thirteenth Amendment and the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment in taking away their livelihood. Both a state district court and the Louisiana Supreme Court rendered decisions in favor of the state-created monopoly held by the Crescent City Livestock Landing & Slaughterhouse Company. This case came to the U.S. Supreme Court on a writ of error along with two other cases involving the same controversy. Although defenders of the statute argued it was a legitimate and necessary response to a genuine public health problem, the independent butchers were outraged by the large-scale bribery that made possible its enactment. Some 6,000 shares of stock in the new slaughterhouse were distributed to members of the legislature as payoffs for their votes on the bill.

Mr. Justice MILLER delivered the opinion of the Court:

* * *

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 13th 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 1st section of the 14th article of amendment.
This court is thus called upon for the first time to give construction to these articles.

**The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.**

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

**Then the next paragraph relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.**

The language is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words "citizen of the state" should be left out when it is so carefully used, and used in contradistinction to "citizens of the United States" in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one prevailing purpose found in them all[:] ***

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so, if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. * * *

* * *
The constitutional provision [here] alluded to did not create [additional] * * * rights, which it called privileges and immunities of citizens of the states. * * *

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

* * *

The reversal of the judgments of the supreme court of Louisiana in these cases would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. * * * [T]hese consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character [that it would] radically change[ ] the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people. * * *

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states, which ratified them.

* * *

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of Crandall v. Nevada, 73 U.S. (6 Wall.) 36, 18 L.Ed. 745 (1868). It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land-offices, and courts of justice in the several states." * * *

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guarantied by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the 13th and 15th articles of Amendment, and by the other clause of the Fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United
States within the meaning of the clause of the 14th Amendment under consideration. * * *

The argument has not been much pressed in these cases that the defendant’s charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. * * *

We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision. * * *

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

Mr. Justice FIELD, dissenting:

* * *

* * * The provisions of the Fourteenth Amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. * * *

* * *

What, then, are the privileges and immunities which are secured against abridgement by state legislation?

* * *

* * * The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. * * *

* * *

* * * [E]quality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name. The 14th Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. * * *

I am authorized by Mr. Chief Justice CHASE, Mr. Justice SWAYNE and Mr. Justice BRADLEY, to state that they concur with me in this dissenting opinion.

Mr. Justice BRADLEY, dissenting:

* * *

[A]ny law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens. * * *

* * *

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section. * * *

The dissenters in Slaughterhouse were perhaps less concerned with the use of the Privileges and Immunities Clause to extend the scope of civil liberties widely than they
were with its use for the immediate protection of certain economic interests. It is significant that, when the Court extended provisions of the Bill of Rights to limit state action, it began with the Takings Clause of the Fifth Amendment, which protects private property. Indeed, Justice Field himself lived to participate in the Court’s decisions of 1896 and 1897 that did this (see p. 481), and he also cast one of the votes that inaugurated the doctrine of “liberty of contract” in Allgeyer v. Louisiana (p. 432) at about the same time.

That Slaughterhouse spelled the demise of the Privileges and Immunities Clause as an effective guarantor of federal liberties at the state level has been lamented by more than a few of the Justices since then. In 1941 in Edwards v. California (p. 387), the Court relied upon the Commerce Clause to strike down state laws that aimed at stopping the influx of poor people. As noted in Chapter 6, both Justices Douglas and Jackson favored reinstating the Court’s decision on the Privileges and Immunities Clause. Justice Douglas wrote, “The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.” And rejecting the Commerce Clause grounds as “denaturing human rights,” Justice Jackson declared with customary eloquence:

This clause was adopted to make United States citizenship the dominant and paramount allegiance among us. The return which the law had long associated with allegiance was protection. The power of citizenship as a shield against oppression was widely known from the example of Paul’s Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: “Take heed what thou doest: for this man is a Roman.” I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of [the Privileges and Immunities Clause] in the Fourteenth Amendment * * *

But the hope proclaimed in such generality soon shriveled in the process of judicial interpretation. * * *

While instances of valid “privileges or immunities” must be but few, I am convinced that this is one. I do not ignore or belittle the difficulties of what has been characterized by this Court as an “almost forgotten” clause. But the difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law. * * *

This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

Further discussion of the right to interstate travel appears in Chapter 14, section E.

The Theories and Process of Incorporation

The second possibility for underwriting a national guarantee of individual rights appeared in the Due Process Clause, which provides that no state shall “deprive any person of life, liberty or property, without due process of law.” Due process, as conventionally understood, means procedural regularity or fairness. It focuses on the means by which government deprives people of things — whether life, liberty, or property — and calls to mind assurances that policy will be implemented in ways that are not irregular, arbitrary, or unreasonable. When governmental action that imposes some deprivation or limits an individual’s right of action is at issue, interpreters of the clause who focus on this variety of due process
essentially ask whether the affected person received all the process that was due. This way of putting the question accurately suggests that procedural due process deals in degrees of protection. Usually we require government to employ more extensive procedures when it seeks to impose the death penalty than when it suspends or revokes a driver’s license. How much process is due ordinarily depends upon a balancing of several factors, such as the importance of the affected interest, the risk of an erroneous decision, and the cost of the procedures to be used. At a minimum, due process usually requires notice and sometimes reasons before government acts; at its maximum, due process requirements take the form of a full-blown trial. Throughout, the focus remains the constitutionality of the methods by which governmental policy is implemented.

Case-by-Case Fairness

Until well into the twentieth century, the Court saw the Due Process Clause as only a very general guarantee of procedural fairness in the legal process at the state level—a point forcefully articulated by a nearly unanimous Court in *Hurtado v. California* (p. 483) in 1884. Speaking for the majority, Justice Matthews sustained the constitutionality of California’s substitution of charging by information in place of indictment by grand jury as consistent with assuring the fundamental value of fairly treating those individuals accused of crime embodied in the evolution of Anglo-American legal institutions. The significance of the *Hurtado* decision and of those in two cases that followed, Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448 (1900) (in which the Court sustained the constitutionality of a Utah law providing for trial before an 8- instead of a 12-person jury) and Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908) (in which the Court sustained as constitutional the act of a state trial judge drawing attention to the fact that two defendants in an embezzlement case had refused to testify on their own behalf), was that they defined due process of law as equivalent to fundamental fairness and applied this standard on a case-by-case basis to evaluate the totality of procedures by which government treated the individual in the criminal justice process. Provisions of the Bill of Rights, then, limited the national government, but not the states, because the Fourteenth Amendment said nothing about it. The Fourteenth Amendment guaranteed due process, equal protection, and—not much else.

More modern expressions of this same case-by-case fairness or balancing approach appear in Justice Frankfurter’s opinions in *Adamson v. California* (p. 489) and *Rochin v. California* (p. 492) and in the opinions of Justice John Harlan, Jr. The fairness standard implicit in “the law of the land” reference in *Hurtado* becomes explicit in *Rochin*’s proscription of “conduct that shocks the conscience” and that “offend[s] the community’s sense of fair play and decency.” Such a standard typifies the balancers’ wide regard for the necessity of judicial discretion and flexibility and for all possible deference to the federal relationship.

But as we saw in the preceding chapter, “due process” was not the only term in the clause that had attraction. “Liberty,” too, had its proponents. From 1895 to 1936, these had been conservatives intent on reading “liberty” to mean “liberty of contract.” Supplying “liberty” with specific content is an approach known as substantive due process. This approach places certain matters beyond the reach of government, or at least erects constitutional hurdles in the path such that government must specially justify its regulation. As contrasted with procedural due process—or fairness—substantive due process limits what government can do, not just how government can go about doing it. The notion that government is forbidden altogether from operating in certain areas, or that it must discharge some special burden of proof to entitle it to do so, necessarily assumes that these matters are customarily committed to the choice and judgment of the individual. Indeed, leaving any sphere of
activity to the control of the individual is what we mean when we use the word “liberty.” The particular freedom or freedoms read into the term “liberty” are often denominated “fundamental” in order to emphasize the fact that they are expected to function as an effective limitation on governmental action. As Exhibit 8.1 on the theories of incorporation (p. 480) shows, “liberty” in this context came to be defined in whole or in part as the freedoms contained in the Bill of Rights.

**Total Incorporation**

Dissenting alone in *Hurtado*, *Maxwell*, and *Twining* was Justice John Harlan, Sr. What distinguished Harlan’s reading of the Due Process Clause from that of his contemporaries was his insistence that the word “liberty” was intended to be a shorthand reference to the protections contained in the Bill of Rights. To Harlan, the whole import of the Fourteenth Amendment was to undo *Barron v. Baltimore* and the antebellum federal system and to nationalize the substantive guarantees of personal liberty contained in the first eight amendments. Such a total incorporation of the provisions of the Bill of Rights into the Fourteenth Amendment by way of the Due Process Clause would not only make them applicable against state infringement, but also simultaneously incorporate any interpretation of those amendments.

The total incorporation approach was taken up several decades later by Justice Hugo Black, notably in his dissenting opinion to the Supreme Court’s decision in *Adamson v. California* (p. 490). In this now classic opinion, Black reacted sharply to what he saw as the unbridled discretion and resulting arbitrariness inherent in the case-by-case fairness approach. To bolster the argument for total and literal incorporation of the Bill of Rights through the Due Process Clause, Black, in an appendix to his opinion, examined extensively numerous historical materials with the aim of showing that it was the intention of the framers of the Fourteenth Amendment to incorporate the first eight amendments and apply them to the states. Assuming that discovery of the framers’ intention is both possible and relevant — matters far from settled — Black’s reading of the proceedings of the Thirty-ninth Congress, which proposed the amendment, and statements of several backers of the amendment are bolstered by the conclusions of Professor Horace Flack in his book *The Adoption of the Fourteenth Amendment* (1908). Black’s analysis, however, has been severely challenged as deliberately distorted by Harvard law professor Charles Fairman in his article “Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,” 2 Stanford Law Review 5 (1949), but other scholars have supported it.1

Justice Black reiterated the total incorporation position he espoused in *Adamson* continually during his remaining tenure on the Court, as his opinion in *Rochin v. California* (p. 493) illustrates. Moreover, faithful adherence to this absolute position led Black to dissent in *Griswold v. Connecticut* (p. 719) in 1965 when the majority began to reach out and incorporate fundamental personal rights not contained in the Bill of Rights. In his view, the incorporation of more than the first eight amendments was fully as fraught with unbounded discretion, and therefore was fully as obnoxious, as the incorporation of less.

**Selective Incorporation**

Ultimately, a majority on the Court came to accept a compromise between no incorporation and total incorporation. Known as “selective incorporation,” this eclectic approach to resolving the conflict between nationalized protection of specific individual rights and the federal system was first enunciated by Justice Cardozo, speaking for the Court

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in *Palko v. Connecticut* (p. 486) in 1937. What this approach entailed, essentially, was a selective nationalization of portions of the Bill of Rights, the incorporation of a given right dependent upon whether it was “found to be implicit in the concept of ordered liberty * * *.” Absorption of those rights implicit in national citizenship through the Due Process Clause of the Fourteenth Amendment on the basis “that neither liberty nor justice would exist if they were sacrificed” had the advantage over total incorporation of guaranteeing fundamental personal rights, such as free speech, without imposing on the states frivolous requirements, such as providing the option of a jury trial in all civil suits involving $20 or more, and it confined the sweeping discretion inherent in the case-by-case fairness approach by permanently incorporating whole fundamental rights and imposing them alike at both the national and the state levels. Such a pragmatic approach, however, lacked any historical justification and was alternately assailed for its imprecision and rigidity. Nevertheless, by a slow and evolutionary process of picking and choosing, largely dependent on the composition of the Court, individual liberties one by one were read into the Fourteenth Amendment. As is evident from the steps in the absorption process, set out in Exhibit 8.2, the Court first included those Fifth Amendment protections restricting government’s exercise of the power of eminent domain, a focus consistent with its initial enthusiasm for protecting economic liberties and property rights shown in so many of its constitutional rulings before 1937. Next,

### Exhibit 8.1 The Four Theories of Incorporation

<table>
<thead>
<tr>
<th>Theory</th>
<th>Definition</th>
<th>Judges</th>
<th>Advantages</th>
<th>Disadvantages</th>
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<tr>
<td>Total Incorporation Plus</td>
<td>“liberty” means all of the provisions of the first eight amendments and any others thought fundamental</td>
<td>Murphy and Rutledge in <em>Adamson</em></td>
<td>Has all of the advantages and disadvantages of total incorporation except that, while it is not static, it raises the problem of subjectivity in incorporation of rights beyond the Bill of Rights.</td>
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<tr>
<td>Total Incorporation</td>
<td>“liberty” means all of the provisions of the first eight amendments, no more and no less</td>
<td>Harlan, Sr., in <em>Hurtado</em>, Manswell, and Tuning</td>
<td>Provides a clear guide as to which rights are incorporated and affords firm protection for civil liberties, but is very rigid, static, and costly. May be historically questionable.</td>
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<tr>
<td>Selective Incorporation</td>
<td>“liberty” means all of the provisions of the first eight amendments thought “fundamental to a scheme of ordered liberty”</td>
<td>Cardozo in <em>Palko</em></td>
<td>Distinguishes between important and unimportant rights and gives firm protection to rights incorporated, but affords no protection for rights outside the Bill of Rights, lacks any historical justification, and criterion for incorporation is vague.</td>
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<tr>
<td>Case by Case Fairness</td>
<td>“due process” means assessing on a case-by-case basis whether the procedures at issue are fair</td>
<td>The Court in <em>Hurtado</em>, Reed in <em>Adamson</em></td>
<td>Is flexible, dynamic, and sensitive to the cost of incorporation, but can be very subjective and unpredictable, and affords inadequate protection to civil liberties.</td>
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<th>AMENDMENT</th>
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<td>“Public use” and “just compensation” conditions in the taking of private</td>
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<td>1896</td>
<td>Missouri Pacific Railway Co. v. Nebraska, 164 U.S. 403, 17 S.Ct. 130, Chicago, Burlington &amp; Quincy Railway Co. v. Chicago, 166 U.S. 226,</td>
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<td>property by government</td>
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<td>1897</td>
<td>17 S.Ct. 581</td>
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<td>254 U.S. 325, 41 S.Ct. 125 (1920) (dictum only)</td>
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<td>Fair trial and right to counsel in capital cases</td>
<td>VI</td>
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<td>Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55</td>
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<td>Freedom of religion</td>
<td>I</td>
<td>1934</td>
<td>Hamilton v. Regents of University of California, 293 U.S. 245, 55 S.Ct. 197 (dictum only)</td>
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<td>of grievances</td>
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<tr>
<td>Free exercise of religious belief</td>
<td>I</td>
<td>1940</td>
<td>Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 902</td>
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<td>Separation of church and state; right against the establishment of religion</td>
<td>I</td>
<td>1947</td>
<td>Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504</td>
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<td>Right to public trial</td>
<td>VI</td>
<td>1948</td>
<td>In re Oliver, 333 U.S. 257, 68 S.Ct. 499</td>
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<tr>
<td>Right to travel as an aspect of “liberty”</td>
<td>V</td>
<td>1958</td>
<td>Ker v. Dallas, 357 U.S. 116, 78 S.Ct. 1113 (right to travel internationally); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 18 L.Ed. 745</td>
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<td>(right to interstate travel)</td>
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<td>Exclusionary rule as concomitant of unreasonable searches and seizures</td>
<td>IV</td>
<td>1961</td>
<td>Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684</td>
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<tr>
<td>Right against cruel and unusual punishments</td>
<td>VIII</td>
<td>1962</td>
<td>Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417</td>
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<td>Right to counsel in all felony cases</td>
<td>VI</td>
<td>1963</td>
<td>Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792</td>
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<td>Right to vote</td>
<td>XIV</td>
<td>1964</td>
<td>Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964)</td>
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</tbody>
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the spotlight on incorporation shifts to First Amendment rights, the absorption of which
appears to be roughly coincident with the emergence of the preferred freedoms approach.
And, rounding out the list of rights included is the substantial body of procedural guarantees
secured by the Warren Court as essential to ensuring fair treatment of individuals accused of
crime. By the end of the 1960s, not only had the body of incorporated rights swollen, but also
several early decisions against the absorption of certain rights were reversed. For example, the

<table>
<thead>
<tr>
<th>Provision</th>
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| Right against self-incrimination   | V         | 1964 | Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489; Murphy v. Waterfront Commis-
|                                    |           |      | sion, 378 U.S. 52, 84 S.Ct. 1594                                         |
| Right to confront and cross-       | VI        | 1965 | Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065                             |
| examine witnesses                  |           |      |                                                                        |
| Right to impartial jury            | VI        | 1966 | Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468                             |
| obtaining witnesses                |           |      |                                                                        |
| Right to jury trial in cases of    | VI        | 1968 | Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444                          |
| serious crime                      |           |      |                                                                        |
| Right against double jeopardy      | V         | 1969 | Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056                           |
| cases entailing a jail term        |           |      |                                                                        |

Other Incorporated Provisions

| Right of petition                  | I         | Included by implication of other First Amendment incorporations |
| Right to be informed of the        | VI        | Included by implication of other Sixth Amendment incorporations |
| nature and cause of the accusation |           |                                                          |

Provisions of the First Eight
Amendments Not Incorporated:

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<th>Amendment</th>
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<td>VIII</td>
<td>Right against excessive bail; right against excessive fines</td>
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| EXHIBIT 8.2 THE PROCESS OF INCORPORATION—CONTINUED |
|-------------------------------------|-------|-------|
| PROVISION                            | AMENDMENT | YEAR | CASE |
| Right against self-incrimination    | V      | 1964  | Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489; Murphy v. Waterfront Commis-
|                                     |        |      | sion, 378 U.S. 52, 84 S.Ct. 1594                                         |
| Right to confront and cross-        | VI     | 1965  | Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065                             |
| examine witnesses                   |        |      |                                                                        |
| Right to impartial jury             | VI     | 1966  | Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468                             |
| obtaining witnesses                 |        |      |                                                                        |
| Right to jury trial in cases of     | VI     | 1968  | Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444                          |
| serious crime                       |        |      |                                                                        |
| Right against double jeopardy       | V      | 1969  | Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056                           |
| cases entailing a jail term         |        |      |                                                                        |

Other Incorporated Provisions

| Right of petition                  | I      | Included by implication of other First Amendment incorporations |
| Right to be informed of the        | VI     | Included by implication of other Sixth Amendment incorporations |
| nature and cause of the accusation |        |                                                          |

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CHAPTER 8 DUE PROCESS OF LAW
initial position taken in both the Twining and the Adamson cases that the right against self-incrimination was not applicable against state infringement was reversed by the Warren Court in Malloy v. Hogan and Murphy v. Waterfront Commission of New York Harbor in 1964. The Warren Court also overturned the ruling in the Palko case with its 1969 decision in Benton v. Maryland, which absorbed into the Fourteenth Amendment the guarantee against double jeopardy.

**Total Incorporation Plus**

A fourth approach to the incorporation issue is illustrated by Justice Murphy's dissenting opinion in the Adamson case. Speaking for Justice Rutledge and himself, Murphy argued for a “total incorporation plus” position. Succinctly put, this school of thought would agree with Black that all of the provisions of the Bill of Rights should be read into the Fourteenth Amendment supplemented by the absorption of any other fundamental liberties that, though not contained in the first eight amendments, are necessary to “a scheme of ordered liberty.” Judging by his concurrence in Justice Black’s Adamson dissent and his authorship of the majority opinion in Griswold v. Connecticut (p. 716) 18 years later, Justice Douglas could also be presumed to reflect the “total incorporation plus” philosophy. As an examination of the cases reproduced in this chapter tends to show, the Court’s selective approach to absorbing the provisions of the first eight amendments plus the Griswold holding has not so much meant the acceptance of the “total incorporation plus” position as it has reflected a trend toward “selective incorporation plus.”

**Hurtado v. California**

Supreme Court of the United States, 1884
10 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232

**Background & Facts** The California Constitution of 1879 provided that prosecution of crimes, formerly requiring indictment by a grand jury, could be initiated on the basis of an information (a formal accusation drawn up by a prosecutor) after review by a magistrate. A district attorney filed an information against Hurtado, charging him with murder. Found guilty of the crime and sentenced to death, Hurtado appealed, but two state courts upheld the conviction over his objection that proceedings initiated by an information were forbidden by the Due Process Clause of the Fourteenth Amendment. Hurtado subsequently petitioned the U.S. Supreme Court for a writ of error.

MATTHEWS, J.

***** The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that “due process of law,” when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the constitution of the United States, and which accordingly it is forbidden to the states, respectively, to dispense with in the administration of criminal law. ** ***

*I*It is maintained on behalf of the plaintiff in error that the phrase “due process of law” is equivalent to “law of the land,” as found in the twenty-ninth chapter of Magna Charta; that * * * it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which * * * have been tried by experience and found fit and necessary for the preservation of those principles, and
which, having been the birthright and inheritance of every English subject, crossed
the Atlantic with the colonists and were transplanted and established in the funda-
mental laws of the state; that, having been originally introduced into the constitution
of the United States as a limitation upon the powers of the government, * * * it has
now been added as an additional security to the individual against oppression by the
states themselves; [and] that one of these institutions is that of the grand jury * * *.

The constitution of the United States was ordained, it is true, by descendants of English-
men, who inherited the traditions of the English law and history; but it was made for an
undefined and expanding future, and for a people gathered, and to be gathered, from
many nations and of many tongues. * * *
There is nothing in Magna Charta, rightly
construed as a broad charter of public right
and law, which ought to exclude the best ideas
of all systems and of every age; and as it was
the characteristic principle of the common
law to draw its inspiration from every fountain
of justice, we are not to assume that the
sources of its supply have been exhausted. On
the contrary, we should expect that the
new and various experiences of our own
situation and system will mould and shape it
into new and not less useful forms.

* * *

The words “due process of law” which appear in the fourteenth amendment * * * are [also] contained in the fifth amendment. That article makes specific and express
provision for perpetuating the institution of the grand jury, so far as relates to
prosecutions for the more aggravated crimes under the laws of the United States. * * *
[If in the adoption of * * * [the fourteenth] amendment it had been part of its purpose
to perpetuate the institution of the grand jury in all the states, it would have
embodied, as did the fifth amendment, express declarations to that effect. Due
process of law in the latter refers to that law of the land which derives its authority
from the legislative powers conferred upon congress by the constitution of the United
States, exercised within the limits therein prescribed, and interpreted according to the
principles of the common law. In the fourteenth amendment, * * * it refers to
that law of the land in each state which derives its authority from the inherent and
reserved powers of the state, exerted within the limits of those fundamental principles of
liberty and justice which lie at the base of all our civil and political institutions, and
the greatest security for which resides in the right of the people to make their own laws,
and alter them at their pleasure. * * *
Great diversities in these respects may exist
in two states separated only by an imaginary line. On one side of this line there may be a
right of trial by jury, and on the other side no such right. Each state prescribes its own
modes of judicial proceeding.”

[Legislative powers are [not] absolute
and despotic, and * * * the amendment [in]
prescribing due process of law is [not] too
vague and indefinite to operate as a
practical restraint. * * * [N]ot every
[legislative] act * * * is law. Law is
something more than mere will exerted as
an act of power. It must be not a special rule
for a particular person or a particular case,
but * * * “a] general law, a law which hears
before it condemns, which proceeds upon
inquiry, and renders judgment only after
trial,” so “that every citizen shall hold his
life, liberty, property, and immunities under
the protection of the general rules which
govern society” * * *. [Due process excludes]
acts of attainted, bills of pains and penalties,
acts of confiscation, acts reversing judg-
ments, * * * acts directly transferring one
man’s estate to another, legislative judg-
ments and decrees, and other similar special,
partial, and arbitrary exertions of power
under the forms of legislation. Arbitrary
power, enforcing its edicts to the injury of
the persons and property of its subjects, is
not law, whether manifested as the decree of
a personal monarch or of an impersonal
multitude. And the limitations imposed by
our constitutional law upon * * * both state and national [governments] are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

Tried by these principles, we are unable to say that * * * proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. * * *

In every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments. * * *

For these reasons, finding no error therein, the judgment of the supreme court of California is affirmed.

HARLAN, J., dissenting.

* * *

The people were not content with the provision in section 2 of article 3 that “the trial of all crimes, except in cases of impeachment, shall be by jury.” They desired a fuller and broader enunciation of the fundamental principles of freedom, and therefore demanded that the guaranties of the rights of life, liberty, and property, which experience had proved to be essential to the safety and security of the people, should be placed beyond all danger of impairment or destruction by the general government through legislation by congress. They perceived no reason why, in respect of those rights, the same limitations should not be imposed upon the general government that had been imposed upon the states by their own constitutions. Hence the prompt adoption of the original amendments, by the fifth of which it is, among other things, provided that “no person shall be deprived of life, liberty, or property without due process of law.” This language is similar to that of the clause of the fourteenth amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the states the same restrictions, in respect of proceedings involving life, liberty, and property, which had been imposed upon the general government.

“Due process of law,” within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words “due process of law,” in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government. * * *

According to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not
consistent with the "law of the land" or with "due process of law." * * * Almost the identical words of Magna Charta were incorporated into most of the state constitutions before the adoption of our national constitution. When they declared, in substance, that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land, they intended to assert his right to the same guaranties that were given in the mother country by the great charter and the laws passed in furtherance of its fundamental principles.

* * *

PALKO V. CONNECTICUT
Supreme Court of the United States, 1937
302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288

BACKGROUND & FACTS
Frank Palko was found guilty of second-degree murder and sentenced to life imprisonment. However, the state was permitted to appeal the decision under a Connecticut statute, and it chose to do so. The state's Supreme Court of Errors set aside the trial court's judgment and ordered a new trial. This time Palko was found guilty of first-degree murder and sentenced to death. The conviction was affirmed by the Supreme Court of Errors, and the case was appealed to the U.S. Supreme Court. Palko contended that the Connecticut statute was unconstitutional because the Due Process Clause of the Fourteenth Amendment protected individuals from being tried twice for the same offense.

Mr. Justice CARDOZO delivered the opinion of the Court.

* * *

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. * * * * * *

* * *

[In appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. * * *

Whatever would be a violation of the original bill of rights (Amendments 1 to 8) 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 informations at the instance of a public officer. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292 (1884). * * * 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 $20. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v.
Sauvinet, 92 U.S. 90, 23 L.Ed. 678 (1876); Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 494 (1900).***

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, 299 U.S. 353, 364, 57 S.Ct. 255, 260 (1937)), or the like freedom of the press (Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936)); Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 627 (1931)); or the free exercise of religion (Hamilton v. Regents of University, 293 U.S. 245, 262, 55 S.Ct. 197, 204 (1934)), ** or the right of peaceable assembly, without which speech would be unduly trammled (De Jonge v. Oregon, supra), *** or the right of one accused of crime to the benefit of counsel (Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932)). 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 *** but *** there emerges *** 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 *** by 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, 291 U.S. 97, *** 105, 54 S.Ct. 330, 332 (1934).*** 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.*** This too might be lost, and justice still be done.

We reach a different plane of social and moral values when we pass to the privileges and immunities *** taken *** from the *** Bill of Rights and brought within the Fourteenth Amendment by a process of absorption.*** The process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.*** 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.*** 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.

*** Is the[el] 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"?*** 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.*** This is not cruelty at all ***. If the trial had been
infected with error adverse to the accused, * * * [review would have been available to him] as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge * * * has now been granted to the state. * * * * * * * The judgment is affirmed.
Mr. Justice BUTLER dissents.

**ADAMSON v. CALIFORNIA**
Supreme Court of the United States, 1947
332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903

**BACKGROUND & FACTS**
The California Constitution and Penal Code permitted the trial judge and attorneys to comment on and juries to consider as evidence of guilt failure of a defendant to testify on his own behalf. Adamson, who was convicted of first-degree murder and sentenced to death, had declined to testify during his trial. In the presentation of the case to the jury, the prosecuting attorney argued that Adamson’s refusal to testify was an indication of his guilt. Adamson’s conviction was affirmed by the state supreme court. On appeal to the U.S. Supreme Court, Adamson challenged the constitutionality of California’s provision for this kind of comment as a violation of the Privileges and Immunities and the Due Process Clauses of the Fourteenth Amendment. At the outset of its opinion, the Court dismissed the privileges and immunities claim as being without any merit.

Mr. Justice REED delivered the opinion of the Court.

* * *

[A]ppellant relies upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law * * * and as applied (a) because comment on failure to testify is permitted, (b) because appellant was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to appellant in permitting comment on his failure to testify.

* * *

Appellant * * * contends that * * * the privilege against self-incrimination * * * inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment. Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut, 302 U.S. 319, 323, 58 S.Ct. 149, 150 (1937). Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were “implicit in the concept of ordered liberty,” * * * became secure from state interference by the clause. But it held nothing more.

* * *

For a state to require testimony from an accused is not necessarily a breach of a state’s obligation to give a fair trial. * * * [We must examine * * * whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an accused. The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion.}
It forbids any other type of coercion that falls within the scope of due process. * * * So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the due process clause, but to the constitutionality of the provision of the California law that permits comment upon his failure to testify. * * *

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions. * * * California, however, is one of a few states that permit limited comment upon a defendant’s failure to testify. That permission is narrow. * * * This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. * * * It allows inferences to be drawn from proven facts. * * * California has prescribed a method for advising the jury in the search for truth. * * * It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant’s failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain. * * *

Affirmed.

Mr. Justice FRANKFURTER, concurring.

* * *

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. * * * But to suggest that such a limitation can be drawn out of “due process” in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. * * *

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one [Justice John Harlan], who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. * * *

* * * The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments * * * that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption. * * *

Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to those States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first
eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above $20. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is * * * [their indispensability] to the dignity and happiness of a free man, we are thrown back to a merely subjective test. * * * [But if] all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," * * * putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field. * * *

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. * * * The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. * * * To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.

* * *

Mr. Justice MURPHY, with whom Mr. Justice RUTLEDGE concurs, dissenting.

While in substantial agreement with the views of Mr. Justice BLACK, I have one reservation and one addition to make. I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

* * *

Mr. Justice BLACK, dissenting.

* * *

This decision reasserts a constitutional theory spelled out in Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908), that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental principles of liberty and justice." Invoking this Twining rule, the Court concludes that although comment upon testimony in a federal court would violate the Fifth Amendment, identical comment in a state court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended. * * *

I would not reaffirm the Twining decision. I think that decision and the "natural law" theory of the Constitution upon which it relies, degrades the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power
which we are not authorized by the Constitution to exercise. * * *

***

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

***

[O]ur prior decisions, including Twining, do not prevent our carrying out * * * [the] purpose * * * of making applicable to the states, not a mere part, as the Court has, but the full protection of the Fifth Amendment’s provision against compelling evidence from an accused to convict him of crime. * * * [T]he “natural law” formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. * * *

***

I cannot consider the Bill of Rights to be an outworn 18th Century “strait jacket” as the Twining opinion did. Its provisions * * * were designed to meet ancient evils. * * *. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court’s practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

***

Mr. Justice DOUGLAS, joins in this opinion.

The text of the Fifth Amendment prohibits the defendant from being forced to testify against himself at trial. The issue in Adamson, of course, was whether the prosecutor or trial judge could call the jury’s attention to the fact that the defendant had failed to testify, presumably indicating that he had something to hide. But the Adamson Court never reached this issue because it held that the Fifth Amendment’s guarantee against self-incrimination did not apply to the states. By 1964, the Court had reversed itself, holding in Malloy v. Hogan and Murphy v. Waterfront Commission (see p. 482) that the liberty protected by the Due Process Clause of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.
stand and testify infringed the Fifth Amendment. More than a decade and a half later, in 
Carrer v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112 (1981), the Court went further and ruled 
that, if the defendant so requests, the trial judge must instruct the jury that it may not 
consider the defendant’s failure to testify as evidence of guilt. In subsequent decisions, the 
Court prohibited taking into account a defendant’s silence in the sentencing phase of a 
capital case (Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981)), and drawing any 
unfavorable inferences from a defendant’s guilty plea or any statements made by her prior to 
entering a plea (Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307 (1999)).

In Rochin v. California, which follows, it became even more apparent that, for the time 
being at least, case-by-case fairness was the direction in which many of the Justices leaned. 
As in Adamson, the broad discretion this afforded the Justices provoked Justice Black.

**Rochin v. California**

Supreme Court of the United States, 1952

342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183

**Background & Facts**

Police officers, having information that Rochin was selling narcotics, went to his residence and entered the premises illegally. They found him partially clothed, sitting on the side of the bed. When asked, “Whose stuff is this?” referring to two capsules lying on the nightstand, Rochin reached for the pills and swallowed them. After efforts by the officers to force Rochin to regurgitate the capsules failed, they took him to a hospital where they ordered his stomach to be pumped. A report confirming that the capsules contained morphine was used to convict the defendant in a California court. The conviction was subsequently affirmed by two higher state courts, whereupon Rochin successfully petitioned the U.S. Supreme Court for certiorari.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

* * * 

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. * * * Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, §10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments.

These limitations, in the main, concern * * * the manner in which the States may enforce their penal codes. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, * * * “we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.” * * * Due process of law, “itself a historical product” * * * is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice. * * * Regard for the requirements of the Due Process Clause “inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons
of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.” * * * These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law * * * [means] respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934), or are “implicit in the concept of ordered liberty,” Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937).

* * *

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. * * *

Due process of law thus conceived is not to be derided as resort to a revival of “natural law.” To believe that this judicial exercise of judgment could be avoided by freezing “due process of law” at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges * * *. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one’s own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. * * * In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, * * * on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

* * *

* * * The judgment below must be reversed.

* * *

Mr. Justice MINTON took no part in the consideration or decision of this case.

Mr. Justice BLACK, concurring.

Adamson v. People of State of California, 332 U.S. 46, 68–123, 67 S.Ct. 1672, 1683, 1684–1711 (1947), sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment’s command that “No person * * * shall be compelled in any criminal case to be a witness against himself.” I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. * * *
In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California’s use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

* * *

Some constitutional provisions are stated in absolute and unqualified language such, for illustration, as the First Amendment stating that no law shall be passed prohibiting the free exercise of religion or abridging the freedom of speech or press. Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an “unreasonable” search or seizure. There is, however, no express constitutional language granting judicial power to invalidate every state law of every kind deemed “unreasonable” or contrary to the Court’s notion of civilized decencies * * *. * * *

[This] philosophy [is of especially grave concern when used] to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. * * *

The Jury Trial Guarantee: A Case Study of Incorporation

Understanding theoretical and historical arguments for and against incorporating fundamental rights into the Due Process Clause of the Fourteenth Amendment is one thing; taking account of the practical effects of incorporating rights is another. The Supreme Court’s experience incorporating the Sixth Amendment’s right to trial by jury in criminal cases affords an opportunity to watch the Court wrestle with the reality that rights have costs—something that often goes unappreciated when rights are discussed in the abstract. In Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968), the Supreme Court, by a 7–2 vote, held “that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction.” As with the right to counsel incorporated in Powell v. Alabama (p. 512), the Court found the jury trial guarantee “among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’” because of its importance in “prevent[ing] oppression by the Government” by “preventing miscarriages of justice” and “making judicial or prosecutorial unfairness less likely.” As a result, “the jury continues to receive strong support[]” The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so.” However, in Duncan, the Court did “not * * * settle * * * the exact location of the line between petty offenses and serious crime[,]” although it reversed the defendant’s conviction for simple battery, a misdemeanor, for which he had been sentenced, after a bench trial, to two years’ imprisonment and a $300 fine.2

Justice Harlan, joined by Justice Stewart, dissented. He began by noting that the majority’s approach of selectively incorporating guarantees in the Bill of Rights was an ill-justified half-way house: The “Court still remain[ed] unwilling to accept the total

2. Probably the best explanation of why the heavy penalty was imposed for such a comparatively light offense is the fact that Gary Duncan was an African-American charged with striking a white boy on the elbow. It was a racial incident that occurred against the backdrop of Louisiana’s school desegregation in the 1960s.
incorporationists’ view of the history of the Fourteenth Amendment *** [and was] also *** unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, was fundamentally unfair.” This “compromise” without any “internal logic” was effected by “merely declar[ing] that *** the clause in question was ‘in’ rather than ‘out.’” The jury trial guarantee, he argued, was not merely a matter of recognizing a single, simple, fundamental principle:

I should suppose it obviously fundamental to fairness that a “jury” means an “impartial jury.” I should think it equally obvious that the rule, imposed long ago in the federal courts, that “jury” means “jury of exactly twelve,” is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned.

Moreover, he continued, although “in the adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right of counsel and to cross-examine opposing witnesses[,]*** [it] simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.” Therefore, in Harlan’s view, there was “no reason why the Court should reverse the defendant’s conviction *** absent any suggestion that this particular trial was in fact unfair ***.” In his view, the many aspects of the operation of jury trials constituted “an almost perfect example” of the opportunity for experimentation, or — to use Justice Brandeis’s words — “one of those happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.” *** New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 52 S.Ct. 371, 386 (1932) (dissenting opinion).”

Although Justice Harlan may have lost the battle over incorporation, it was only a matter of time before the Court was called upon to clarify the components of the jury trial guarantee he alluded to in his Duncan dissent. Most immediately, this required identifying the difference between “serious” and “petty” offenses. In Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886 (1970), and Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2687 (1974), the Supreme Court pegged the dividing line between “serious” and “petty” offenses at six months’ incarceration. But what if the defendant is convicted on several counts of a petty offense? Ray Lewis, a mail handler for the U.S. Postal Service, was spotted by postal inspectors as he opened several pieces of mail and pocketed the currency inside. Lewis was arrested and charged with two counts of obstructing the mail, a petty offense carrying a maximum of six months’ imprisonment. Although Lewis requested a jury trial, the federal district judge trying the case denied the request because she said she would not sentence the defendant to more than a total of six months in prison. In Lewis v. United States, 518 U.S. 322, 116 S.Ct. 2163 (1996), the Supreme Court, speaking through Justice O’Connor, held that a petty offense within the meaning of Duncan was one for which the statutory penalty was no more than six months. That several counts of the offense might aggregate to a total substantially in excess of six months did not entitle the defendant to the Sixth Amendment’s guarantee of a jury trial.

At least as troubling for the Court were Harlan’s nagging questions about jury size and jury unanimity: If a jury of less than 12 would suffice, how many jurors would be needed to pass constitutional muster? If unanimity was not required, what would be the minimum allowable majority for conviction by any jury with less than 12 members? Would there be a point below which jury size could not go and where the decision had to be unanimous? What principle(s) would be used to justify drawing these lines?

Addressing the first of these issues in Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the Court held that a “12-man panel is not a necessary ingredient for ‘trial by jury,’ and that [Florida’s] refusal to impanel more than the six members provided for by state law
did not violate petitioner’s Sixth Amendment rights as applied to the States through the Fourteenth.” (Williams had been convicted of robbery, and Florida law allowed all but capital offenses to be tried before a six-person jury.) Speaking for the Court, Justice White observed that the 12-person common law jury, dating from “sometime in the 14th century * * * appear[ed] to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.” Justice White continued:

[T]he essential function of a jury * * * lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group’s determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as factfinder hardly seems likely to be a function of its size.

Adhering to the number 12, then, would have amounted to little more than “blind formalism,” as Justice White put it.

Concurring in the result only, Justice Harlan thought the majority’s historical analysis “much too thin to mask the true thrust of this decision.” The majority had sidestepped the question whether those who framed the Bill of Rights intended a 12-person jury, disclaiming any possibility of “divin[ing] precisely what the word ‘jury’ meant to the Framers, the First Congress, or the States in 1789.” In Justice Harlan’s view, the majority discarded precedent in its reading of the federal jury trial guarantee as well. In place of these, the majority had substituted a policy judgment. In Harlan’s opinion, the majority now was engaged in the dangerous practice of watering down a federal constitutional right to free itself from the incorporationist straitjacket. Since the cost of implementing the 12-person jury trial guarantee was now apparent, the majority, in his view, sought to have it both ways: The Sixth Amendment guarantee of a jury trial in serious criminal cases was applicable to the states, but by paring the size of what was guaranteed, the states would be spared the unacceptably burdensome cost of fully implementing this right. Said Harlan, “Tempering the rigor of Duncan should be done forthrightly, by facing up to the fact that at least in this area the ‘incorporation’ doctrine does not fit well with our federal structure, and by the same token that Duncan was wrongly decided.” Taking the Court’s decision in Williams together with its decision in Apodaca v. Oregon (p. 497), he added:

These decisions demonstrate that the difference between a “due process” approach, that considers each particular case on its own * * * to see whether the right alleged is one “implicit in the concept of ordered liberty,” * * * and “selective incorporation” is not an abstract one whereby different verbal formulas achieve the same results. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The “backlash” in Williams exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of “incorporation,” the “jot-for-jot and case-for-case” application of the federal right to the States, with the reality of federalism. Can one doubt that had Congress tried to undermine the common-law right to trial by jury before Duncan came on the books the history today recited would have barred such action? Can we expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been “incorporated”?

Stung by the charge that the incorporationists had watered down federal rights to make their approach workable, Justice Black, the total incorporationist, fired back:
Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to re-examine our prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in situations where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the question presented here arisen in a federal court before our decision in Duncan v. Louisiana * * * this Court would still, in my view, have reached the result announced today. In my opinion the danger of diluting the Bill of Rights protections lies not in the “incorporation doctrine,” but in the “shocks the conscience” test on which my Brother Harlan would rely instead—a test which depends, not on the language of the Constitution, but solely on the views of a majority of the Court as to what is “fair” and “decent.”

But what about a jury of less than six? In Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029 (1978), decided eight years after Williams, the Court invalidated Georgia’s practice of five-person juries. The Court’s decisions in Williams and in Colegrove v. Batrin, 413 U.S. 149, 93 S.Ct. 2448 (1973), which held that a jury of six members did not violate the Seventh Amendment right to a jury trial in a civil case, spurred research on decision making and jury size. In a plurality opinion that announced the judgment in Ballew and in which only Justice Stevens joined, Justice Blackmun canvassed the studies and noted that they raised significant questions about the wisdom and constitutionality of juries comprised of less than six members. As discussed by Justice Blackmun, those empirical studies highlighted several disquieting consequences associated with a too-small jury: (1) the reduced motivation and critical facility of the group to reason toward a sound and objective decision based on evidence, not prejudice; (2) the higher risk of inaccuracy and inconsistency in group decision making; (3) the decreasing prospect for hung juries, to the detriment of the defense; and (4) the markedly lower chances that the jury would represent a fair cross section of the community by grossly underrepresenting minorities. Admitting that “a clear line between six members and five” could not be discerned, Justice Blackmun concluded that the assembled data raised “substantial doubt about the reliability and appropriate representation” afforded by panels of less than six. It did not matter that Georgia used the five-person jury only in misdemeanor cases and that it was defended as more efficient and less costly.

In a spate of concurring opinions, the other Justices made it clear that they joined only in the conclusion that six was the minimum constitutional jury size. Justice White preferred to rest his decision against the five-person jury on its inability to satisfy the fair-cross-section requirement of the Sixth Amendment. Justice Powell concurred in the result but expressed concern both “as to the wisdom—as well as the necessity—of Justice Blackmun’s heavy reliance upon numerology derived from statistical studies” since the research methodology had not been subjected to “the traditional testing mechanisms of the adversary system.”

Two years after its decision in Williams, the Court, in Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628 (1972), addressed the second of Justice Harlan’s nagging issues—the fate of the unanimity rule. Apodaca and two others had been convicted of assault with a deadly weapon, burglary of a dwelling, and grand larceny, by split jury votes; two of the defendants were convicted by an 11–1 vote and the third by a vote of 10–2, the minimum margin allowed under Oregon law. By a 5–4 vote, the Court held that, although the Sixth Amendment required jury unanimity in federal criminal trials, it was not required in state criminal trials. A plurality, speaking through Justice Rehnquist, held that the unanimity requirement “does not materially contribute to the exercise of the jury’s commonsense judgment.” The plurality also perceived “no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one” as
far as the fair-cross-section-of-the-community requirement was concerned. The defendants had argued that the unanimity requirement for state criminal juries should be upheld in order “to give substance to” the beyond-a-reasonable-doubt standard for conviction, but the plurality rejected this contention for three reasons: (1) the standard for conviction had never been associated with the interpretation of Sixth Amendment guarantees (although the standard has been held to be what due process requires under the Fifth Amendment); (2) the Sixth Amendment prohibited only the exclusion of identifiable elements of the community in jury selection; it did not include the right of “every distinct voice in the community *** to be represented on every jury” much less “a right to prevent conviction of a defendant in any case”; and (3) there was no support for the belief that “minority groups, even when represented on a jury, will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result.” As to this last point, Justice Rehnquist added, “We simply find no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence.”

The decisive vote in Apodaca was cast by Justice Powell, who rejected the premise “that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment” and, with it, the conclusion “that all elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.” Justice Douglas, speaking for the dissenters, thought the decision produced an anomaly: “[T]hough unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?” Justice Douglas also protested what he termed the “watered down version of what the Bill of Rights guarantees” that resulted from unauthorized policy making by “nine men appointed for life sitting as a super-legislative body.” In his view, the balance had already been struck “when the Constitution and Bill of Rights were written and adopted.” If good news could be found by the dissenters, it lay in Justice Blackmun’s wobbly vote. Concurring in the plurality opinion, he noted, “My vote means only that I cannot conclude that the system is constitutionally offensive. *** I do not hesitate to say, either, that a system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty.”

The Court didn’t have long to wait to face the matter Justice Blackmun found troubling in Apodaca. In Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623 (1979), the defendant had been convicted of exhibiting an obscene motion picture, on a jury vote of 5–1. The state supreme court affirmed, but the U.S. Supreme Court reversed this judgment, concluding that “conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense deprives the accused of his constitutional right to trial by jury.” Speaking for the Court, Justice Rehnquist, noting that “this case lies at the intersection of our decisions concerning jury size and unanimity[,]” confessed to an inability “to discern *** a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. *** But having already departed from the strictly historical requirements of trial by jury, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.” He found the reasons for drawing the line in this case “much the same *** as in Ballew.” Rejecting as well the state’s claims of greater efficiency and less cost, Justice Rehnquist found the Court’s conclusion “buttressed *** by the current jury practices of the several States” — “of those *** that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts.”
This review of the Court’s decisions on incorporating the Sixth Amendment’s jury trial guarantee has exposed some real problems. Whether or not to incorporate a right has left the Justices with some tough choices. If a right is to be incorporated and the same requirements are to be imposed on the states as are imposed on the national government, the costs may well be substantial, especially for rights related to the criminal justice system. On the other hand, judging the extent of constitutional abuses on a strictly case-by-case basis may well leave unacceptable latitude to the states. As we saw in Chapter 1, the Court’s caseload is such that there is very limited opportunity for review. To use its resources wisely cannot mean turning the Court into a tribunal for doing justice in individual cases, which is what case-by-case fairness risks becoming. There has also been a long history of human rights abuses and unequal treatment of citizens by the states, especially in certain regions of the country. In the effort to avoid the hard choice between incorporation and case-by-case fairness, the Court, inadvertently or not, appears to have diluted some federal constitutional rights—here, the jury trial guarantee—to avoid the full cost of incorporation. Moreover, in the attempt to treat the jury trial guarantee as a matter of degree—whether with respect to jury size, jury unanimity, or the severity of the crime that triggers the right to a jury trial in the first place—drawing lines has been difficult and appears to have acquired an air of arbitrariness. How severe must an offense be to warrant the right to a jury trial? How many jurors is enough to constitutionally constitute a jury? By what permissible margin may they vote to convict? Answering these questions by saying “the line has to be drawn somewhere” is not convincing. And Justice Blackmun’s reliance in Ballew upon social science studies about jury decision making does little to insulate such line-drawing from criticism. After all, a judicial decision that rests upon empirical evidence can never be stronger than the evidence upon which it rests. Yet “bright lines,” even if they existed, would entail fixed rules, and categorical rules, imposed solely for the sake of consistency and without regard to their real-world consequences, are likely to prove both unworkable and oppressive. The practicalities of the incorporation debate, then, would appear to confront the Justices with a genuine dilemma.

Regardless of any constitutional ambiguities about minimal jury size or the margin necessary for conviction, it is worth emphasizing that—unless the defendant chooses to have a bench trial (that is, to have the judge determine the facts necessary for conviction)—the Sixth Amendment requires that the jury determine every element of the crime with which the defendant is charged. As the Supreme Court held in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The Court reaffirmed this holding in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005), and declared that the federal sentencing guidelines, adopted pursuant to the Sentencing Reform Act of 1984, were only advisory in their effect, not mandatory. The guidelines, which prescribe minimum and maximum penalties for federal crimes, were designed both to toughen the sentences judges imposed and to reduce the disparity in sentences. The guidelines originally required judges to tack on additional time if certain features of the crime or the defendant’s background were proved to the judge. Enhancing factors must now be proved to the satisfaction of the jury. Even so, sentences imposed within the range identified by the guidelines are presumed to be reasonable if challenged on appeal by the defendant (see Rita v. United States, 551 U.S. —, 127 S.Ct. 2456 (2007)).

Probably the most dramatic impact of the decisions in Apprendi and Booker, however, is on the decision to impose the death penalty. The Court’s 1976 decision in Woodson v. North Carolina (p. 573), that capital punishment cannot automatically be imposed by statute, had the effect of making the death sentence an enhanced penalty. As such, Apprendi and Booker make it clear that it is for the jury, not the judge, to decide whether the
prosecution has met its burden of showing that at least one aggravating factor in the 
defendant’s behavior or character justifies imposing the death sentence.

The Nonincorporated Second Amendment

Ordinarily, we might dispense with any discussion of nonincorporated rights at this point, 
but the heat generated over gun control sets the argument over the scope and application of 
the Second Amendment apart from other provisions of the Bill of Rights that have not been 
thought essential to “a scheme of ordered liberty.” During the spring and summer 
preceding the 2000 presidential election campaign, for example, the Gallup Poll reported 
that four in 10 Americans said they had a gun at home. Three-quarters of those surveyed 
favored the registration of all handguns and only a few percent less endorsed the idea of a 
 federal law requiring handgun owners to obtain a special license. Three-fifths of the 
respondents believed that the regulation of handguns should be made more strict. As for the 
handgun purchases, 58% favored limiting them to one a month per individual, and 93% 
agreed that there should be a five-day waiting period to purchase a handgun. Women and 
individuals not reported as having a gun were roughly twice as likely to favor increased gun 
control than were men and gun-owners. Compared with abortion as a political issue, 
roughly twice as many respondents said a presidential candidate’s position on handgun 
regulation was important to their decision about which presidential candidate to support in 
the 2000 election.1

While there have been only three decisions by the Supreme Court interpreting the 
Second Amendment, and only one dealing with the regulatory power of the national 
government, the federal courts have consistently ruled that “the right of the people to keep 
and bear Arms” is qualified by the amendment’s prefatory clause, which asserts that it is 
“necessary to the security of a free State.” Thus, the courts have said that the amendment 
protects a collective right: it prevents the national government from abolishing the state 
militias but does not ensure an individual right of gun ownership. Many recent challenges 
to this interpretation of the Second Amendment have resulted from Congress’s enactment 
of gun legislation outlawing the possession of certain automatic and semi-automatic 
weapons, requiring background checks on gun purchasers, and expansive federal 
criminalization of offenses in the commission of which guns were used. In substantial 
part the impetus for this new wave of gun regulation resulted from the assassination attempt 
on President Reagan in 1981 that left his press secretary, Jim Brady, permanently disabled 
and from a rising tide of school violence in which the use of firearms has taken a 
devastating toll.

Typical of these enactments was 18 U.S.C.A. § 922(g), which makes it a crime for 
someone who is subject to a domestic violence protection order, or who has been convicted 
of a misdemeanor violence offense, to possess a firearm. A federal appeals court in United 
States v. Napier, 233 F.3d 394 (6th Cir. 2000), sustained the statute in the customary 
fashion against constitutional challenges. The defendant first argued that the statute ran 
aftol of the Commerce Clause like the Gun Free School Zones Act successfully attacked in 
Lopez (p. 322), but the appellate court, reasoning that § 922(g) “only applies to firearms or 
ammunition that are shipped or transported in interstate or foreign commerce, or possessed 
in or affecting commerce[,]” concluded: “There is no question that the firearm and

1. Polling figures reported by The Washington Post/ABC News and by Gallup/USA Today for concurrent October 
2006 survey periods show that not much has changed. Whereas the Washington Post/ABC News poll found 59% of 
the public favored stricter gun control laws in January 2001, 61% of the public said so in October 2006. The Gallup 
Poll found 56% of Americans in October 2006 favored stricter laws on the sale of firearms, down only two points 
ammunition possessed by Napier had previously traveled in interstate commerce. That is sufficient to establish the interstate commerce connection.” The court then rejected Napier’s Second Amendment argument, cited its past rulings, and quoted from United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818 (1939), the most directly relevant Supreme Court decision, in which the Justices had declared unanimously, “In the absence of any evidence tending to show that possession or use of a * * * [firearm] has some reasonable relationship to the preservation or efficiency or a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” The appeals court went on to say, “It is well-established that the Second Amendment does not create an individual right. Since Miller, the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual, right[.]” and cited decisions across the circuits. The court continued, “Every circuit court which has had occasion to address the issue has upheld § 922 generally against challenges under the Second Amendment.” The following year, another federal appellate court, in United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907, 122 S.Ct. 2362 (2002), did take the view — though not unanimously — that the Second Amendment afforded a personal right to gun possession but nonetheless upheld § 922 as a reasonable restriction of that right.

The case that follows, Parker v. District of Columbia, deals with the validity of a local gun-control ordinance, not the provision of a federal statute. The federal appeals court in this case offered quite a different reading of the Supreme Court’s opinion in Miller and became the first federal appeals court ever to declare a law unconstitutional because it infringed a personal right to bear arms under the Second Amendment. To the dissenting judge in Parker, like her counterpart in Emerson, what the majority had to say was entirely beside the point and therefore only dicta.

PARKER v. DISTRICT OF COLUMBIA
United States Court of Appeals, District of Columbia Circuit, 2007
478 F.3d 370

BACKGROUND & FACTS Shelly Parker, Dick Heller, and four others brought suit challenging a District of Columbia ordinance that prevented the registration of handguns (except for retired D.C. police officers), prohibited carrying a pistol without a license, and required all lawfully-owned firearms to be kept unloaded and disassembled or bound by a trigger lock. In short, except for a very few citizens, the ordinance effectively banned possession of handguns. Plaintiffs wanted to keep firearms in their homes for self-defense. Heller, a D.C. special police officer detailed to guard duty, wanted to have a gun at home when off-duty. The plaintiffs’ argument that the ordinance violated their personal right to possess firearms under the Second Amendment was rejected by a federal district court and they appealed.

Before HENDERSON, GRIFFITH, Circuit Judges, and SILBERMAN, Senior Circuit Judge.

SILBERMAN, Senior Circuit Judge.

* * *

[T]he Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” * * *

The provision’s second comma divides the Amendment into two clauses; the first is prefatory, and the second operative. Appellants’ argument is focused on their reading
of the Second Amendment’s operative clause. According to appellants, the Amendment’s language flat out guarantees an individual right “to keep and bear Arms.” Appellants concede that the prefatory clause expresses a civic purpose, but argue that this purpose, while it may inform the meaning of an ambiguous term like “Arms,” does not qualify the right guaranteed by the operative portion of the Amendment.

The District of Columbia argues that the prefatory clause declares the Amendment’s only purpose—to shield the state militias from federal encroachment—and that the operative clause, even when read in isolation, speaks solely to military affairs and guarantees a civic, rather than an individual, right. ** The District claims that the Second Amendment “protects private possession of weapons only in connection with performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state.” Individuals may be able to enforce the Second Amendment right, but only if the law in question ‘will impair their participation in common defense and law enforcement when called to serve in the militia.’

We are told by the District that ** the Amendment should be understood to check federal power to regulate firearms only when federal legislation was directed at the abolition of state militias, because the Amendment’s exclusive concern was the preservation of those entities. ** [But if so,] it seems ** strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely ** more direct ** [language was available], such as “Congress shall make no law disarming the state militias” or “States have a right to a well-regulated militia.”

** In the Second Amendment debate, there are two camps. On one side are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual right theorists, the Amendment guarantees personal liberty analogous to the First Amendment’s protection of free speech, or the Fourth Amendment’s right to be free from unreasonable searches and seizures.

** The lower courts are divided between these competing interpretations. Federal appellate courts have largely adopted the collective right model. ** State appellate courts ** offer a more balanced picture. And the United States Department of Justice [under President George W. Bush] has recently adopted the individual right model. ** [However,] we have no direct precedent—either in this court or the Supreme Court—that provides us with a square holding on the question **.

** In determining whether the Second Amendment’s guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—“the people.” That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of individuals against government intrusion, interference, or usurpation. We also note that the Tenth Amendment—“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between “the people,” on the one hand, and “the states,” on the other. The natural reading of “the right of the people” in the Second
Amendment would accord with usage elsewhere in the Bill of Rights.

***

The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it. * * *

* * * The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting. * * *

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. * * * The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government. * * *

*** Just as it is clear that the phrase “to bear arms” was in common use as a byword for soldiering in the founding era, * * * it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of “bear Arms” also encompassed the carrying of arms for private purposes such as self-defense. * * * Thus, it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them “bearing arms.”

*** The Amendment does not protect “the right of militiamen to keep and bear arms,” but rather “the right of the people.” The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, we point out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. * * *

That the Amendment’s civic purpose was placed in a preamble makes perfect sense given the then-recent ratification controversy, wherein Antifederalist opponents of the 1787 Constitution agitated for greater assurance that the militia system would remain robust so that standing armies, which were thought by many at the time to be the bane of liberty, would not be necessary. * * * The Federalists who dominated the First Congress offered the Second Amendment’s preamble to palliate Antifederalist concerns about the continued existence of the popular militia. But neither the Federalists nor the Antifederalists thought the federal government had the power to disarm the people. This is evident from the ratification debates, where the Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. * * *

*** United States v. Miller, 307 U.S. 174, 59 S.Ct. 816 (1939) involved a Second Amendment challenge by criminal defendants to section 11 of the National Firearms Act * * * which prohibited interstate transportation of certain firearms without a registration or stamped order. The defendants had been indicted for transporting a short-barreled shotgun from Oklahoma to Arkansas in contravention of the Act. * * *

On the question whether the Second Amendment protects an individual or collective right, the Court’s opinion in Miller is most notable for what it omits. The government’s first argument in its Miller brief was that “the right secured by [the Second Amendment] to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the
A * protection of the state.* * * This is a version of the collective right model. * * * [W]e think it is significant that the Court did not decide the case on this, the government’s primary argument. * * * Rather, the Court followed the logic of the government’s secondary position, which was that a short-barreled shotgun was not within the scope of the term “Arms” in the Second Amendment.

* * * If the Miller Court intended to endorse the government’s first argument, i.e., the collective right view, it would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization. * * *

* * * [Instead,] the Miller court * * * examined the relationship between the weapon in question—a short-barreled shotgun—and the preservation of the militia system, which was the Amendment’s politically relevant purpose. * * * Thus the Miller Court limited the term “Arms”—interpreting it in a manner consistent with the Amendment’s underlying civic purpose. Only “Arms” whose “use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia,” * * * would qualify for protection.

Essential * * * to understanding what weapons qualify as Second Amendment “Arms” is an awareness of how the founding-era militia functioned. * * * The members of the militia were to be “civilians primarily, soldiers on occasion.” * * * When called up by either the state or the federal government, “these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” * * * (emphasis added).

* * *

* * * Despite the importance of the Second Amendment’s civic purpose, * * * the activities it protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia. * * *

The modern handgun—and for that matter the rifle and long-barreled shotgun—* * * is, after all, a lineal descendant of that founding-era weapon, and it passes Miller’s standards. Pistols certainly bear “some reasonable relationship to the preservation or efficiency of a well regulated militia.” They are also in “common use” today, and probably far more so than in 1789. * * * Just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a “search,” the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. * * *

That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. * * * Indeed, the right to keep and bear arms * * * was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable “to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . .” * * * And as we have noted, the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment. * * * Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. * * * These regulations promote the government’s interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

Reasonable restrictions also might be thought consistent with a “well regulated
Militia. The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society also make someone unsuitable for service in the militia. On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms. A physically disabled person, for instance, might not be able to participate in even the most rudimentary organized militia. But this person would still have the right to keep and bear arms, just as men over the age of forty-five and women would have that right, even though our nation has traditionally excluded them from membership in the militia. As we have explained, the right is broader than its civic purpose.

In United States v. Miller, 307 U.S. 174, 59 S.Ct. 816 (1939), the Court declared: “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense” (emphases added). Then, quoting Article I, §8 of the Constitution, the Court succinctly—but unambiguously—set down its understanding of the Second Amendment: “With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.” (emphases added). By these words, it emphatically declared that the entire Second Amendment—both its “declaration” and its “guarantee”—“must be interpreted and applied” together. Construing its two clauses together so that, as Miller declares, the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States, I believe that, under Miller, the District is inescapably excluded from the Second Amendment because it is not a State. Until and unless the Supreme Court revisits Miller, its reading of the Second Amendment is the one we are obliged to follow.

In summary, by focusing on the meaning of the word “liberty”—even if there was no clear consensus among the Justices about what it meant exactly—the Court took a clause
popularly thought of as just a vehicle for criminal justice and turned it into a mechanism for securing individual freedoms of all sorts. Because “due process” is a concept so closely associated with the administration of criminal justice, it is natural that the remainder of this chapter and the next will focus on those rights most intimately connected to the functioning of the adversary system, the imposition of punishment, and the acquisition of evidence. The fact that we now turn to an extended consideration of those incorporated rights pertaining to criminal justice should not obscure the point that First Amendment rights and property rights as well have been incorporated—indeed, they were the first to be so recognized. When we take up the freedoms of speech, press, and religion later in this book, our examination of each of those rights will begin by recalling that they limit both the national government and the states and that the same interpretation of them binds government at both levels.

**B. The Right to Counsel**

**Competing Priorities in Criminal Justice**

An understanding of those constitutional rights that pertain to the administration of criminal justice best begins with “the big picture.” The Supreme Court’s interpretations of the guarantees contained in the Fourth, Fifth, Sixth, and Eighth Amendments should be seen not as consisting of isolated rulings on separate constitutional provisions, but as forming patterns that reflect basic attitudes about what matters most in the enforcement of the criminal law. In his incisive essay “Two Models of the Criminal Process” below, the late Herbert Packer discussed two very different value systems that compete for priority in the administration of criminal justice. Proponents of the crime control and the due process models he sketches see the threat to liberty differently, emphasize the importance of different participants in the criminal justice system, and strike a different balance among the competing values of efficiency, accuracy, and fairness in law enforcement. As the Supreme Court decisions presented in this chapter and the next will confirm—whether about the right to counsel, self-incrimination, search and seizure, or the death penalty—more often than not the Warren Court (1953–1969) favored the due process model, while the Burger (1969–1986) and Rehnquist (1986–2005) Courts handed down rulings that accentuated priorities associated with the crime control model.
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The Right to Counsel at Trial

Few of us would deny that all but the most gifted and exceptional defendants are ill-equipped to defend themselves in a criminal prosecution. The maze of procedures and technicalities that govern the criminal justice process has long been recognized as demanding the skills of a trained lawyer to preserve some parity between the state and the individual so that the defendant can be given a meaningful chance to tell his side of the story. Giving the defendant “his day in court” is the essence of due process of law. However, it was not until 1932, in one of the infamous Scottsboro cases, Powell v. Alabama below, that the Supreme Court began to speak of any constitutional right to a fair trial that defendants possessed. While there were many breaches from a full and fair observance of the criminal justice process—violations of such magnitude as to reduce the proceedings against the Scottsboro defendants to a travesty—the Court zeroed in on the effective denial of counsel as particularly offensive. By recognizing “the fundamental nature” of the right to counsel “at least in cases like the present,” Powell is commonly thought to have partially incorporated the Sixth Amendment right, insofar as it was deemed essential to ensuring the fairness of trials in capital cases.

POWELL V. ALABAMA

Supreme Court of the United States, 1932
287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158

BACKGROUND & FACTS

Ozie Powell and two other African-American defendants were charged with raping two white girls and pleaded “not guilty.” At the conclusion of each trial—all of which were completed in a single day—the juries convicted the defendants and imposed the death penalty. The trial judge overruled motions for new trials and sentenced the defendants as the juries directed. The judgments were affirmed by the Alabama Supreme Court. Defendants subsequently appealed to the U.S. Supreme Court, alleging a denial of due process and equal protection of the laws because (1) they had not been given a fair and impartial trial; (2) they were denied the right to counsel and the corresponding opportunity for effective consultation and preparation for trial; and (3) they had been deprived of trials before juries of their peers, since African-Americans were systematically excluded from jury service. The last of these challenges was sustained by the Supreme
Court in Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579 (1935). Together, the Powell and Norris controversies were widely known as “The Scottsboro Cases,” named for the Alabama town where the trials occurred. Especially during the Depression, people without much money hopped aboard passing freight trains for a free ride. The facts in this case began with a fight that broke out when two different racial groups hopped the same train. More facts appear in the following opinion. For additional background, see James Goodman, Stories of Scottsboro (1994).

Mr. Justice SUTHERLAND delivered the opinion of the Court.

***

The record shows that on the day when the offense is said to have been committed, these defendants, together with a number of other negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took place between the negroes and the white boys, in the course of which the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent ahead, reporting the fight and asking that every negro be gotten off the train. The participants in the fight, and the two girls, were in an open gondola car. The two girls testified that each of them was assaulted by six different negroes in turn, and they identified the seven defendants as having been among the number. None of the white boys was called to testify, with the exception of Gilley, who was called in rebuttal.

Before the train reached Scottsboro, Ala., a sheriff’s posse seized the defendants and two other negroes. Both girls and the negroes then were taken to Scottsboro, the county seat. Word of their coming and of the alleged assault had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safe-keeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safe-keeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the courthouse and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard. The record does not disclose their ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as “the boys.” They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

We confine ourselves * * * to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

*** The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. * * *

It is hardly necessary to say that * * * a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such
designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. * * *

[Un]til the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter, if no counsel appeared in their behalf, was a matter of speculation only * * *. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but * * * whether many or few, they would not, * * * collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

[This] action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one * * *. In any event, * * * during perhaps the most critical period of the proceedings against these defendants, * * * from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. * * *

* * * The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

* * * Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. * * * [A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

* * * The question * * * is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

* * *

* * * In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

* * * All that it is necessary now to decide * * * is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the
preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate * * * "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." * * * In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. * * *

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

[Justice BUTLER dissented in an opinion in which Justice McREYNOLDS concurred.]

After Powell, the Court went on to hold in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938), that the Sixth Amendment's specific guarantee of counsel applied to all federal cases, but in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252 (1942), it refused to recognize any constitutionally guaranteed right to counsel in state prosecutions of noncapital felonies, saying “[t]he due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment," although on a case-by-case basis, denial of any guarantee contained in the first eight amendments might be so fundamentally unfair as "to deprive a litigant of due process of law in violation of the Fourteenth." This dichotomy of constitutionally assuring the right to counsel for defendants accused of crimes punishable by death, but denying it in trials for lesser crimes, no matter how serious, persisted until the mid-1960s.

The expansion of the right to counsel that came with the overruling of Betts v. Brady in 1963 took two paths. The path of least resistance was the growth of the right to counsel within the courtroom itself. Speaking for a unanimous Court in Gideon v. Wainwright, Justice Black announced the demise of the Betts doctrine and held instead that the right to counsel extended to the state level to include indigent defendants in all felony prosecutions. Nine years later in Argersinger v. Hamlin (p. 518), the Court further extended the Sixth Amendment's guarantee of counsel to any defendant whose sentence included a jail term. By the early 1970s, then, the indigent defendant's right to have counsel provided for him at trial extended to all but petty offenses at the state level.

**GIDEON v. WAINWRIGHT**  
Supreme Court of the United States, 1963  
372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799

**BACKGROUND & FACTS** Clarence Gideon was charged with breaking and entering a pool hall with the intent to commit a crime—a felony under Florida law. When he appeared for trial, Gideon, who did not have a lawyer or the money with which to retain one, requested the trial judge to appoint one for him. The trial judge declined, citing a Florida statute that permitted the appointment of counsel only in capital cases. Gideon then proceeded to conduct his own defense. The jury found him guilty, and the judge sentenced him to five years in prison. Gideon subsequently sued out a writ of habeas corpus against Wainwright, the state director of corrections. The Florida Supreme Court denied relief, and Gideon appealed to the U.S. Supreme Court, asserting that the trial judge's refusal to appoint counsel for him was a denial of rights guaranteed by the Sixth and Fourteenth Amendments.
Gideon appealed to the Court in forma pauperis, that is, in the manner of a person too poor to pay for counsel or for the usual printed briefs and petition. The Court acted on his handwritten petition and appointed Washington lawyer Abe Fortas to act as his attorney. Two years later, Fortas was appointed to the Court by President Lyndon Johnson. Anthony Lewis’s book Gideon’s Trumpet (1964) presents an excellent account of this case.

Mr. Justice BLACK delivered the opinion of the Court.

* * * Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: “Should this Court's holding in Betts v. Brady* * * be reconsidered?”

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. * * * 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.

* * * 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. * * *

We accept Betts v. Brady’s assumption * * * 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, 287 U.S. 45, 68, 53 S.Ct. 55, 63 (1932). 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. * * *

* * * The fact is that in deciding as it did—“appointment of counsel is not a constitutional right, essential to a fair trial”—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged
with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. 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. * * *

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.

* * * Mr. Justice CLARK, concurring in the result.

* * *

* * * The Court’s decision today does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. * * *

I must conclude * * * that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life — a value judgment not universally accepted — or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well-considered precedents." * * *

In 1932, in *Powell v. Alabama*, * * * a capital case, this Court declared that under the particular facts there presented — "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility * * * and above all that they stood in deadly peril of their lives" * * * — the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized * * * and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938), but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v.
Alabama, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

* * * When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I [would] not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. * * * In what is done today I * * * [would not] depart from the principles laid down in Palko v. Connecticut * * * or * * * embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

* * *

Nine years later in Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972), the Court further extended the right to counsel to any defendant whose sentence included a jail term. Argersinger had been charged with carrying a concealed weapon, an offense under Florida law that carried a penalty of up to six months in jail and a $1,000 fine. The case was tried to a judge without the assistance of a defense attorney, and Argersinger was convicted and sentenced to 90 days in jail. Argersinger's subsequent habeas corpus suit was ultimately dismissed by the Florida Supreme Court, which relied on Duncan v. Louisiana (p. 494) and concluded "that the right to court-appointed counsel extends only to trials for non-petty offenses punishable by more than six months imprisonment."

The U.S. Supreme Court unanimously reversed. Writing for the Court, Justice Douglas reasoned, "The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." Justice Powell, speaking also for Justice Rehnquist, concurred. He preferred that the decision rest on the concept of due process in the Fourteenth Amendment rather than the Sixth Amendment. In light of (1) the great disparity in the distribution of both lawyers and funding throughout the country and (2) the incentive this ruling might provide to litigate every issue no matter how frivolous, Justice Powell would have held "that the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising judicial discretion on a case-by-case basis." In Justice Powell's view, the determination as to whether counsel would be provided would be made by the trial court before the accused formally pleads, would be accompanied by reasons if the request were denied, would result in formal trial rules not being applied as strictly against defendants presenting their own case, and would be carefully scrutinized by appellate courts.

Ambiguity remained after the Court announced its holding in Argersinger as to whether the appointment of counsel to an indigent was triggered only in instances where the defendant was in fact sentenced to a term of confinement or whether the guarantee of counsel extended to the trial of all offenses that carried a possible penalty of confinement, even if the defendant was not ultimately sentenced to jail, but ordered to pay a fine instead. In Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158 (1979), the Court selected the first alternative as the proper interpretation of its Argersinger holding. So if a judge wanted to hold open the option of sentencing a defendant to jail, he would have to appoint counsel at the outset of legal proceedings; if he failed to appoint counsel, any sentence of confinement would be foreclosed, even if an indigent defendant, tried without counsel, convicted of a misdemeanor, and given a suspended sentence, later violates the terms of his probation (Shelton v. Alabama, 535 U.S.
An indigent defendant’s right to have counsel provided for him at trial thus extends to all but petty offenses at the state level.

But is there a right to counsel on appeal? Although the Constitution does not compel a state to grant appeals as a matter of right to criminal defendants seeking review of alleged trial court errors, the Court held in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), that where a transcript of the trial court proceedings is required for a decision on the merits of an appeal, the state must provide such a transcript to a criminal defendant who cannot afford one. In Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963), seven years later, the Court ruled that a state that afforded criminal defendants the right of appeal had to supply an indigent appellant in a criminal case with an attorney, although it limited the right to counsel to the conduct of the first appeal. In subsequent decisions, the Court made it clear that it expected the attorney to function as an active advocate for his client and not as a friend of the court, although counsel was not required to make every argument urged by his client regardless of how frivolous. On the other hand, although appellate review of death penalty cases is invariably automatic, the Court ruled in Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765 (1989), that neither the Eighth Amendment nor the Due Process Clause of the Fourteenth Amendment requires states to appoint counsel for indigent death row inmates attacking their conviction or sentence by petitioning for habeas corpus after losing on direct appeal.

Every profession has its better and worse practitioners, and lawyering is no different. Guaranteeing that a defendant has an attorney, however, does not say anything about the quality of representation the accused receives. The question thus arises whether the Sixth Amendment guarantees not only the right to counsel, but also the right to the effective assistance of counsel. Although the Court has recognized this as a legitimate component of the right to counsel, it has also recognized its potential for mischief. Equating conviction with unfairness, a defendant, accustomed to asserting his innocence, may be tempted to argue that, but for the incompetence of his attorney, he would have gone free. Unless carefully circumscribed, a right to the effective assistance of counsel easily raises the prospect that one trial might be replaced by two and maybe more: The defendant’s criminal trial would be followed by another trial at which the competence of his attorney would be the issue, and, conceivably, if that were unavailing, it might be followed by another questioning the effectiveness of his lawyer in the second trial. There would be an explosion of trials and no finality to the proceedings. Because of this concern, recent Court rulings asserting that the defendant is entitled to the effective assistance of counsel also adopt a posture of considerable deference toward an attorney’s judgment and actions in defense of his client, as the following note explains.

**NOTE—THE EFFECTIVE ASSISTANCE OF COUNSEL**

In a spate of recent cases, the Supreme Court has enunciated the view that provision of counsel only in a nominal sense is constitutionally inadequate because the Sixth Amendment necessarily includes “the guarantee of the effective assistance of counsel.” As articulated for the Court by Justice Stevens in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984), the precept that the right to counsel entails the right to effective counsel springs from the assumption that competent advocacy is essential to the truth-finding process of the adversary system. Where an attorney’s representation of a defendant has been so deficient as to undermine the “meaningful adversarial testing” of facts and the presentation of argument in a criminal trial, “the reliability of the trial process” has been jeopardized, as has the prospect that justice has been done.
In a subsequent case, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Court, per Justice O'Connor, spelled out the test for identifying those circumstances in which the effective assistance of counsel has been denied. She explained:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to “counsel,” not specifying particular requirements of effective assistance. It relies instead on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. * * * The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. * * * From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. * * *

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like * * * are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. * * * Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

On rare occasion, such as the claim at issue in Powell v. Alabama, the ineffectiveness of counsel is so flagrant and the resulting prejudice so obvious that little weighing of factors is needed. However, most ineffectiveness claims are more complex and less compelling. Warning that “[t]he availability of intrusive post-trial inquiry into attorney performance” could provoke a sequence of events in which “criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense,” Justice O’Connor emphasized the proper posture from which claims about the denial of effective counsel should be viewed:

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all
too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.  * * * A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” * * *

There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. * * *

Even granting all the deference that’s due, it wouldn’t take any “second guessing” to conclude that nodding off during the trial shows a failure to exercise due diligence in behalf of your client. By a 9–5 vote, a federal appeals court sitting en banc, vacated a defendant’s conviction for capital murder on the grounds that his lawyer slept during the trial for periods of up to 10 minutes. The court held that the effective assistance of counsel had been denied because the Sixth Amendment guarantees the assistance of counsel at every “critical stage” of criminal proceedings and obviously the trial is a critical stage. Burdine v. Johnson, 262 F.3d 336 (5th Cir. en banc, 2001), cert. denied, 535 U.S. 1120, 122 S.Ct. 2347 (2002).

The Sixth Amendment, of course, does not require that counsel be appointed to assist a defendant who prefers to go it alone. As the Court held in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), the accused has a right to proceed without counsel if he intelligently and voluntarily chooses to do so; the government may not force a lawyer upon him if he is determined to conduct his own defense. But if he is convicted — as seems rather likely — the defendant will not be heard to argue afterward that the trial was unfair.

One final point is worth mentioning. Although everyone accused of a crime has the right to counsel, the discussion to this point has emphasized the constitutional protection of the defendant who is poor. Whether poor or not, most of the individuals convicted — even if a high percentage of them are repeaters — are amateur criminals. There are individuals, however, for whom criminal activity is neither occasional nor unrewarding. If the defendant has profited from the violation of federal drug laws or engaged in racketeering, he may not be able to mount a defense staffed by high-priced legal talent. Federal law, specifically 21 U.S.C.A. § 853(e)(1), provides for the freezing and subsequent forfeiture upon conviction of all property so acquired. In United States v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657 (1989), and Caplin & Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2646 (1989), the Supreme Court held that there is no denial of the Sixth Amendment right to counsel or the Fifth Amendment right to due process if a defendant is thereby deprived of sufficient funds to retain the attorney of his choice.

The Pretrial Right to Counsel

The right to counsel at trial, no matter how liberal its sweep in terms of the offenses at issue, is unlikely to be very meaningful if the most crucial phase of the proceedings has already taken place. Since defendants often emerged from secret pretrial interrogation by the police having made statements implicating themselves in a crime or having signed confessions admitting guilt, the Warren Court developed an understandable suspicion that these covert proceedings preyed upon the fear and ignorance of suspects and were used to amass a case against the defendant with the result that the guarantee of counsel at trial became a sham. Striving to maintain the integrity of the adversary system outside the courtroom as well as within, a majority on the Court expanded the right to counsel in a second direction — to include the critical investigative phases of the criminal justice process.
### Other Cases on Effective Assistance to the Defense

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<td><em>Evitts v. Lucey</em>, 469 U.S. 387, 104 S.Ct. 830 (1985)</td>
<td>The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to the effective assistance of counsel on his first appeal.</td>
<td>7–2; Chief Justice Burger and Justice Rehnquist dissented.</td>
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<td><em>Ake v. Oklahoma</em>, 470 U.S. 68, 105 S.Ct. 1087 (1985)</td>
<td>Where a defendant has made a preliminary showing that his sanity at the time the crime was committed is likely to be a significant issue at trial, the state must, as a matter of constitutional law, provide the aid of a psychiatrist on this matter, if the defendant cannot otherwise afford such assistance.</td>
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<td><em>Nix v. Whiteside</em>, 475 U.S. 157, 106 S.Ct. 988 (1986)</td>
<td>Where a criminal client informed his attorney that he was going to lie on the stand, the attorney did not deprive his client of the right to effective counsel when he indicated that he would seek to withdraw from the case.</td>
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<td><em>Wiggins v. Smith</em>, 539 U.S. 510, 123 S.Ct. 2527 (2003)</td>
<td>Defendant’s lawyer at penalty phase of his murder trial violated the requirements of <em>Strickland v. Washington</em> (p. 520) when the attorney chose to fight the death penalty on grounds the defendant was not directly responsible for the victim’s death rather than offer evidence of the defendant’s very “troubled history.” Evidence, readily available to the attorney, showed the defendant had no history of violence, had undergone severe physical and sexual abuse by his mother and, while in a foster home, had endured rape, was left alone for days, was forced to beg for food, and was often beaten.</td>
<td>7–2; Justices Scalia and Thomas dissented.</td>
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<td><em>Florida v. Nixon</em>, 543 U.S. 175, 125 S.Ct. 551 (2004)</td>
<td>A defense attorney clearly has a duty to discuss trial strategy with his client. But when defendant in a murder case neither consents nor objects to strategy of concentrating effort on winning leniency for the defendant at the penalty phase of the trial (rather than contesting the defendant’s guilt), the lawyer’s representation of his client cannot be said to “fall below an objective standard of reasonableness.” The attorney’s performance cannot not be presumed to be either deficient or prejudicial.</td>
<td>8–0; Chief Justice Rehnquist did not participate.</td>
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<td><em>Rompilla v. Beard</em>, 545 U.S. 374, 125 S.Ct. 2456 (2005)</td>
<td>“[E]ven when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravating [circumstances] in the sentencing phase of trial.” In this case, defense lawyers failed to investigate “pretty obvious signs” that the defendant had a troubled childhood and suffered from mental illness and alcoholism. The defense instead just relied on the defendant’s own account that he had a conflicted childhood.</td>
<td>5–4; Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented.</td>
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In Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964), decided the year after Gideon, the Court announced that the right to counsel would become applicable at the beginning of custodial interrogation or whenever “the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.” Danny Escobedo had been arrested for the murder of his brother-in-law and taken to the police station. On the way, he refused to answer questions and told police officers he wanted to consult with his lawyer. Questioning continued at the station. Although he had not yet been formally charged with the crime, at that point—in the words of one of the officers—“he was in custody” and “couldn’t walk out the door.” During the interrogation, Escobedo’s lawyer arrived at the station and indicated he wanted to see his client. Although Escobedo and his attorney were forbidden to talk until the questioning ended, at one point Escobedo and his lawyer could see each other from a distance and waved. Since “most confessions are obtained during the period between arrest and indictment,” Justice Goldberg, speaking for the Court, emphasized “its critical nature as a ‘stage when legal aid and advice’ are surely needed.” He continued, “The right to counsel would indeed be hollow if it began at a period when few confessions were obtained.”

Escobedo already had a lawyer when he was being questioned; the only issue was when Escobedo would be allowed to speak to him.4 With its decision in Miranda v. Arizona, two years later, the Court went substantially further and required that a lawyer be made available at that point to suspects who could not afford one. The Miranda ruling also contained specific requirements governing pretrial questioning. These include standards imposing necessary warnings that the defendant must receive, ground rules for the conduct of interrogation, provision for the appointment of counsel in case of indigence, and understandings pertaining to the defendant’s waiver of rights. By formulating these constitutional requirements, the majority of Justices on the Warren Court sought to transform the prevailing inquisitorial operation of the criminal justice process to fit the adversary model commanded by the Sixth Amendment.

Miranda v. Arizona
Supreme Court of the United States, 1966
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

BACKGROUND & FACTS This case was heard by the Supreme Court together with three others, all raising the issue of the admissibility into evidence of statements obtained from defendants during custodial interrogations in possible violation of Fifth, Sixth, and—in three of the cases—Fourteenth Amendment guarantees. The specific facts of the Miranda case appear in the excerpt of Justice Harlan’s dissenting opinion that follows:

[It] may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. Miranda v. Arizona serves best, being neither the hardest nor easiest of the four under the Court’s standards.

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had “an emotional

4. In Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986), on the other hand, the suspect’s sister, without his knowledge, had hired an attorney to represent him. The Court held that the failure of police to inform him that the lawyer was trying to reach him did not deprive the suspect of the right to counsel or invalidate the waiver of his Miranda rights.
illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a line-up, and two officers then took him into a separate room to interrogate him, starting about 11:30 A.M. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and— I will assume this though the record is uncertain— without any effective warnings at all.

Mr. Chief Justice WARREN delivered the opinion of the Court.

***

We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution— that "No person * * * shall be compelled in any criminal case to be a witness against himself," and that "the accused shall * * * have the Assistance of Counsel"— rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it." Cohens v. Commonwealth of Virginia, 19 U.S. (6 Wheat.) 264, 387, 5 L.Ed. 257 (1821).

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Our holding * * * is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

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.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions."***

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. * * *

We stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472 (1940), this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

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From *** representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. * * *
The constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a “fair state-individual balance,” to require the government “to shoulder the entire load,” * * * to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. * * * In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." * * *

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. * * * We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. * * *

**

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.

**

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. * * * 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 fact-finding 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.

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There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.
To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

We are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.

We have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

[Reversed.]
[Justice CLARK dissented.]

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the
competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

* * *

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." Ashcraft v. State of Tennessee, 322 U.S. 143, 161, 64 S.Ct. 921, 929 (1944) (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.

* * *

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. There can be little doubt that the Court’s new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.

* * *

[The Court is taking a real risk with society’s welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation. While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.]

* * *

*** Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities.***

* * *

Despite protestations by several Justices in succeeding years that Miranda had been a big mistake and promises to overrule it when the opportunity presented itself, the Court declined to do so—and by the rather wide margin of 7–2. In Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326 (2000), the Justices struck down a statute, 18 U.S.C.A. § 3501, which provided that the admissibility of statements made by suspects undergoing custodial interrogation was to be judged solely on the basis of whether they were made voluntarily in light of all the circumstances. Miranda, of course, provides that statements are inadmissible if the suspect has not first been given the Miranda warnings, and then knowingly and voluntarily waived them, in the absence of any well-recognized exception (such as blurt out an incriminating statement before the warnings can be given or the
existence of a “public safety” emergency (p. 547)). Professing uncertainty whether “we would agree with Miranda’s reasoning and its resulting rule, were we addressing the issue in the first instance,” Chief Justice Rehnquist concluded that “the principles of stare decisis weigh heavily against overruling it now.” Miranda, it appears, had not proved unworkable: Law enforcement authorities had adjusted to its strictures and, the Court observed, “the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than Miranda for law enforcement officers to conform to, and for courts to apply in a consistent manner.” So it continues to be good law that failure to give the Miranda warnings usually invalidates a confession.

Expansion of the right to counsel to pretrial investigative proceedings, together with other Warren Court rulings interpreting the Fourth and Fifth Amendments, evoked considerable controversy and resistance. Critics on and off the Bench assailed Escobedo, Miranda, and other decisions for impairing effective law enforcement. To those concerned about the preservation of “law and order,” the Warren Court’s decisions inequitably balanced the contending interests of individual rights and public safety too heavily in favor of the former. The spiraling crime rate and large-scale civil disorders of the late 1960s intensified these misgivings. It was not surprising, then, that critics attacked the Court for decisions that “handcuffed the police” by “making crime easy and convictions hard.” One of these critics was Richard Nixon, who, assuming the role of a law-and-order presidential candidate—a posture that seems ironic in light of subsequent events—said, “As a judicial conservative, I believe some Court decisions have gone too far in weakening the police forces as against the criminal forces in our society.” After winning the 1968 election, he succeeded in redeeming his pledge “to nominate to the Supreme Court individuals who share my philosophy which is basically a conservative philosophy” by naming four Justices in less than three years. The results of subsequent presidential elections and the appointments made by President Reagan and the two Presidents Bush moved the Court still further in a conservative direction. Although President Clinton picked two Justices (Ginsburg and Breyer), Republican presidents made all the other appointments to the Court (13 of 15) during the period 1969–2006.

The effect of this Republican hegemony over the Presidency was a long-term trend curtailing—but usually not directly overruling—many of the important criminal-procedure decisions made by the Warren Court during the 1960s. The cases included in this and the next chapter generally reflect the different approaches to criminal procedure taken by the Warren Court, on the one hand, and the Burger and Rehnquist Courts over

5. Sometimes police officers have conducted a two-step interrogation process designed to undercut the impact of the Miranda warnings: The officers fail to give the warnings at first, interrogate the suspect until he makes incriminating statements, then give the warnings and secure a waiver of his rights, then get him to repeat the incriminating statements. The argument is that his repetition of the statements after he has been given the warnings removes the taint of failing to Mirandize him at the start. But in Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004), the Court rejected this contention. The consensus of the Justices (there was no Opinion of the Court) was that Miranda warnings given mid-interrogation were reduced to a mere formality and rendered ineffective (because the questioning was nearly continuous), thus making the subsequent confession inadmissible at trial.

Although statements obtained in technical violation of Miranda are inadmissible at trial, they are generally admissible at the sentencing stage. After all, following conviction, the general principle is to permit the judge to know as much as possible about the defendant’s background and the circumstances of the crime so that the most accurate sentence may be imposed. A federal appeals court, in United States v. Nichols, 438 F.3d 437 (4th Cir. 2006), held that evidence obtained in violation of Miranda may be admitted at the sentencing stage as long as it is not coerced or involuntary because “the policies underlying the Miranda exclusionary rule normally will not justify the exclusion of illegally obtained but reliable evidence from a sentencing proceeding.” The appeals court noted that the Supreme Court’s decision in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), to exclude un-Mirandized statements applied only to sentencing in death penalty cases.
the succeeding quarter century, on the other hand. Although this political transformation of the Court might broadly be described as a trend toward weighting the interest of public safety over that of protecting the rights of individuals accused of crime, it might more precisely be understood as the triumph of the proponents of the Crime Control Model over the advocates of the Due Process Model, to use Packer’s terms.

An early skirmish between these competing value systems of criminal justice is evident in opposing decisions by the Warren and Burger Courts on extending the right to counsel announced in Escobedo and Miranda to pretrial lineups. In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967), the Warren Court held that the Sixth Amendment protected counsel’s presence at a post-indictment lineup. The Court rejected the government’s claim that a line-up was no different from obtaining the defendant’s fingerprints or a sample of hair or clothing, or from drawing a sample of blood to determine the suspect’s blood-alcohol level. By contrast, a lineup in which a witness is asked to identify the possible culprit runs a substantial risk of misidentification that is not nearly as likely to be corrected at trial through cross-examination of the prosecution’s experts or the presentation of expert witnesses by the defense. The Court took note of the fact that, when the witness’s opportunity for observation of the perpetrator is short, his susceptibility to suggestion at a lineup is substantial. Moreover, it was “a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.” Speaking for the Court, Justice Brennan continued:

[T]he defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants’ names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury’s choice is between the accused’s unsupported version and that of the police officers present. In short, the accused’s inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness’ courtroom identification.

But there was no constitutional defect, the Court said, in requiring participants in a lineup to repeat the words allegedly uttered by the culprit at the time he committed the crime. The Court ruled that, in doing so, Wade was merely required to provide a sample of his voice—not admit his guilt—so there was no compulsion to give testimonial evidence. As authority for this conclusion, the Court cited Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) (see p. 543), and reasoned that voice exemplars were indistinguishable from blood or breathalyzer tests. Four dissenting Justices, however, concluded that repeating the culprit’s words was indeed an act of self-incrimination.

In a companion case, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1051 (1967), the Court held that the right to counsel at post-indictment lineups was applicable to the states
through the Due Process Clause of the Fourteenth Amendment. Five years later, in Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972), the Burger Court rejected any expansion of the Wade-Gilbert rule to post-arrest, preindictment line-ups on the ground that a post-arrest, preindictment lineup occurred prior to the beginning of the adversary process and, therefore, before the right to counsel became applicable. The four dissenters in Kirby, on the other hand, argued that the factors potentially prejudicing postindictment lineups were just as likely as in preindictment lineups.

The Escobedo and Miranda rulings entwine Fifth and Sixth Amendment rights. Although discussion to this point has highlighted the guarantee of access to counsel, two of the warnings that Miranda requires police officers to give a suspect in fact are directed at self-incrimination and its consequence. Furthermore, the Court’s opinions in both Escobedo and Miranda make it clear those decisions were prompted by a concern that pressure was being applied during custodial interrogation to induce suspects to make incriminating admissions. In the Court’s view, the attorney for the accused had important roles to play in preventing coercion, monitoring the accuracy of the proceedings, and assuring that any waiver of the right against self-incrimination was intelligent, knowing, and voluntary. However, as the Court repeatedly observed, outside the context of protecting Fifth Amendment rights, the right to counsel is essentially a trial right.

The more blatant and heavy-handed tactics used to secure criminal confessions may have been blunted by Escobedo and Miranda, but it could hardly be said that police stopped trying. Rulings after Miranda have, therefore, focused on the increased subtlety of police techniques. The Court has reaffirmed that the right to counsel becomes applicable at the point of custodial interrogation or its functional equivalent, that is, when the suspect is not free to leave and when the officer acts in such a way that his behavior is reasonably likely to elicit an incriminating response from the suspect. But when do the police exceed the limits of mere trickery in provoking inculpatory remarks from defendants who have already “lawyered-up”? A majority of the Justices in the following case, Brewer v. Williams, thought the cleverly orchestrated appeals to the defendant’s religious streak crossed the line, particularly in light of the explicitly agreed-to conditions governing his transportation.

**BREWER V. WILLIAMS**

Supreme Court of the United States, 1977
430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424

**BACKGROUND & FACTS** Williams, an escapee from a mental institution, was arrested, arraigned, and held in jail in Davenport, Iowa, for the abduction of a 10-year-old girl. Both Kelly, his lawyer in Davenport, and McKnight, his lawyer in Des Moines, where he was to be transferred to stand trial, advised him not to make any statements until he had consulted with his attorney in Des Moines; and police officers who were to escort him to Des Moines agreed not to question him during the trip. During the drive, the defendant indicated no willingness to discuss the matter with the officers, saying only that he would tell the full story after conferring with his counsel. One of the officers, however, knowing that the defendant was deeply religious, endeavored to get the defendant to make incriminating remarks. At one point, the officer, referring to the poor weather conditions, the low visibility, and the likelihood of several inches of snow, observed that, if more time passed, it would be difficult, if not impossible, to find the girl’s body and lamented that “the parents of this little girl should be entitled to a Christian burial for the little girl who was
snatched away from them on Christmas Eve and murdered." This prompted Williams to make a number of incriminating statements and ultimately to lead the police to her body. The trial judge denied a motion to suppress all of the evidence gained as a result of Williams's automobile ride on grounds the defendant had waived his right to have counsel present. Thereafter, the jury returned a guilty verdict on a murder charge. On appeal, the Iowa Supreme Court affirmed, holding that, applying "the totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver," "evidence of the time involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged."

Williams subsequently petitioned a federal district court for a writ of habeas corpus. That court held in Williams's favor, and a divided federal appeals court affirmed the decision to issue the writ, whereupon Brewer, Williams's warden, sought review by the U.S. Supreme Court.

Mr. Justice STEWART delivered the opinion of the Court.

* * *

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial * * *.

* * *

[In determining the question of waiver as a matter of federal constitutional law[.]]

* * * it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." * * * [The right to counsel does not depend upon a request by the defendant * * * and that courts indulge in every reasonable presumption against waiver * * *. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. * * *

[The Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining the State's burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right. He consulted McKnight by long distance telephone before turning himself in. He spoke with McKnight by telephone again shortly after being booked. After he was arraigned, Williams sought out and obtained legal advice from Kelly. Williams again consulted with Kelly after Detective Leaming and his fellow officer arrived in Davenport. Throughout, Williams was advised not to make any statements before seeing McKnight in Des Moines, and was assured that the police had agreed not to question him. His statements while in the car that he would tell the whole story after seeing McKnight in Des Moines were the clearest expressions by Williams himself that he
desired the presence of an attorney before any interrogation took place. But even before making these statements, Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.

Despite Williams’ express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Mr. Chief Justice BURGER, dissenting.

The evidence is uncontradicted that Williams had abundant knowledge of his right to have counsel present and of his right to silence. Since the Court does not question his mental competence, it boggles the mind to suggest that Williams could not understand that leading police to the child’s body would have other than the most serious consequences. All of the elements necessary to make out a valid waiver are shown by the record and acknowledged by the Court.

Constitutional rights are personal, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court’s holding operates to “imprison a man in his privileges,” it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present.

This is demonstrably not the case where police conduct collides with Miranda’s procedural safeguards rather than with the Fifth Amendment privilege against compulsory self-incrimination. Involuntary and coerced admissions are suppressed because of the inherent unreliability of a confession wrung from an unwilling suspect by threats, brutality, or other coercion.

But use of Williams’ disclosures and their fruits carries no risk whatever of unreliability, for the body was found where he said it would be found. Moreover, since the Court makes no issue of voluntariness, no dangers are posed to individual dignity or free will. Miranda’s procedural safeguards are premised on presumed unreliability long associated with confessions extorted by brutality or threats; they are not personal constitutional rights, but are simply judicially created prophylactic measures.

In cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the Miranda prophylaxis, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against “the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. We also ‘must consider society’s interest in the effective prosecution of criminals’ [B]ecause Williams’ incriminating disclosures are not...
infected with any element of compulsion the Fifth Amendment forbids[,] nor does this evidence pose any danger of unreliability to the factfinding process[,]. There is no reason to exclude this evidence.

Mr. Justice WHITE, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

The majority simply finds that no waiver was proved in this case. I disagree. That respondent knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral certainty. He was advised of the right by three officials of the State—telling at least one that he understood the right—and by two lawyers. Finally, he further demonstrated his knowledge of the right by informing the police that he would tell them the story in the presence of McKnight when they arrived in Des Moines. The issue in this case, then, is whether respondent relinquished that right intentionally.

Respondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the evidence. However, even if his statements were influenced by Detective Learning's statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborn will. The statement by Learning was not coercive; it was accompanied by a request that respondent not respond to it; and it was delivered hours before respondent decided to make any statement. Respondent's waiver was thus knowing and intentional.

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently, the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guaranty of assistance of counsel is designed to protect. * * * The police did nothing "wrong," let alone anything "unconstitutional." To anyone not lost in the intricacies of the prophylactic rules of Miranda v. Arizona, * * * the result in this case seems utterly senseless; * * * the statements made by respondent were properly admitted. In light of these considerations, the majority's protest that the result in this case is justified by a "clear violation" of the Sixth and Fourteenth Amendments has a distressing hollow ring. I respectfully dissent.

Brewer v. Williams, however, is certainly not the only instance in which the Court has ruled on ploys designed to snare an already Mirandized defendant. Three years later, in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980), a different Court majority, but one still speaking through Justice Stewart, ruled the other way. After robbing a taxicab driver, Innis was picked up by police based on a photo police had shown the victim. Innis was read his Miranda rights when police arrested him, and his rights were read to him again after more officers arrived on the scene, at which time Innis said he understood those rights and said he wanted to speak with a lawyer. The taxicab driver had told police that his
assailant had brandished a shotgun, but Innis was unarmed when he was apprehended. During the ride to the police station, one of the officers in the squad car said he was familiar with the area, that there were a lot of handicapped children in the vicinity because a school for them was located nearby, and “God forbid one of them might find a weapon with shells and they might hurt themselves.” Another officer also accompanying Innis to the station agreed and added that “it would be too bad if [a] little girl would pick up the gun” and “maybe kill herself.” At that point, Innis told the officers to turn the car around and he would lead them to the gun because of the school kids. When they returned to the scene and while a search for the gun was underway, Innis was read his Miranda rights a third time.

Following his indictment on various criminal charges, Innis moved to suppress the gun and his statements about it. The Rhode Island Supreme Court set aside Innis’s subsequent conviction on grounds the provocative remarks by the police amounted to interrogation after Innis had said he wanted to speak to a lawyer.

Justice Stewart began from the premise that “[t]he term ‘interrogation’ under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” In light of the fact that the conversation here consisted of “a few off hand remarks” and there was “nothing in the record to suggest that [Innis] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children[,]” Stewart continued, “[w]e cannot say that the officers should have known that it was likely that Innis would so respond.” This was not a case, he added, where “police carried on a lengthy harangue in the presence of the suspect” or where “the officers’ comments were particularly ‘evocative.’” Justices Brennan and Marshall, in dissent, were of the opinion that “[t]he notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verge[d] on the ludicrous.” Justice Stevens, who also dissented, argued that “the Court’s test create[d] an incentive for police to ignore a suspect’s invocation of his rights in order to make continued attempts to extract information from him.” In Stevens’s view, there was no material difference between the direct question “Will you please tell me where the shotgun is so we can protect handicapped school children from danger?” — a direct question Miranda barred — and what was said in this case. All the police had to do to stay clear of a constitutional violation was to be “careful not to punctuate their statements with question marks.”

By contrast, the facts in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), decided a year later, fell on the Williams side of the line. In that case, the defendant, who was charged with robbery, burglary, and first-degree murder, was informed of his Miranda rights, indicated he understood them, and agreed to answer questions. After being informed that another suspect in custody already had implicated him, Edwards first resorted to an alibi and then sought to negotiate. When the officer questioning him said he had no authority to make a deal, Edwards said he wanted to speak to an attorney, the questioning stopped, and the defendant was taken to jail. The next morning, when he was informed by the guard on duty that two detectives wanted to talk to him, Edwards told the guard he did not want to talk. The guard told Edwards he “had to” talk to them. After being read his Miranda rights again, Edwards said he wanted to hear the taped confession of the alleged accomplice who had pointed the finger at him. After listening to the tape for several minutes, Edwards made incriminating statements. Edwards’s conviction was affirmed by the state supreme court on grounds his waiver and confession “were voluntarily and knowingly made.”

Speaking for the Court and reversing the judgment in this case, Justice White said:

Although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, * * * the Court has strongly
indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. * * * [A]n accused, having expressed a desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

“Miranda, itself indicated,” he noted, that once the right to counsel had been asserted, “‘the interrogation must cease until an attorney is present.’” Later cases, he reaffirmed “have not abandoned that view.” That police officers had returned the next day to question him was certainly “not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk with anyone.” Edwards’s statement therefore had been made in the absence of counsel and without a valid waiver.

The relevance of Brewer v. Williams does not end here, however, because another question was raised by the events that followed the Supreme Court’s decision in that case. The defendant was tried again on the murder charge, and evidence pertaining to the condition of the victim’s body was admitted at the second trial, but recall that the defendant had taken police to the body after he had made incriminating statements that were prompted by illegal police behavior. Although Williams’s admission of guilt could not be used at the second trial, what about evidence pertaining to the body? In its decision in Nix v. Williams, described in the note that follows, the Court addressed the admissibility of evidence obtained from leads tainted by an inadmissible confession.

**NOTE—NIX V. WILLIAMS: THE “FRUIT OF THE POISONOUS TREE” DOCTRINE AND THE “INEVITABLE DISCOVERY” EXCEPTION**

Evidence about the condition of the victim’s body, articles and photographs of her clothing, and results of postmortem medical and chemical tests of the body were introduced at Williams’s retrial on the murder charge. Williams again challenged his conviction, this time arguing that the evidence pertaining to the victim’s body violated the “fruit of the poisonous tree” doctrine.

Evidence is generally excluded from trial if it is illegally obtained or secured through police misconduct. The “fruit of the poisonous tree” doctrine, enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182 (1920), and Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963), also bars the admission of evidence that is derived from these tainted sources. For example, in the case of a burglary where police have a suspect, but have not recovered the stolen property, a confession to the crime coerced from the suspect would be inadmissible, but so would the property recovered if leads to its whereabouts came from the tainted confession. In the figure of speech for which the doctrine is named, the illegally obtained primary evidence of the police misconduct is the “tree” and the secondary evidence derived from it is the “fruit.” Both are tainted and must be excluded. However, evidence is not the fruit of the poisonous tree if it is obtained by means that did not exploit the illegality, that is, from a source sufficiently independent to purge the evidence of its taint.

Williams argued that discovery of the body (and, therefore, evidence relating to its condition) was made possible because he led the police officers to it. But discovery of the evidence in this manner resulted from the police misconduct previously identified in Brewer v. Williams. Discovery of the victim’s body was thus tainted by the illegal police conduct that prompted Williams’s confession.

Although Williams did indeed lead the police to the victim’s body, at the same time more than 200 volunteers working in teams were combing the area several miles on either side of the interstate highway where witnesses had seen Williams traveling the day the little girl disappeared. One witness
recalled seeing Williams carrying a wrapped bundle, and another witness at a rest area along the interstate said he saw a bundle in Williams's car with two skinny, white legs protruding. Although the search was called off after Williams showed the officers where the body was, the search parties were less than three miles from that location at the time and headed in that direction.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), the Supreme Court rejected Williams's argument and affirmed his conviction. The Court began from the premise that exclusion of evidence from trial is justified because of its potential for deterring police misconduct. Under the circumstances of this case, the Court accepted the conclusion that the victim's body and articles of clothing would have been discovered by the search team anyway. In so ruling, the Court recognized an "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine, just as it has recognized the "independent source" exception in the past. Speaking for the Court, Chief Justice Burger explained: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."

Justice Brennan penned a dissenting opinion that also spoke for Justice Marshall. He took the position that the "inevitable discovery" exception should require clear and convincing proof rather than proof by simply a preponderance of the evidence as would satisfy the "independent source" exception. He concluded that a heightened standard of proof was warranted because the "inevitable discovery" exception implicated a hypothetical finding rather than an actual one: "[s]pecifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigators were allowed to proceed." He continued, "Increasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted."

It is worth pointing out that physical evidence is admissible, however, even if the leads to it were obtained from a defendant's un-Mirandized statements so long as those statements were made voluntarily. The problem in Williams was that the defendant's statements were incriminating and he had not voluntarily waived his constitutional rights. The rule in Miranda protects against violations of the Self-Incrimination Clause; it does not make giving Miranda warnings an end in itself. In the words of Justice Thomas, "The Self-Incrimination Clause * * * is not implicated by the admission into evidence of the physical fruit of a voluntary statement." (Emphasis supplied.) United States v. Patane, 542 U.S. 630, 124 S.Ct. 2620 (2004). Failure to give the Miranda warnings makes subsequent admissions presumptively inadmissible, not always inadmissible.

C. THE RIGHT AGAINST SELF-INCrimINATION

The Fifth Amendment guarantees that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." This prohibition appears to be absolute. Does it mean that, if someone accused of stalking and then murdering the victim had recorded his daily thoughts and activities in the process, his diary could not be introduced as evidence against him? Does it mean that an individual may constitutionally refuse to provide any information at all if it bears on his criminal prosecution?

The Supreme Court's earliest decision on the Fourth Amendment—one in which it concluded that a defendant's search and seizure rights could also implicate his Fifth Amendment right against self-incrimination— suggested that the answers to these questions might be "Yes." Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886), involved the seizure and forfeiture of property for defrauding the government in the payment of customs duties by falsifying an invoice in the importation of several cases of plate glass. When it became important to show the quantity and value of glass in an earlier shipment, the government
subpoenaed an invoice from the defendant, but he objected that by being forced to provide the document, he was being compelled to give evidence against himself. Speaking for the Court, Justice Bradley declared, "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." The Court, therefore, held that "a compulsory production of the private books and papers of the owner of the goods sought to be forfeited * * * is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." Although the Supreme Court has never overruled Boyd, recent decisions have repudiated its expansive language.

"In Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569 (1976) and United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237 (1984), the Supreme Court held that the privilege obtains only if the act of producing the papers or records, by itself, would have communicative or testimonial aspects which could incriminate the individual compelled to produce them, but it does not protect against their incriminating contents voluntarily committed to paper before the government makes demand for them. Doe emphasized that the Fifth Amendment "protects the person asserting the privilege only from compelled self-incrimination." Documents prepared voluntarily "cannot be said to contain compelled testimonial evidence" in and of themselves." Therefore, “[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.”

However, a witness may be compelled to testify about her illegal acts, if the jeopardy created by the admission of criminal wrongdoing has been eliminated. Faced with a criminal enterprise involving several confederates where successful prosecution of the principal culprits is doubtful, it is not unusual for a prosecutor to provide immunity to a witness further down the food chain in exchange for testimony about the illicit activities of higher-ups. That was the reason Independent Counsel Kenneth Starr granted immunity in the Whitewater and Lewinsky investigations during the Clinton Administration. The question then becomes: What is the scope of the immunity required by the Fifth Amendment to avoid compelled self-incrimination? In Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195 (1892), the Supreme Court initially said that nothing less than transactional immunity would do. In other words, the Fifth Amendment required complete immunity from criminal prosecution in the matter. However, the Court subsequently adopted the view that, like Boyd, this statement overshot the mark, and retracted its ruling in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972). In Kastigar, the Court held that the Fifth Amendment only requires use and derivative use immunity. The government could not use the witness’s statement to convict her of the crime (use immunity), nor could it use any evidence obtained from leads supplied by her statement (derivative use immunity). Together, this does not equal transactional immunity because it still leaves open the possibility that

6. At least two members of the current Court, however, believe that the narrow view adopted in Fisher may be inconsistent with the original meaning of the Self-Incrimination Clause. Justices Scalia and Thomas have said that, when the proper opportunity is presented, they are prepared to reconsider Fisher and restore the interpretation in Boyd as authoritative. See United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000). If the Court returned to Boyd, then the Fifth Amendment would protect against the compelled production of books and papers, whether or not such material was thought to be "testimonial."

7. Senate Select Committee on Ethics v. Packwood, 845 F.Supp. 17, 23 (D.D.C. 1994) stay denied, 510 U.S. 1319, 114 S.Ct. 1039 (1994). The federal district court went on to reject Senator Robert Packwood’s claim of Fifth Amendment privilege protecting personal diaries in which he recorded his observations on public events and matters in his personal life during his years in the Senate. The diaries had been subpoenaed by a Senate committee investigating charges that the senator over the years had sexually harassed certain women, had threatened several witnesses and complainants of such harassment, and had misused his staff for the same purpose.
independently discovered evidence of the witness’s wrongdoing—untainted by any connection to the immunized statements she made (which the prosecution would have to prove)—could be used to convict her. To be sure, this possibility is a longshot, since the untainted evidence would have to be so strong that every element of the crime could still be proved beyond a reasonable doubt. Absolute protection against prosecution (transactional immunity) is not constitutionally required, since use and derivative use immunity are sufficient to displace the jeopardy against which the Self-Incrimination Clause protected the witness. A prosecutor, anxious to obtain vital evidence, might agree to provide transactional immunity to sweeten the deal—and, indeed, Monica Lewinsky’s lawyers insisted on it—but that is a matter for the prosecutor’s discretion, not a constitutional requirement.

Naturally, any grant of immunity is conditioned on the witness providing full and truthful testimony. Once immunity has been given, even if it has not been sought by her and she in fact has resisted it, the witness must testify because it is now constitutionally sufficient to displace the jeopardy of testifying about an incriminating act. If she refuses to testify in the face of immunity, like Susan McDougal who adamantly resisted giving immunized testimony before the Whitewater grand jury, she can be cited for contempt and jailed, and her confinement could have continued until she cooperated.

As the Court’s decision in California v. Byers below shows, the prohibition on compulsion extends only to testimonial evidence. In Byers, a majority of the Court upheld the constitutionality of California’s “stop and report” requirements where motor vehicle operators are involved in accidents that cause property damage or personal injury. A plurality, speaking through Chief Justice Burger, concluded that the statutory requirement simply did not amount to a form of self-incrimination because the information compelled did not entail a confession of guilt. Justice Harlan, who cast the crucial fifth vote, conceded it did amount to self-incrimination, but concluded that was outweighed by important regulatory interests that the state had. Justice Black in dissent argued that the “stop and report” requirement flatly violated the Constitution. At least as pernicious as the plurality’s use of the distinction between testimonial and nontestimonial evidence to skirt the plain words of the amendment was, in his judgment, the balancing approach in which Harlan indulged. Black’s recognition of the incrimination problem is clear, but if one adopted Black’s approach, what would be the impact on necessary and legitimate governmental regulation in a society where increasingly the behavior of each of us has an impact on others? Subsequent decisions on the apprehension of drunk drivers (p. 543) clearly attest to the vitality of the ruling in Byers.

**California v. Byers**

Supreme Court of the United States, 1971

402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9

**BACKGROUND & FACTS** California’s “hit and run” statute requires the driver of a motor vehicle involved in an accident that causes damage to another’s property to stop at the scene and give his or her name and address to the owner. Jonathan Byers was involved in such an accident, but did not comply with the requirements of the law. When charged with violation of the statute, he argued that this “stop and report” provision of the state motor vehicle code violated his Fifth Amendment right against compelled self-incrimination as made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The California Supreme Court agreed and held that Byers faced “substantial hazards of self-incrimination” as this statute was applied to him. The California Supreme Court then affirmed the ruling of a lower state court quashing the prosecution against him, whereupon the state petitioned for certiorari.
Mr. Chief Justice BURGER announced the judgment of the Court and an opinion in which Mr. Justice STEWART, Mr. Justice WHITE, and Mr. Justice BLACKMUN join.

This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California’s so-called “hit and run” statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar “hit and run” or “stop and report” statutes are in effect in all 50 States and the District of Columbia.

** * * *

Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State’s demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.

In each of these situations there is some possibility of prosecution — often a very real one — for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be “a link in the chain” of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

United States v. Sullivan, 274 U.S. 259, 47 S.Cal. 607 (1927), shows that an application of the privilege to the California statute is not warranted. There a bootlegger was prosecuted for failure to file an income tax return. He claimed that the privilege against compulsory self-incrimination afforded him a complete defense because filing a return would have tended to incriminate him by revealing the unlawful source of his income. * * * Sullivan’s tax return, of course, increased his risk of prosecution and conviction for violation of the National Prohibition Act. But the Court had no difficulty in concluding that an extension of the privilege to cover that kind of mandatory report would have been unjustified. In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with “substantial hazards of self-incrimination.”

** * * *

Although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal. The California Supreme Court noted that [the statute] was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents. In Marchetti v. United States, 390 U.S. 39, 88 S.Cal. 697 (1968)],8 the Court rested on the reality

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8. In Marchetti, the Court struck down a provision of the federal wagering tax law which required gamblers paying the prescribed federal tax on their winnings to register with the Internal Revenue Service. In a classic example of cooperative federalism, federal tax officials then freely shared the names and addresses of the registrants with local and state authorities whose job it was to enforce state laws against gambling. Under these circumstances, the Court held that the compelled registration provision of the tax statute violated the Fifth Amendment's guarantee against self-incrimination.
that almost everything connected with gambling is illegal under “comprehensive” state and federal statutory schemes. The Court noted that in almost every conceivable situation compliance with the statutory gambling requirements would have been incriminating. Largely because of these pervasive criminal prohibitions, gamblers were considered by the Court to be “a highly selective group inherently suspect of criminal activities.”

In contrast, [the statute here,] like income tax laws, is directed at all persons — here all persons who drive automobiles in California. This group, numbering as it does in the millions, is so large as to render [this statute] a statute “directed at the public at large.”

It is difficult to consider this group as either “highly selective” or “inherently suspect of criminal activities.” Driving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver involved in an accident. An accident may be the fault of others; it may occur without any driver having been at fault. No empirical data are suggested in support of the conclusion that there is a relevant correlation between being a driver and criminal prosecution of drivers. So far as any available information instructs us, most accidents occur without creating criminal liability even if one or both of the drivers are guilty of negligence as a matter of tort law.

[ Disclosure with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in Marchetti. Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.]

* * * Compliance with [the statute] requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address. The act of stopping is no more testimonial — indeed less so in some respects — than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or blood. Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles.

* * * A name, linked with a motor vehicle, is no more incriminating than the tax return, linked with the disclosure of income, in United States v. Sullivan, supra. It identifies but does not by itself implicate anyone in criminal conduct.

Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.

The judgment of the California Supreme Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Mr. Justice HARLAN, concurring in the judgment.

* * *

The public regulation of driving behavior through a pattern of laws which includes compelled self-reporting to ensure financial responsibility for accidents and criminal sanctions to deter dangerous driving entails genuine risks of self-incrimination from the driver’s point of view.

* * *

* * * If the privilege is extended to the circumstances of this case, it must, I think, be potentially available in every instance where the government relies on self-
reporting. * * * Technological progress creates an ever-expanding need for governmental information about individuals. If the individual’s ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices. * * *

California’s decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byer’s behavior was criminal. Nor will it relieve the State of the duty to determine whether the accident which Byers was forced to admit involvement in was proximately related to the aspect of his driving behavior thought to be criminal. In short, Byers having once focused attention on himself as an accident-participant, the State must still bear the burden of making the main evidentiary case against Byers as a violator of [other provisions] of the California Vehicle Code. * * *

Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas. * * *

On the premises set forth in this opinion, I concur in the judgment of the Court.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS and Mr. Justice BRENNAN join, dissenting:

* * * It is now established that the Fourteenth Amendment makes [the self-incrimination] provision of the Fifth Amendment applicable to the States. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964). * * *

*** The plurality opinion *** suggests that * * * Byers would not have subjected himself to a “substantial risk of self-incrimination” by stopping after the accident and providing his name and address as required by California law. * * * This suggestion can hardly be taken seriously. A California driver involved in an accident causing property damage is in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which constitute most of two volumes of the California Code. More important, the particular facts of this case demonstrate that Byers would have subjected himself to a “substantial risk of self-incrimination,” * * * had he given his name and address at the scene of the accident. He has now been charged not only with failing to give his name but also with passing without maintaining a safe distance as prohibited by California Vehicle Code § 21750 * * *. It is stipulated that the allegedly improper passing caused the accident from which Byers left without stating his name and address. In a prosecution under § 21750, the State will be required to prove that Byers was the driver who passed without maintaining a safe distance. Thus, if Byers had stopped and provided his name and address as the driver involved in the accident, the State could have used that information to establish an essential element of the crime under § 21750. It seems absolutely fanciful to suggest that he would not have faced a “substantial risk of self-incrimination,” * * * by complying with the disclosure statute.

The plurality opinion also seeks to distinguish this case from our previous decisions on the ground that [the statute] requires disclosure in an area not “permeated with criminal statutes” and because it is not aimed at a “highly selective group inherently suspect of criminal activities.” * * * Of course, these suggestions ignore the fact that this particular respondent would have
run a serious risk of self-incrimination by complying with the disclosure statute. Furthermore, it is hardly accurate to suggest that the activity of driving an automobile in California is not "an area permeated with criminal statutes." * * * And it is unhelpful to say the statute is not aimed at an "inherently suspect" group because it applies to "all persons who drive automobiles in California." * * * The compelled disclosure is required of all persons who drive automobiles in California who are involved in accidents causing property damage. If this group is not "suspect" of illegal activities, it is difficult to find such a group.

* * *

I also find unacceptable the alternative holding that the California statute is valid because the disclosures it requires are not "testimonial" (whatever that term may mean). * * * Even assuming that the Fifth Amendment prohibits the State only from compelling a man to produce "testimonial" evidence against himself, * * * [w]hat evidence can possibly be more "testimonial" than a man's own statement that he is a person who has just been involved in an automobile accident inflicting property damage? * * *

My Brother HARLAN's opinion * * * "balances" the importance of a defendant's Fifth Amendment right not to be forced to help convict himself against the government's interest in forcing him to do so. * * *

[This balancing inevitably results in the dilution of constitutional guarantees * * * [because it makes] the scope of the Fifth Amendment's protection * * * depend on what value a majority of nine Justices chooses to place on this explicit constitutional guarantee as opposed to the government's interest in convicting a man by compelling self-incriminating testimony, * * *[T]his does indeed "embark us" on Brother HARLAN's "uncharted and treacherous seas." * * *

* * *

[Mr. Justice MARSHALL also dissented.]

NOTE—TESTIMONIAL EVIDENCE IN DRUNK DRIVING CASES

In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966), the Supreme Court held that the withdrawal of a small sample of blood from an individual suspected of drunk driving and the introduction at trial of the results of a chemical analysis to determine the presence of alcohol did not violate the Fifth Amendment. As in Byers, the Court concluded that such evidence was physical, not testimonial. In South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983), addressing a question that had been left open in Schmerber, the Supreme Court concluded that admission at trial of the defendant's refusal to submit to a blood-alcohol test did not violate the Fifth Amendment guarantee against compelled self-incrimination. In this case, a state statute allowed an individual suspected of drunk driving to refuse to submit to the blood-alcohol test, but authorized revocation of the operator's license of the driver so refusing and permitted such refusal to be admitted against him at trial. When Neville was arrested by police officers for driving while intoxicated, they asked him to submit to a blood-alcohol test and told him that he could lose his license if he refused. However, they failed to warn him that his refusal could be admitted against him at trial.

Speaking for the Court, Justice O'Connor observed that while Schmerber clearly permits a state to compel an individual suspected of drunk driving to submit to a blood-alcohol test, South Dakota has decided against authorizing its police officers to administer such a test against a suspect's will. Instead, South Dakota offers the option of refusal to take the test, but attaches certain burdens to that choice: (1) revocation of the driver's license for one year after affording the individual a hearing, and (2) admission into evidence at trial of the driver's refusal to take the test. Justice O'Connor explained:

"The values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The
simple blood-alcohol test is so safe, painless, and commonplace * * * that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. * * * We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

As to the failure of the police officers to advise Neville that his refusal to take the test could be admitted against him at trial, the Court reasoned that “such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly ‘trick’ respondent if the evidence was later offered against him at trial.” After all, the Court reasoned, it could hardly be said that Neville was misled into believing that refusal would be “a ‘safe harbor,’ free of adverse consequences” where, in conformity with the South Dakota law, the officers informed him that, if he did take the test, he had the right to know the result and to have an additional test administered by someone of his own choosing and, more important, that refusal could mean a loss of his driving privileges for a year.

In a dissenting opinion in which Justice Marshall joined, Justice Stevens voted to affirm the decision of the South Dakota Supreme Court excluding the evidence of Neville’s refusal to take the test. Justice Stevens concluded that court’s decision rested upon “an adequate and independent ground,” namely, that the practice of admitting such a refusal at trial violated a parallel self-incrimination provision of the state constitution.

Seven years later, in a third drunk driving case, Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990), the Court again demonstrated just how narrow and technical the distinction between testimonial and nontestimonial evidence can be. In that case, after being arrested for driving under the influence, the defendant was taken to a booking center and told his actions and voice would be videotaped. By an 8–1 vote (Justice Marshall dissented), the Court held that the defendant’s slurred responses to routine booking questions about his name, address, height, weight, eye color, birth date, and age did not constitute testimonial evidence and hence lay outside the protection afforded by the Miranda warnings. But by a 5–4 vote (Chief Justice Rehnquist and Justices White, Blackmun, and Stevens dissented), the Court held that his response to identify the date of his sixth birthday was testimonial evidence that required suppression in the absence of Miranda warnings because the content of his answer supported the inference that his mental state was confused.

Claims of compelled self-incrimination typically arise after the criminal justice process has been set in motion. Escobedo and Miranda indicated that constitutional rights are implicated once questioning by the police begins to focus on a particular suspect. The preceding section of this chapter established that the principal reason for guaranteeing the right to counsel when criminal investigations reach the accusatory stage is to ensure that defendants will not be forced to incriminate themselves. The requirement that government establish the guilt of accused persons beyond a reasonable doubt and without compelling them to produce the incriminating evidence themselves—the foundation of the adversary system—is premised on the fundamental value in our society of protecting the integrity of the individual. The proposition that individuals—those accused of crime no less than anyone else—are ends in themselves and not just means to an end underlies the
Constitution's commitment to providing the defendant with his day in court. That fundamental value is violated when law enforcement officers coerce the defendant into making incriminating statements or signing a confession.

It is important to understand that respect for individuals, regardless of the crimes of which they are accused and until they are convicted, is the basic value that governs our criminal procedures. Of course, we strive to reconstruct the facts concerning the commission of a crime as accurately as we can and to properly assign responsibility, but learning the truth is not the ultimate value. If it were, we surely would not try to reconstruct it by letting two, often highly charged partisans, the prosecutor and the defense counsel—frequently by deliberate distortion, cunning, and emotion—endeavor to persuade a jury composed of individuals who usually have little knowledge of criminal law and only a passing acquaintance with the criminal justice system. If all we wanted were the truth, we would shoot the defendant full of sodium pentathol and let him tell us. That we choose the adversary system despite its telltale deficiencies in reconstructing the truth tells us that we regard reliable fact-finding as an important, but not overriding, value. The fundamental purpose apparent in the design of the adversary system is to assure the accused a fair hearing by equalizing the enormous power and resources that the state can bring to bear in a criminal prosecution.

The Voluntariness of Confessions Before Miranda

The essence of compelled self-incrimination was a coerced confession. But what is it that marked a confession as coerced? As the Court made clear in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961), the legitimacy of a confession was based not on its reliability or trustworthiness, but on its voluntariness. Prohibition of the use of physical force by law enforcement authorities was underscored by the Court's decision in Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940). Since, today, coercion is much more likely to be psychological than physical and subtle rather than overt, how could we know whether admissions of guilt or incriminating statements were made voluntarily?

The answer to this question inhered in several factors that often appeared in cases where a lawyer had not been present during pretrial interrogation, which rendered a confession obtained under those circumstances highly suspect.

One of these elements was an unreasonable delay in arraignment, that is, an excessive lapse of time between the point at which an accused was taken into custody and the point at which he was brought before a magistrate, formally apprised of the charges against him, and asked to state his plea. As the Court in Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356 (1957), ruled, a confession obtained during an unreasonably long delay in getting the accused before a magistrate was presumed to be coerced and thus was inadmissible. The holding in Mallory, however, applied only to the federal courts, since it was based on the statutory power of the Supreme Court to supervise federal law enforcement procedures; it was not a constitutional requirement.

A second circumstance that tainted a confession was lengthy interrogation. In Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921 (1944), the Court held that 36 hours of relay questioning was inherently coercive, and in Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, five years later, the Court held that five days of noncontinuous interrogation was likewise unconstitutional.

As indicated by the Court in Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202 (1959), a confession had to be the result of "free and rational choice." The prohibition of the use of pressure did not mean that interrogators could not resort to trickery in dealing with the accused, but it did mean that when the police engaged in deceit, they were on unsteady
ground. Mere trickery would not taint a confession, but trickery that caused coercion would, and, in the absence of counsel, substantial use of tricks by the police was constitutionally risky.

Inducements to confess were likewise unconstitutional because they violated the “free and rational choice” test. Thus, in Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336 (1963), the Court vacated the conviction of the defendant for robbery because he was held incommunicado and told that he could not call his wife until after he had made a confession. In Lynum v. Illinois, 372 U.S. 528, 83 S.Ct. 917, the same year, the Court also set aside the conviction of a woman defendant prosecuted for unlawful possession of marijuana when she was induced to confess by threats that she would lose custody of her children and that welfare checks would be cut off. Finally, as a third example of inducement to confess, the Minnesota Supreme Court in State v. Biron, 266 Minn. 272, 123 N.W.2d 392 (1963), held that where police officers coaxed the 18-year-old defendant to confess to a purse-snatching that culminated in the death of the victim by holding out to him the prospect of keeping the case in juvenile court (as opposed to the regular trial court), the admission of guilt was not voluntary. However, a guilty plea to a reduced charge, entered subsequent to bargaining between the prosecution and the defense, was held in Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970), not to be induced. Although the courts would not interfere to upset such pleas, provided they were “intelligible” and “voluntary” and were made after the defendant had consulted with his lawyer, the courts would intervene on the defendant’s side if the state did not keep its part of the bargain. See Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971).

Admissibility of Confessions After Miranda

Since Miranda, the admissibility of criminal confessions has depended upon the compliance of law enforcement officers with the requirements imposed in that ruling. As explained in the section on the right to counsel, this involves much more than the voluntariness of the suspect’s statements. It depends on giving explicit warnings in advance of questioning; obtaining a knowing, voluntary, and intelligent waiver of rights; and observing the right to counsel if invoked and unless clearly rescinded. Familiarity with post-Miranda standards of admissibility thus entails a review of the Court’s decisions in Williams, Innis, and Edwards presented previously.

Supreme Court decisions have made it clear, though, that waiver of Miranda rights need not be in writing and need not take the form of an explicit statement (North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979)). Whether there has been a knowing, intelligent, and voluntary waiver of those rights depends on a variety of circumstances, such as the suspect’s age, whether other persons besides the police officers were present at the time of questioning, the time of day, and the suspect’s mental state.9 But a waiver of Miranda rights cannot be presumed from silence (Tague v. Louisiana, 444 U.S. 469, 100 S.Ct. 2688 (1980)).

9. The admissibility of statements made when the suspect’s mental state interferes with his capacity for rational and voluntary choice turns on state rules of evidence, not Supreme Court decisions. In Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986), the Court held that, although psychiatric testimony revealed the defendant suffered from a psychosis that substantially interfered with his capacity to make free and rational choices, there was no constitutional violation when he made detailed incriminating statements before and after he had been given the Miranda warnings and indicated he understood them. The defendant’s mental state alone cannot be the sole basis for concluding that he did not waive his rights voluntarily. Here the defendant said that by confessing he was “following the advice of God”; police conduct was not a cause of the confession.
If the defendant repudiates his confession at trial and alleges that it was coerced, the burden, as Miranda holds, is on the state to show otherwise. The Warren Court believed that the exclusion of inculpatory statements from admission at trial, unless the defendant was first given the Miranda warnings and waived his rights, was the price demanded by the Fifth Amendment for violating its guarantee against compelled self-incrimination. But the Court’s recent decision in Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246 (1991), signaled an important departure. Previously, in accord with the foregoing principle articulated by the Warren Court, admission of a coerced confession at trial was sufficient in itself to trigger the reversal of a criminal conviction. In Fulminante, the Court ruled that an erroneously admitted coerced confession need not constitute grounds for reversing the defendant’s conviction if the impact of the confession, in light of all the other evidence, was “harmless,” that is, unlikely to have prejudiced his rights by contributing to the verdict.

The continued ascendancy of crime control values among Supreme Court Justices has limited, but not eviscerated, Miranda. Its erosion is apparent in the Court’s creation of a “public safety” exception in New York v. Quarles. Do the facts in this case make a strong argument for recognizing such an exception?

**NEW YORK V. QUARLES**
Supreme Court of the United States, 1984
467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550

BACKGROUND & FACTS
Shortly after midnight a woman approached two police officers on patrol, told them she had just been raped, described her assailant, and indicated that he had just entered a nearby supermarket and was carrying a gun. While one of the officers entered the supermarket, the other radioed for assistance. Once inside the store, the officer soon spotted Quarles as the man fitting the description given by the woman. Quarles ran toward the back of the store, and the police officer, with gun drawn, pursued the suspect, but lost sight of him for a few seconds. When he regained sight of Quarles, the officer ordered him to stop and to put his hands over his head. After frisking the suspect, discovering that he was wearing an empty shoulder holster, and handcuffing him, the officer asked where the gun was. Quarles nodded in the direction of some empty cartons and said, “The gun is over there.” The police officer then retrieved the gun, formally arrested Quarles, and read him his Miranda rights. The defendant indicated he would answer questions without the presence of an attorney and admitted he owned the gun. Quarles was subsequently charged with criminal possession of a weapon. The state trial court excluded the defendant’s initial statement and the gun because the Miranda warnings had not been read first and suppressed other statements made by Quarles on grounds they were tainted by the Miranda violation. After suppression of this evidence was affirmed by an intermediate appellate court and by the New York Court of Appeals, the state sought review by the U.S. Supreme Court.

Justice REHNQUIST delivered the opinion of the Court.

* * *

In this case we have before us no claim that respondent’s statements were actually compelled by police conduct which overcame his will to resist. * * * Thus the only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since Miranda.

* * *
We hold that on these facts there is a "public safety" exception to the requirement that Miranda warnings be given before a suspect’s answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives— their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. * * *

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

In such a situation, if the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles’ position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the Miranda majority was willing to bear that cost. Here, had Miranda warnings deterred Quarles from responding to Officer Kraft’s question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination. * * *

* * *

* * * The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimony evidence from a suspect.

The facts of this case clearly demonstrate that distinction and an officer’s ability to recognize it. Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings that he continued with investigatory questions about the ownership and place of purchase of the gun. The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety.
We hold that the Court of Appeals in this case erred in excluding the statement, “the gun is over there,” and the gun because of the officer’s failure to read respondent his Miranda rights before attempting to locate the weapon. Accordingly we hold that it also erred in excluding the subsequent statements as illegal fruits of a Miranda violation. We therefore reverse and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O’CONNOR, concurring in part in the judgment and dissenting in part.

* * * Were the Court writing from a clean slate, I could agree with its holding. But Miranda is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures. Accordingly, I would require suppression of the initial statement taken from respondent in this case. On the other hand, nothing in Miranda or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree with the Court that admission of the gun in evidence is proper.

* * *

In my view, a “public safety” exception unnecessarily blurs the edges of the clear line heretofore established and makes Miranda’s requirements more difficult to understand. * * *

[The critical question] Miranda addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. Miranda, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State. When police ask custodial questions without administering the required warnings, Miranda quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.

The Court concedes, as it must, that respondent was in “custody” and subject to “interrogation” and that his statement “the gun is over there” was compelled within the meaning of our precedent. * * * In my view, since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of Miranda requires that respondent’s statement be suppressed.

* * *

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

* * *

The majority’s entire analysis rests on the factual assumption that the public was at risk during Quarles’ interrogation. This assumption is completely in conflict with the facts as found by New York’s highest court. * * * Contrary to the majority’s speculations, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns. As Officer Kraft acknowledged at the suppression hearing, “the situation was under control.” * * * Based on Officer Kraft’s own testimony, the New York Court of Appeals found: “Nothing suggests that any of the officers was by that time concerned for his own physical safety.” * * * The Court of Appeals also determined that there was no evidence that the interrogation was prompted by the arresting officers’ concern for the public’s safety.

* * *

* * * Miranda v. Arizona and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.

* * *
It would strain credulity to contend
that Officer Kraft's questioning of respon
dent Quarles was not coercive. In the
middle of the night and in the back of an
empty supermarket, Quarles was surround
ed by four armed police officers. His hands
were handcuffed behind his back. The first
words out of the mouth of the arresting
officer were: “Where is the gun?” In the
majority’s phrase, the situation was “kalei
doscopic.” Police and suspect were
acting on instinct. Officer Kraft’s abrupt and
pointed question pressured Quarles in
precisely the way that the Miranda Court
feared the custodial interrogations would
crime control model flourishes in informal settings. Invoking one’s constitutional
cost-benefit analysis, the
Court’s strongest argument in favor of a
public-safety exception to Miranda is that
the police would be better able to protect
the public’s safety if they were not always
required to give suspects their Miranda
warnings. The crux of this argument is that,
by deliberately withholding Miranda warn
ings, the police can get information out of
suspects who would refuse to respond to
custodial interrogations would
crime control model flourishes in informal settings. Invoking one’s constitutional
right against self-incrimination becomes more difficult still when sanctions attend a failure
to answer. In Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984), the Supreme
Court considered whether the privilege against self-incrimination may be asserted by an
individual on probation when asked questions by his probation officer. The Court reasoned
that the Fifth Amendment’s prohibition of compelled self-incrimination applies only to
criminal proceedings, so a probationer may not invoke it to avoid giving a truthful answer
to a question that might result in revocation of his probation. However, an individual on
probation enjoys the same right possessed by all citizens to be free from compelled self-
incrimination in criminal matters. It follows, therefore, that whether the Fifth Amendment
protection affords protection to a probationer depends upon the manner in which his
answers may incriminate him. If a truthful answer indicates that he violated a condition of
his probation, the state may legitimately insist he answer the question and is entitled to
impose sanctions on him for refusing to do so. If, on the other hand, there is some chance
that his truthful answer to a probation officer’s question would expose him to liability for a
crime different from that for which he has already been convicted, he has the right to refuse
to answer, and the state may not force him to waive that right.
These principles are easier understood in the abstract than recognized in concrete situations. Imagine the risk for an unschooled probationer in an informal setting having to decide on the spot whether to answer his probation officer’s questions — assuming, of course, the probationer was aware of these principles in the first place. But the Court (dividing 6–3) held that, since a probation interview does not constitute custodial interrogation, it does not trigger the Miranda warnings. The probabilities then clearly favor failure to assert one’s legitimate Fifth Amendment right. In the Court’s view, the fact that the probation officer could compel the probationer’s attendance and truthful answers and consciously sought incriminating evidence, that Murphy did not expect questions about his prior criminal conduct and could not seek counsel before attending the meeting, and that there were no observers there to guard against abuse or trickery, neither alone nor together balanced out Murphy’s failure to invoke his Fifth Amendment privilege.10

One of the most controversial settings in which self-incrimination questions can arise — apart from criminal interrogation — is that of required therapy. Confession, while perhaps good for the soul and an essential first step in rehabilitation, raises constitutional difficulties when it is part of a compelled regimen. In McKune v. Lile, 536 U.S. 24, 122 S.Ct. 2017 (2002), for example, a sexual abuse treatment program for inmates required that each participant disclose his complete history of sexual activities, including conduct that might be deemed criminal and for which he still could be convicted. An inmate’s refusal to participate in the program triggered reduced prison privileges (such as less availability of television, limited work and wage opportunities, and curtailed exercise) but not a lengthened sentence or revocation of good-time credit. The deeply divided Court ruled that there was no violation of the Fifth Amendment. A plurality, per Justice Kennedy, concluded that “[a] prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute typical and significant hardships in relation to the ordinary incidents of prison life.” The four Justices subscribing to the plurality opinion thought the potential additional punishment for past offenses aided rehabilitation by underscored the gravity of the offender’s conduct and deterred particularly dangerous offenders from future criminal acts by keeping the door open to prosecution. Moreover, no one had ever been prosecuted based on information obtained from such disclosures. The critical fifth vote, supplied by Justice O’Connor, hinged on her view that the alteration in prison conditions was insubstantial and thus there was no compulsion. The dissenters (Justices Stevens, Souter, Ginsburg, and Breyer) believed that, while offering minimal incentives to participate in a therapeutic program requiring full disclosure certainly would not violate the Fifth Amendment, the scheme at issue was far different: Here there was compulsion because the sanction for nonparticipation was the same as if a disciplinary hearing had found that the inmate committed theft, assault, or any

10. Probationers and their property can also be searched on less than probable cause — indeed anytime, anywhere, on mere suspicion by any probation or other peace officer — particularly if they have agreed to it as a condition of probation. This is so, said the Court, because, “probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal” since they “are aware that they may be subject to supervision and face revocation of probation and possible incarceration.” United States v. Knights 534 U.S. 112, 122 S.Ct. 587 (2002). The Court explained that the state’s “interest in apprehending violators of the law * * * may * * * justifiably focus on probationers in a way that it does not on the ordinary citizen.” The same is true of parolees. See Samson v. California, 547 U.S. —, 126 S.Ct. 2193 (2006).
of several other offenses. The lack of a majority opinion, however, leaves us without a clear principle for resolving the tension between rehabilitation and the guarantee against self-incrimination.

D. CONFRONTATION AND CROSS-EXAMINATION

The protection afforded by the Confrontation Clause of the Sixth Amendment was recognized as fundamental when it was incorporated by the Court’s decision in Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965). The Confrontation Clause secures two separate rights: the right of a defendant to physically face the witnesses who give testimony against him or her and the right to cross-examine those witnesses. The values secured by the Confrontation Clause are outlined well in the following excerpt from Justice Scalia’s opinion for the Court in Coy v. Iowa, 487 U.S. 1012, 1015–1020, 108 S.Ct. 2798, 2800–2802 (1988):

There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.” Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. * * *

* * *

The Sixth Amendment’s guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. * * * What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his home town of Abilene, Kansas. In Abilene, he said, it was necessary to “[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. * * * In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.” * * * The phrase still persists, “Look me in the eye and say that.” Given these human feelings of what is necessary for fairness, the right of confrontation “contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.” Lee v. Illinois, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062 (1986).

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.” Z. Chafee, The Blessings of Liberty 35 (1956) * * *. It is always more difficult to tell a lie about a person “to his face” than “behind his back.” In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both “ensur[e] the integrity of the fact-finding process.” Kentucky v. Stincer, 482 U.S., at 736, 107 S.Ct., at 2662. * * *

Thus, the Confrontation Clause serves two values that are entwined, honorableness and reliability.

The conduct of cross-examination has, of course, been long thought of as essential to testing the veracity of witnesses’ testimony by unearthing contradictions, whether inaccuracies or lies. Indeed, the procedure of cross-examination lies at the core of the adversary system. In this respect, the off-asserted relationship between adversariness and truth-testing was stated with remarkable clarity by Justice Fortas for the Court in In re Gault, 387 U.S. 1, 21, 87 S.Ct. 1428, 1440 (1967):
As Mr. Justice Frankfurter has said: “The history of American freedom is, in no small measure, the history of procedure.” But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. “Procedure is to law what 'scientific method' is to science.”

A recent controversy surrounding the Confrontation Clause asks whether observing the formal requirement of face-to-face confrontation is necessary to ensuring reliability in determining the facts. When the principle requiring face-to-face confrontation between accuser and accused is applied to trials in which the defendant stands charged with the crime of child abuse, the difficulty is readily apparent. The nub of the problem is captured well by Justice Scalia again speaking for the Court in Coy:

The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential “trauma” that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

In Coy, the Court rejected the contention that generalized statements about the risk of child trauma were sufficient to override the guarantee of face-to-face confrontation, but the Court left open the question whether a more particularized showing of risk in a given case would be enough to permit modification of the constitutional guarantee. That issue is addressed by the Court in Maryland v. Craig.

**MARYLAND v. CRAIG**

Supreme Court of the United States, 1990

497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666

**BACKGROUND & FACTS** Sandra Craig was indicted on numerous felony counts stemming from her alleged sexual abuse of a six-year-old in her day care center. Before the case went to trial, the state sought to use a procedure, available under Maryland law, that allows a judge to receive one-way closed-circuit television testimony by an alleged child abuse victim. As the prerequisite for invoking the procedure, the trial judge must determine that the testimony by the child victim in the courtroom would result in such emotional distress that the victim could not reasonably communicate. As the majority opinion of U.S. Supreme Court in this case later described it: “Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness’ testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.”

Craig objected to use of this procedure on grounds it violated the express guarantee of the Confrontation Clause in the Sixth Amendment. The trial court rejected that contention and went on to hold that the procedure was justifiably invoked in this case. The Maryland Court of Appeals reversed on the grounds that the Confrontation Clause, made applicable to the states by the Due Process Clause of the Fourteenth...
Amendment, requires a face-to-face encounter between the accused and the accusers in all criminal cases. The state then sought certiorari from the U.S. Supreme Court.

Justice O’CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant’s physical presence, by one-way closed circuit television.

We have never held * * * that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial. Indeed, in Coy v. Iowa, we expressly "left [it] for another day * * * the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: ‘a right to meet face to face all those who appear and give evidence at trial.’" 487 U.S., at 1021, 108 S.Ct., at 2802–2803 * * *

The procedure challenged in Coy involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. * * * In holding that the use of this procedure violated the defendant’s right to confront witnesses against him, we suggested that any exception to the right "would surely be allowed only when necessary to further an important public policy"—i.e., only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. * * *

We concluded that "[s]ince there had been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." * * * Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in Coy.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. * * *

The right guaranteed by the Confrontation Clause includes not only a "personal examination," * * * but also "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” [California v.] Green, 399 U.S., at 158, 90 S.Ct., at 1935 * * *

* * *

We have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant’s inability to confront the declarant at trial. * * *

Justice O’CONNOR then discussed several well-recognized exceptions to the requirement of face-to-face confrontation: dying declarations (see Mattox v. United States, 156 U.S., at 254, 15 S.Ct., at 339 (1895); Pointer v. Texas, 380 U.S., at 407, 85 S.Ct., at 1069 (1965)) and hearsay statements of non-testifying co-conspirators (see Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987)).

In sum, our precedents establish that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," [Ohio v.]
We have attempted to harmonize the goal of the Clause — placing limits on the kind of evidence that may be received against a defendant — with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. Bourjaily, * supra, * at 182, 107 S.Ct., at 2782. * * *

Maryland’s statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland’s procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation — oath, cross-examination, and observation of the witness’ demeanor — adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. * * *

Butressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, * * * we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

* * *

*** That a significant majority of States has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. * * * Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; 24 States have authorized the use of one-way closed circuit television testimony in child abuse cases; and 8 States authorize the use of a two-way system in which the child-witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge is permitted to view the child during the testimony.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

* * *

*** The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. * * *
trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. * * * Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than * * * "mere nervousness or excitement or some reluctance to testify," Wildermuth v. State, 310 Md., at 524, 530 A.2d, at 289 * * *.

***

In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

* * *

[Vacated and remanded.] Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." [Emphasis added.] * * *

* * *

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent. According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." * * * That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." * * * The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable
evidence, undeniably among which was “face-to-face” confrontation. Whatever else it may mean in addition, the defendant’s constitutional right “to be confronted with the witnesses against him” means, always and everywhere, at least what it explicitly says: the “right to meet face to face all those who appear and give evidence at trial.” Coy v. Iowa, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800 (1988) * * *

**The Court characterizes the State’s interest which “outweigh[s]” the explicit text of the Constitution as an “interest in the physical and psychological well-being of child abuse victims,”* * * * an “interest in protecting” such victims “from the emotional trauma of testifying” * * *. That is not so. A child who meets the Maryland statute’s requirement of suffering such “serious emotional distress” from confrontation that he “cannot reasonably communicate” would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State’s own fault. Protection of the child’s interest—as far as the Confrontation Clause is concerned—is entirely within Maryland’s control. The State’s interest here is in fact no more and no less than what the State’s interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the present context, innocent defendants accused of particularly heinous crimes. The “special” reasons that exist for suspending one of the usual guarantees of reliability in the case of children’s testimony are perhaps matched by “special” reasons for being particularly insistent upon it in the case of children’s testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. * * *

* * * For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. * * *

The Court today has applied “interest-balancing” analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. * * *

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), Justice Scalia declared, “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” The Sixth Amendment, he argued, guarantees the right to confront and cross-examine, nothing less. Criticizing the effort to substitute for it a rule that an unavailable witness’s out-of-court statement could be admitted as long as it met adequate standards of reliability, he scoffed, “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”

But what makes a statement “testimonial” and, thus, the sort of declaration by a witness within the meaning of the Confrontation Clause? In Davis v. Washington, 548 U.S. —, 126 S.Ct. 2266 (2006), the Court provided an answer “[w]ithout attempting to produce an exhaustive classification of all conceivable statements.” Said Justice Scalia for the majority: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the
primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.’ In Davis, the statements were made by an assault victim identifying her assailant in the course of her call to 911 for assistance. These statements, the Court reasoned, were different from the statements at issue in Crawford which were made in response to police questioning because: (1) the call in Davis was in the midst of an ongoing emergency; (2) the questions asked by the 911 operator were necessary to get aid to her; and (3) there were ‘striking’ differences in the formality of the two interview situations.

Another contemporary controversy rooted in the Confrontation Clause is the latitude in cross-examination to be permitted the defense in rape prosecutions. By enacting "rape shield" laws, mainly during the 1970s, the states sought to address the humiliation and abuse through which complainants in rape cases were dragged by defendants willing to resort to any means to save themselves. What gave rise to the laws was the defense tactic of introducing evidence of the complaining witness’s entire sexual history, whether or not it had anything to do with the defendant’s behavior in the case at hand. The object of the defense strategy was either to show that the complainant was the sort of person who likely gave consent to have sexual relations with the defendant or to dissuade the complainant from even filing charges by facing her with the harrowing prospect of having her entire sexual past revealed at trial with all of the potential pain and embarrassment that would accompany being questioned about it. Rape shield laws were a response, then, to the belief that complainants in rape trials were in a sense twice victimized: once by being raped, and a second time by the ordeal of taking the stand under circumstances that frequently amounted to a sexual inquisition. Today, 46 states and the federal government have such statutes on the books. An Illinois law, typical of those enacted, thus provided that "the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.” An Illinois appellate court in People v. Cornes, 80 Ill.App.3d 166, 35 Ill.Dec. 818, 399 N.E.2d 1346 (1980), upheld the statute against a Sixth Amendment challenge, saying:

Defendant’s right of confrontation necessarily includes the right to cross-examine witnesses, but that right does not extend to matters which are irrelevant and have little or no probative value. Complainant’s past sexual conduct has no bearing on whether she has consented to sexual relations with defendant. The legislature recognized this fact and chose to exclude evidence of complainant’s reputation for chastity as well as specific acts of sexual conduct with third persons in cases of rape and sexual deviate assault. The exclusion of this evidence does not prevent defendant from challenging or attacking complainant’s credibility or veracity or otherwise utilizing cross-examination as an effective tool of impeachment. It merely denies defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. At the same time, it provides an effective law enforcement tool by encouraging victims of rapes and other sexual assaults to report these crimes to the proper authorities without fear of having the intimate details of their past sexual activity brought before the public.

Except as to disputes about fine points of procedure, the U.S. Supreme Court implicitly recognized the constitutionality of these rape shield statutes in Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743 (1991).

The rights of confrontation and cross-examination, however, are only applicable in adjudicative settings. In Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502 (1960), the Court held that such guarantees do not extend to the process of administratice fact finding. In that case, voting registrars in the South demanded to know the identity of black witnesses who testified that they had been denied the right to vote on the basis of race. The registrars
also asserted the right to cross-examine them. Upholding the U.S. Civil Rights Commission’s denial of these demands, Chief Justice Warren wrote:

> [T]he investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

Distasteful as they found it to dissent in such a case, Justices Black and Douglas objected that “[f]arming out pieces of trials to investigative agencies [and legislative committees] is fragmenting the kind of trial the Constitution authorizes. * * * It leads to government by inquisition.”

Even in an adjudicative setting, however, the defendant does not have the right to present whatever evidence he pleases. Where the defendant was convicted by general court-martial of passing bad checks, using drugs, and being absent without leave, the Supreme Court held that the airman did not have either a Fifth or Sixth Amendment right to introduce the results of a polygraph (lie detector) examination that purported to demonstrate he had not knowingly used drugs. On appeal, the narrowly divided U.S. Court of Appeals for the Armed Forces had ruled that an absolute ban on the admission of polygraph evidence violated the defendant’s Sixth Amendment right to present a defense, where he sought to offer such evidence to rebut the attack on his credibility. A nearly unanimous Supreme Court, in United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261 (1998), held that the absolute rule promulgated by the President excluding such evidence was reasonable because it precluded the admission of evidence the reliability of which was a matter of widespread disagreement. Although the Court was clearly of the view that no constitutional infringement occurred, the eight-Justice majority was evenly split over the validity of the absolute rule. Half, speaking through Justice Thomas, concluded that the total ban on such evidence was constitutional; the other half, speaking through Justice Kennedy, favored a case-by-case approach, observing that “there is much inconsistency between the Government’s extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.”

### E. Cruel and Unusual Punishment

#### Punishment for an Act, Not a Condition

When the Supreme Court handed down its decision in *Robinson v. California* (p. 560) at the close of its October 1961 Term, it unveiled a constitutional mechanism of enormous potential for revising the content and sanctions of criminal law throughout the country. The Court’s holding in *Robinson* was significant both for what it said and for what it implied. First, it incorporated the constitutional guarantee against the imposition of cruel and unusual punishments into the Fourteenth Amendment, thus making it applicable at the state as well as at the national level. Second, it established that criminal statutes could impose liability only for conduct, not on the basis of the offender’s status or condition. Finally, it appeared to recognize in the Eighth Amendment a potential constitutional command that the punishment fit the crime. The sweep of these propositions was
potentially enormous. In Powell v. Texas (p. 562), six years later, for example, the Court came within one vote of extending Robinson to prohibit the punishment of any individual who lacked the capacity to control his or her behavior. Reaching such a conclusion, as Justice Marshall pointed out, would have compelled the Court to devise a complete theory of criminal responsibility, replete with constitutional tests to identify such defenses as insanity, alcoholism, and other compulsive circumstances where free will is lacking.

**Robinson v. California**

Supreme Court of the United States, 1962

370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758

**BACKGROUND & FACTS** Lawrence Robinson was convicted in Los Angeles Municipal Court for violation of a California statute that made it a misdemeanor for a person to be addicted to narcotics. At the time of his arrest, Robinson was not under the influence of drugs. However, a police officer took him into custody after observing scars, scales, and needle marks on Robinson’s arms. A state appellate court affirmed the conviction after which Robinson appealed to the U.S. Supreme Court.

Mr. Justice STEWART delivered the opinion of the Court.

This statute * * * is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. * * *

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are * * * countless fronts on which those evils may be legitimately attacked. We deal in this case only with an individual provision
of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

Mr. Justice CLARK, dissenting.

***

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. * * *

** * Although the [statute] is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control. * * *

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital. * * *

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

***

The majority ** * viewpoint is premised upon the theme that [the statute] is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the only treatment for narcotics addiction—that anything less is a punishment denying due process. * * *

However, ** * even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to [the statute, it] ** * still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society in themselves, the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. * * *

***

Mr. Justice WHITE, dissenting.

***

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court, addiction is the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past. California is entitled to have its statute. * * *

***

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of
narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court’s opinion bristles with indications of further consequences.* * *

Finally, I deem this application of “cruel and unusual punishment” so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court’s allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures for Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding. I respectfully dissent.

NOTE—POWELL v. TEXAS

Leroy Powell was found guilty of being drunk in a public place in violation of Texas penal law. He eventually appealed his conviction to the U.S. Supreme Court, contending that his drunken behavior was “not of his own volition” because he suffered from “the disease of chronic alcoholism” and that, therefore, the $50 fine imposed constituted cruel and unusual punishment. (This was approximately the 100th time appellant had been convicted for the offense.)

In this case, Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145 (1968), the Court narrowly rejected the invitation to extend Robinson. Justice Marshall announced the judgment of the Court in a plurality opinion in which he spoke for Chief Justice Warren and Justices Black and Harlan. He found Robinson inapposite:

/Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant’s behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being “mentally ill, or a leper * * * * * * * * * * *

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless Robinson is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.* * *

The entire thrust of Robinson’s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing. * * * It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, “involuntary” or “occasioned by a compulsion.”

Ultimately, * * * the most troubling aspects of this case, were Robinson to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. * * *

Concluded Justice Marshall in affirming the trial court’s judgment, “Nothing could be less fruitful than for this Court to be compelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of Robinson to this case.” Justice White concurred in the result only, saying:
The sober chronic alcoholic has no compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.

Justice Fortas dissented in an opinion joined by Justices Douglas, Brennan, and Stewart. Beginning with the premise that chronic alcoholism is a disease—an issue that the plurality skirted—the dissenters found Robinson directly applicable:

Robinson stands upon a principle * * * [that] is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct. The statute imposed a penalty for the offense of “addiction”—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in Robinson. The statute covers more than a mere status. But the essential constitutional defect here is the same as in Robinson, for in both cases the particular defendant was accused of being in condition which he had no capacity to change or avoid. The trial judge * * * found upon the medical and other relevant testimony, that Powell is a “chronic alcoholic.” He defined appellant’s “chronic alcoholism” as “a disease which destroys the afflicted person’s will power to resist the constant, excessive consumption of alcohol.” He also found that “a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.” I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had “an uncontrollable compulsion to drink” to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.

The dissenters concluded that “a person may not be punished if the condition essential to constitute the defined crime part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.”
The Death Penalty

More recently and certainly more intensely a matter of public controversy, a seemingly endless parade of cases has asked whether the death penalty, in itself or as imposed, violates the constitutional ban on cruel and unusual punishments. The Court’s consideration of this matter reflects a significant shift from more insensitive days when, in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374 (1947), it held that a young black man, convicted of murder and sentenced to be executed, was not made to suffer cruel and unusual punishment when he was ordered to face death again because the electric chair malfunctioned the first time. The magnitude of the controversy surrounding the Court’s early capital punishment decisions was reflected in the fragmentation of the Court. In Furman v. Georgia below, the first death penalty decision, a bare majority of the Court concluded that Georgia’s capital punishment statute violated the Constitution, but there was no consensus as to why. Justice Douglas thought it was because the death penalty was discriminatorily applied, Justices Brennan and Marshall concluded it was because the death penalty as such constituted cruel and unusual punishment, and Justices Stewart and White, casting the decisive votes, believed it was because such an ultimate sanction was so unpredictably, even freakishly, applied. Four years later, in Gregg v. Georgia (p. 570), a Court every bit as badly divided held that the death penalty itself was not unconstitutional, but that its arbitrary manner of application violated the Eighth Amendment. This arbitrariness, the Court held in Woodson v. North Carolina (p. 573), also included automatic imposition of the death penalty, since capriciousness in the sentence could be concealed in a refusal to convict. The message in the death penalty cases of 1976 was that statutes providing for the imposition of the death penalty had to structure the judge’s or jury’s discretion by identifying the relevant factors to be taken into account.

**Furman v. Georgia**

Supreme Court of the United States, 1972

408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346

**BACKGROUND & FACTS** The Supreme Court granted certiorari to review three state court decisions affirming the imposition of the death penalty for murder in William Furman’s case and for rape in the other two.

**PER CURIAM.**

*** Certiorari was granted limited to the following question: “Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” *** The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

***

Mr. Justice DOUGLAS, Mr. Justice BRENNAN, Mr. Justice STEWART, Mr. Justice WHITE, and Mr. Justice MARSHALL have filed separate opinions in support of the judgments.

THE CHIEF JUSTICE [BURGER], Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST have filed separate dissenting opinions.

Mr. Justice DOUGLAS, concurring.

***

The generalities of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do or may lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth,
social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

The words “cruel and unusual” certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards. * * *

In a Nation committed to Equal Protection of the laws there is no permissible “caste” aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. * * *

The high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. * * *

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. * * * Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

* * *

Mr. Justice BRENNAN, concurring.

* * *

At bottom the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.

* * *

In sum, the punishment of death is inconsistent with four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

* * *

Mr. Justice STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide.

* * *

Legislatures—state and federal—have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. * * *
I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Mr. Justice WHITE, concurring.

In joining the Court's judgment, therefore, I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative “policy” is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

Mr. Justice MARSHALL, concurring.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy.

[Justice MARSHALL then exhaustively considered each purpose in turn and rejected it.]

Even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless “it shocks the conscience and sense of justice of the people.”

Judge Frank once noted the problems inherent in the use of such a measuring stick:

“[The court,] before it reduces a sentence as ‘cruel and unusual,’ must have reasonably good assurances that the sentence offends the ‘common conscience.’ And, in any context, such a standard— the community's attitude—is usually unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully-taken ‘public opinion poll’ would be inconclusive in a case like this.”

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention “shocks the conscience and sense of justice of the people,” but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.

In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.

It has often been noted that American citizens know almost nothing about capital punishment. Some of the conclusions
arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: e.g., that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public's desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. * * *

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST join, dissenting.

* * *

If we were possessed of legislative power, I would either join with Mr. Justice BRENNAN and Mr. Justice MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Although the Eighth Amendment literally reads as prohibiting only those punishments that are both "cruel" and "unusual," history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.
[W]here, as here, we consider a punishment well known to history, and clearly authorized by legislative enactment, it disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term “unusual” as affecting the outcome of these cases. Instead, I view these cases as turning on the single question whether capital punishment is “cruel” in the constitutional sense. The term “unusual” cannot be read as limiting the ban on “cruel” punishments or as somehow expanding the meaning of the term “cruel.” For this reason I am unpersuaded by the facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now “cruel and unusual.”

Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice STEWART and Mr. Justice WHITE, which are necessary to support the judgment setting aside petitioners’ sentences, stop short of reaching the ultimate question.

The critical factor in the concurring opinions of both Mr. Justice STEWART and Mr. Justice WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society’s abhorrence of capital punishment—the inference that petitioners would have the Court draw—but as the earmark of a deteriorated system of sentencing.

The decisive grievance of the opinions not translated into Eighth Amendment terms—is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern.

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority’s ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. While I cannot endorse the process of decisionmaking that has yielded today’s result and the restraints which that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today’s opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits. The “hydraulic pressures” that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.

Mr. Justice BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, Mr. Justice POWELL, and Mr. Justice REHNQUIST, and add only the following, somewhat personal, comments.
Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

Mr. Justice POWELL, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join, dissenting.

* * * It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. * * *

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice POWELL join, dissenting.

* * * Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

* * * Whatever overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. * * *

The very nature of judicial review * * * makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court's hold in these cases has been reached, I believe, in complete disregard of that implied condition.
NOTE—THE DEATH PENALTY CASES OF 1976

The legislative response that Chief Justice Burger predicted in his Furman dissent quickly materialized, and the Court was promptly confronted with the problem again. In July 1976, the Court handed down a covey of controversial, complex, and anxiously awaited decisions focusing once more on the death penalty. Although the Court dealt at length with specific issues raised by the state laws involved in the cases with respect to constitutional interpretation, what is most important in these decisions is the Court’s response to two basic questions: (1) Is the punishment of death for the crime of murder, “under all circumstances, ‘cruel and unusual’ in violation of the Eighth and Fourteenth Amendments of the Constitution”? (2) Does a death sentence “returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses” constitute cruel and unusual punishment?

Announcing the judgment of the Court in an opinion in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), in which he spoke for Justices Powell and Stevens as well as himself, Justice Stewart answered the first question with a “No”:

[Until Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), 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.]

[In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.]

[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.]

[In the only statewide referendum occurring since Furman and brought to our attention, the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California that the death penalty violated the California Constitution.]

[The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that “one of the most important functions any jury can perform in making a selection between life imprisonment and death for a defendant convicted in a capital case is to maintain a link between contemporary community values and the penal system.” Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1777 (1968). It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se.]
Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. * * * Indeed, the actions of juries in many States since Furman is fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since Furman, and by the end of March 1976, more than 460 persons were subject to death sentences.

However, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. Trop v. Dulles, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion). Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," * * * the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. * * *

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

* * *

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. * * * Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Justice Marshall dissented, saying:

In Furman v. Georgia, 408 U.S. 238, 314, 92 S.Ct., at 2834 (1972), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.

* * *

Since the decision in Furman, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. * * * I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In Furman, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. * * * A recent study, conducted after the enactment of the post-Furman statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.

* * *

The * * * contentions— that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its own hands and reinforces moral values—are not retributive in the purest sense. They are essentially
utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer’s life is itself morally good. Some of the language of the plurality’s opinion appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment. * * *

It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. * * * The mere fact that the community demands the murderer’s life in return for the evil he has done cannot sustain the death penalty, for as the plurality reminds us, “the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society.” * * * To be sustained under the Eighth Amendment, the death penalty must “[comport] with the basic concept of human dignity at the core of the Amendment,” * * * (opinion of Stewart, Powell, and Stevens, JJ.); the objective in imposing it must be “[consistent] with our respect for the dignity of other men.” * * * Under these standards, the taking of life “because the wrong-doer deserves it” surely must fall, for such a punishment has as its very basis the total denial of the wrong-doer’s dignity and worth.

Turning to the question of what kinds of statutory systems permitting the death penalty do not violate the Constitution, again in Gregg, the plurality per Justice Stewart continued:

* * * Georgia’s new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” * * *

* * *

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

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 wantonly 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. * * *
The Court went on in two more cases, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), to uphold the capital-sentencing laws of two other states.11

The Court then turned its attention to the second question posed in the 1976 death penalty cases, “whether a death sentence returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses constitutes cruel and unusual punishment,” and answered it in the affirmative. Unlike Georgia, Florida, and Texas, North Carolina “responded to the Furman decision by making death the mandatory sentence for all persons convicted of first-degree murder.” The statute distinguished this kind of offense from second-degree murder (which carried a prison term of from two years to life) by defining murder in the first degree as “murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony * * *.” Speaking once again for the plurality, in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976), Justice Stewart observed at the outset that “[t]he issue, like that explored in Furman, involves the procedure employed by the State to select persons for the unique and irreversible penalty of death,” and then wrote:

[There] is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes. * * * Moreover, as a matter of historic fact, juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first-degree murder cases. In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina’s mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by restoring the penalty determination on the particular jury’s willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill Furman’s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

[Another] shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In Furman, members of the Court acknowledged what cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree. * * * A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual

11. The Florida statute sur

human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

* * * While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside. * * *

In another case, Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001 (1976), the plurality, although acknowledging that Louisiana’s death penalty law differed from North Carolina’s, nonetheless concluded that the difference was “not of controlling constitutional significance.”

It bears emphasis that all of the 1976 death penalty decisions were “announced” by a plurality of only three Justices: Stewart, Powell, and Stevens. They were able to fashion a majority in these cases by virtue of the concurrences of Chief Justice Burger and Justices White, Blackmun, and Rehnquist in Gregg, Proffitt, and Jurek and the concurrences of Justices Brennan and Marshall (who, throughout, held to the view previously expressed in Furman that the death penalty per se constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments) in Woodson and Roberts.

Succeeding cases circumscribed the imposition of the death penalty still further. In Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993 (1977), the Supreme Court struck down a state law that mandated the death penalty for the murder of a police officer or fireman. In a per curiam opinion, a bare majority of the Court cited Woodson and Roberts from the Court’s preceding Term as controlling precedents and went on to observe that there must be an opportunity “for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.” In the case of the murder of a police officer, the Court suggested such mitigating factors might be the youth of the offender; the absence of any prior conviction; the influence of drugs, alcohol, or emotional disturbance; and even possibly a moral justification the offender might choose to offer. Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Justice Rehnquist argued that as “the foot soldiers of society’s defense of ordered liberty, the State has an especial interest in the protection of police officers. And as to the last of the mitigating factors cited by the majority, he wrote:

* * * I cannot believe that States are constitutionally required to allow a defense, even at the sentencing stage, which depends on nothing more than the convict’s moral belief that he was entitled to kill a peace officer in cold blood. John Wilkes Booth may well have thought he was morally justified in murdering Abraham Lincoln, whom, while fleeing from the stage of Ford’s Theater, he characterized as a “tyrant”; I am appalled to believe that the Constitution would have required the government to allow him to argue that as a “mitigating factor” before it could sentence him to death if he were found guilty. I am equally appalled that a State should be required to instruct a jury that such individual beliefs must or should be considered as a possible balancing factor against the admittedly proper aggravating factor.

In Coker v. Georgia (p. 575), decided the same Term, and Lockett v. Ohio (p. 576), decided a year later, the Court, respectively, addressed the questions whether capital punishment
could be imposed for the crime of rape and whether it could be mandated for felony-murder where the defendant was not the perpetrator who pulled the trigger. Coker argued that the death sentence was disproportionate to the offense and thus was cruel and unusual. The problem in Lockett merits more extended explanation.

Many states adopted the common law principle that, where a death results from the commission of a felony, it is automatically first-degree murder, the so-called felony-murder rule. The argument for this doctrine was one of deterrence: Individuals would be less likely to commit a felony if they knew that any death caused by perpetrating it made them guilty of the most serious homicide offense. The credibility behind this threat was supplied by the death penalty, since lesser degrees of homicide were not punishable by death. The issue in Lockett, therefore, reached substantially beyond one of fairness to Sandra Lockett and directly implicated the public policy question of whether the plug would be pulled on the felony-murder rule.

NOTE—COKER V. GEORGIA

Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861 (1977), involved the imposition of capital punishment after the defendant had been convicted of rape. While serving sentences for murder, rape, kidnapping, and aggravated assault, Coker escaped from a Georgia prison and entered the Carvers’ home late one night. After threatening the couple with a board, Coker tied up Mr. Carver and raped Mrs. Carver. He then fled, taking some money, their car, and Mrs. Carver. After Mr. Carver freed himself and called police, Coker was soon apprehended. He was subsequently convicted of raping Mrs. Carver and sentenced to death.

In Coker, Justice White, speaking for a plurality composed of himself and Justices Stewart, Blackmun, and Stevens, held that the death sentence for the crime of rape is grossly disproportionate and, therefore, violates the Eighth Amendment’s ban on cruel and unusual punishments. The plurality offered two bases of support for this conclusion: (1) The response of state legislatures in redesigning death penalty statutes to comply with the Court’s decision in Furman v. Georgia was such that a far greater number of states chose to reimpose capital punishment for the crime of murder than chose to reimpose the death penalty also for the crime of rape; and (2) the evidence showed that there was a demonstrable reluctance on the part of jurors to impose the death penalty in rape cases.

Summing up, Justice White said:

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the “ultimate violation of self.” It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which “is unique in its severity and irrevocability,” * * * is an excessive penalty for the rapist who, as such, does not take human life.

Justices Brennan and Marshall concurred in the judgment only, adhering to their views previously elaborated in Furman and reaffirmed in the 1976 death penalty cases that capital punishment always
violates the Eighth Amendment's proscription on cruel and unusual punishments.

Chief Justice Burger dissented in an opinion in which Justice Rehnquist joined. Observing at the outset that the issue of proportionality ought to be addressed in terms of the specifics of Coker's crime and background—matters the Chief Justice argued were sufficient to sustain imposition of the death penalty in the case at hand—Burger turned "reluctantly * * * to what * * * [he saw] as the broader issues raised by this holding." He went on to charge that (1) the plurality, by focusing only on legislative policy making since Furman, had willfully shut its eyes to the longer historical view, which showed that a significant number of legislatures concluded capital punishment was an appropriate penalty for rape; (2) the plurality substituted its views on the wisdom and desirability of the death penalty in rape cases in place of interpreting the Eighth Amendment; and (3) the plurality showed insufficient respect for the diversity, flexibility, and experimentation that are the wellsprings of the federal system. Justice Powell concurred in the judgment, but dissented from the plurality's "expansive pronouncement," which "draws a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim." Continued Justice Powell, "I dissent because I am not persuaded that such a bright line is appropriate. * * * Some victims are so grievously injured physically or psychologically that life is beyond repair." He concluded, "Thus it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape."

**NOTE—LOCKETT v. OHIO**

Ohio law provided that, once a defendant was convicted of murder aggravated by at least one of seven enumerated factors, the death penalty had to be imposed unless, after "considering the nature and circumstance of the offense" and the defendant's "history, character, and condition," the trial judge found by a preponderance of the evidence that the victim had induced or facilitated the offense or that it was unlikely the crime would have been committed had the defendant not acted under "duress, coercion, or strong provocation" or that "[t]he offense was primarily the product of the offender's psychosis or mental deficiency" (and such condition was insufficient to establish an insanity defense). Sandra Lockett was convicted of aggravated murder in the death of a pawnbroker, which occurred in the course of an armed robbery. She was not the triggerman, but drove the getaway car and was one of four who devised and executed the robbery. The Supreme Court reversed the imposition of the death penalty and remanded the case in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

Chief Justice Burger announced the judgment of the Court on the death penalty issue in an opinion in which Justices Stewart, Powell, and Stevens joined. The plurality concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The merit of this conclusion, reasoned the plurality, was established by the fact that "the imposition of death by public authority is so profoundly different from all other penalties" that "an individualized decision is essential" and because of "the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence * * *.

By contrast, "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Such relevant factors, the plurality pointed out, might include, for example, the defendant's age, or the absence of intent to cause the death of the victim, or the defendant's comparatively minor role in the offense. "The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute" was, therefore, "incompatible with the Eighth and Fourteenth Amendments."

Justice Marshall, "adher[ing] to * * * [the] view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment," concurred in the judgment.
Justice White, dissenting in part and concurring in the judgment, concluded that “it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.” He continued, “[T]he infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment.” Justice Blackmun also cited the “gross disproportionality” in Lockett’s sentence and coupled this objection with another—that, under Ohio law, “the sentencing court has full discretion to prevent imposition of a capital sentence ‘in the interests of justice’ if a defendant pleads guilty or no contest, but wholly lacks such discretion if the defendant goes to trial.”

Justice White, however, argued that with its announcement of this decision the Court had “completed its about-face since Furman v. Georgia.” Specifically, White “fear[ed] that the effect of the Court’s decision * * * will be to constitutionally compel a restoration of the state of affairs at the time Furman was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that ‘its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” Justice White also wondered to what extent the Court’s previous holdings in Proffitt v. Florida and Jurek v. Texas had been undone by “calling into question any other death penalty statute that permits only a limited number of mitigating circumstances to be placed before the sentencing authority or to be used in its deliberations.” Justice Rehnquist, who dissented from the judgment, agreed, observing that the Court’s ruling “encouraging * * * consideration [of] anything under the sun as a ‘mitigating circumstance’ * * * will not guide sentencing discretion but will totally unleash it.” In his view, rather than contributing a seminal ruling on the Eighth Amendment, the Court’s decision “represents a third false start * * * within the past six years.” Justice Brennan did not participate in the Court’s disposition of the case.

The Court’s performance in death penalty cases gave rise to at least two major criticisms. One, well articulated by Justice White in his Lockett dissent, was that the Court had now come full circle. Having constitutionally condemned typical death penalty statutes in Furman as arbitrary because they left too much discretion to the jury, the Court now invited the return of such capriciousness by the backdoor when it held that the defendant could not be denied the opportunity to offer in argument any factor he or she believed should mitigate the death sentence. The Court, Justice White argued, simply could not have it both ways.

A second criticism came from then-Justice Rehnquist in an unusual dissent from a run-of-the-mill denial of certiorari in Coleman v. Balkcom, 491 U.S. 949, 101 S.Ct. 2031 (1981). He objected that the Court’s intrusive and technicality-prone rulings made it virtually impossible to execute anybody. After losing on direct appeal, state prisoners sentenced to death could seek to stave off their fate by repeatedly petitioning federal courts for habeas corpus, a strategy with some prospect of success, given the complexity of the Court’s death penalty jurisprudence. He suggested the Court grant certiorari in all the capital cases, hear the appeals, decide them, and get on with it.

Justice Stevens responded to this criticism by pointing out that the objection principally characterized the state of affairs between Furman and the death penalty decisions of 1976, a period of four years, when state responses to the Court’s first decision raised a number of novel questions. That situation, he argued, no longer prevailed. Furthermore, adopting the Rehnquist proposal, he observed, meant death penalty cases would consume most of the Court’s scarce time and resources and leave little for the other important constitutional and statutory issues that crowded the Court’s docket.

Frustration over what critics (such as Justice Rehnquist) saw as undue delay in the imposition of capital punishment—arising chiefly from death-row inmates’ extensive use of
petitions for habeas corpus to litigate every conceivable constitutional issue—culminated in congressional passage of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1217. Title I of that statute severely restricted state prisoners’ use of federal habeas corpus by, among other things: (1) requiring that the constitutional issues first have been raised in a timely manner in state court (unless there were truly extenuating circumstances); (2) compelling the dismissal of a claim presented in a state prisoner’s second or successive application for federal habeas corpus if the claim was a repeat from a previous application; (3) creating a gate-keeping mechanism to limit the filing of habeas petitions (a prospective applicant first had to file a notice to apply for habeas relief and then a federal three-judge panel had to decide whether to permit the application (which it could do only if the prisoner showed he or she met one of the qualifying conditions identified in the statute)); and (4) declaring that the gate-keeping panel’s grant or denial of authorization to file a habeas petition “shall not be appealable and shall not be subject to a petition for * * * writ of certiorari.” In Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333 (1996), the Supreme Court unanimously upheld these and other provisions against contentions that they unconstitutionally deprived the Supreme Court of appellate jurisdiction in violation of Article III, section 2, or that they violated the Suspension Clause (Art. I, § 9, cl. 2), which prohibits the suspension of the writ of habeas corpus unless in case of rebellion or invasion.

In his opinion concurring with the judgment in Furman, Justice Douglas argued that imposition of the death penalty was unconstitutional because it was racially discriminatory. In McCleskey v. Kemp, the Court was confronted with statistical evidence that appeared to buttress Justice Douglas’s contention. McCleskey argued that the system was rigged because the chances of an African-American convicted of first-degree murder receiving the death penalty were far higher than for a white defendant, especially if the victim was white. Quantitative analysis of more than 2,000 capital cases presented to substantiate McCleskey’s argument clearly suggested that, even when all the relevant statutorily recognized sentencing variables were taken into account, the factor of race was still statistically significant. The Court’s decision in McCleskey rejected both the Eighth Amendment and the equal protection claims based on this evidence.

12. For example, §104 of the statute specifies that habeas corpus shall not be granted unless the applicant has exhausted all his remedies at the state level first, or there is an absence of corrective state remedies available, or circumstances exist that make such corrective processes ineffective. Moreover, habeas cannot be granted unless the prisoner’s claim was adjudicated on the merits at the state level and “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.” In any event, the state court decision is presumed to be correct and the prisoner bears the burden of demonstrating any error by clear and convincing evidence.

These provisions were aimed at reining in lower federal courts which, it was thought, too often overturned decisions in state capital cases with controversial rulings on novel constitutional issues. Although frequently reversed on appeal, these decisions, it was argued, materially contributed to the delay in executions. Illustrative of this point is the recent unanimous ruling of the Supreme Court in Carey v. Musladin, 549 U.S. —, 127 S.Ct. 649 (2006), reversing a decision by a federal appeals court that had granted habeas relief to a state capital defendant and ordered a new murder trial because it concluded the original trial was prejudiced by the fact that the victim’s family sat in the front row of the spectator’s gallery wearing buttons that displayed the image of the victim. The Supreme Court reversed the judgment granting habeas relief on the ground that, while it had previously decided state-sponsored actions could taint a trial, it had never decided that courtroom behavior by private individuals was so inherently prejudicial as to deprive the defendant of a fair trial. The Justices in Musladin said only that there was no existing Supreme Court ruling on the issue and refrained from addressing the merits of this constitutional question until it was properly presented in a future case.
MCCLESKEY V. KEMP
Supreme Court of the United States, 1987
481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262

BACKGROUND & FACTS Warren McCleskey, an African-American, was convicted of armed robbery and murder in a Georgia county court. At the penalty hearing that followed, the jury found that the killing had been accompanied by two aggravating circumstances, either of which would have sufficed under state law to warrant the death sentence: (1) The murder was committed during an armed robbery, and (2) a law enforcement officer had been killed in the performance of his duties. McCleskey offered no mitigating evidence, and the judge, following the jury's recommendation, imposed the death penalty. The Georgia Supreme Court affirmed. McCleskey subsequently filed a petition for a writ of habeas corpus in federal district court against his warden. Among other things, McCleskey argued that the Georgia capital-sentencing process operated to deny him equal protection of the laws in violation of the Fourteenth Amendment and amounted to cruel and unusual punishment in violation of the Eighth Amendment.

In support of his claim, McCleskey relied upon a statistical study performed by David Baldus and two other law professors. That sophisticated study of more than 2,000 murder cases occurring in Georgia during the 1970s concluded that variation in the imposition of the death sentence in Georgia was related to the race of the murder victim and, to a lesser extent, the race of the defendant. The study indicated that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing black persons received the death penalty only 1% of the time.

When the cases were sorted according to the combination of race of the victim and race of the defendant, the Baldus study found that the death penalty was imposed in 22% of the cases involving black defendants and white victims, in 8% of the cases involving white defendants and white victims, in 1% of the cases involving black defendants and black victims, and in 3% of the cases involving white defendants and black victims. The Baldus study also concluded that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, in 32% of the cases involving white defendants and white victims, in 15% of the cases involving black defendants and black victims, and in 19% of the cases involving white defendants and black victims. The authors subjected the data to extensive statistical analysis, which took account of some 230 variables that could have explained the disparities on nonracial grounds. One of the models presented in the study, even after taking account of 39 nonracial variables, nonetheless concluded that defendants charged with murdering white victims were 4.3 times as likely to receive the death sentence as defendants charged with killing blacks. The study indicated that black defendants, such as McCleskey, who killed white persons had the greatest probability of receiving the death sentence.

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

* * *
McCleskey’s first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment. * * *

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving “the existence of purposeful discrimination.” * * * A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination “had a discriminatory effect” on him. * * *

Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. McCleskey argues that the Baldus study compels an inference that his sentence rests on discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.

McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey’s claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black. * * *

[The State has no practical opportunity to rebut the Baldus study. “[C]ontrolling considerations of *** public policy,” * * * dictate that jurors “cannot be called *** to testify to the motives and influences that led to their verdict.” * * * Similarly, the policy considerations behind a prosecutor’s traditionally “wide discretion” suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, “often years after they were made.” * * * Moreover, * * * it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty. * * *

**

McCleskey *** suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. * * * For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.

Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. * * * Accordingly, we reject McCleskey’s equal protection claims.

McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment. * * *

**

In light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is “disproportionate to the crime in the traditional sense.” * * * He does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. * * * His disproportionality claim * * * is that the sentence in his case is disproportionate to the sentences in other murder cases.

He cannot base a constitutional claim on an argument that his case differs from other cases in which defendants did receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey’s death sentence was not disproportion-
ate to other death sentences imposed in the State. * * * The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. * * *

***

[H]e * * * contends that the Georgia capital punishment system is arbitrary and capricious in application, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia. * * *

** Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury’s decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. * * * The question “is at what point that risk becomes constitutionally unacceptable” * * * McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do. * * *

Individual jurors bring to their deliberations “qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.” * * * The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. * * *

McCleskey’s argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the sentence, it can decline to convict, or choose to convict of a lesser offense. Whereas decisions against a defendant’s interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is “firmly entrenched in American law.” * * * As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. * * *

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. * * * Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process. * * *

McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. * * * Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. * * * If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim
could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

* * * McCleskey’s arguments are best presented to * * * [l]egislatures * * * [which] are better qualified to weigh and “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts,” Gregg v. Georgia, supra, 428 U.S., at 186, 96 S.Ct., at 2931. * * *

Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL joins, and with whom Justice BLACKMUN and Justice STEVENS join in all but Part I, dissenting.

I

[M]y view [is] that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments * * *.

Even if I did not hold this position, however, I would reverse the Court of Appeals, for petitioner McCleskey has clearly demonstrated that his death sentence was imposed in violation of the Eighth and Fourteenth Amendments. * * *

III

The statistical evidence in this case * * * relentlessly documents the risk that McCleskey’s sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty; a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black. * * * Surely, we should not be willing to take a person’s life if the chance that his death sentence was irrationally imposed is more likely than not. In light of the gravity of the interest at stake, petitioner’s statistics on their face are a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned.

* * * We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. * * *

For many years, Georgia operated openly and formally the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. * * *

[It] would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey’s evidence. * * *

* * *

History and its continuing legacy thus buttress the probative force of McCleskey’s statistics. Formal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless, * * * the Georgia system gives such attitudes considerable room to operate. * * *

* * * Sentencing data, history, and experience all counsel that Georgia has provided insufficient assurance of the heightened rationality we have required in order to take a human life.

IV

Considering the race of a defendant or victim in deciding if the death penalty
should be imposed is completely at odds with the concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital-sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.

The Court's unwillingness to regard the petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role.

Justice BLACKMUN, with whom Justice MARSHALL and Justice STEVENS join and with whom Justice BRENNAN joins in all but [p]art, * * *, dissenting.

* * * Analysis of his case in terms of the Fourteenth Amendment is consistent with this Court's recognition that racial discrimination is fundamentally at odds with our constitutional guarantee of equal protection. * * *

A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination. He may establish a prima facie case of purposeful discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson v. Kentucky, 476 U.S., at, 94, 106 S.Ct., at 1721. Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case. * * *

Under Batson v. Kentucky and the framework established in Castaneda v. Partida [430 U.S. 482, 97 S.Ct. 1272 (1977)], McCleskey must meet a three-factor standard. First, he must establish that he is a member of a group "that is a recognizable, distinct class, singled out for different treatment." Second, he must make a showing of a substantial degree of differential treatment. Third, he must establish that the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral.

There can be no dispute that McCleskey has made the requisite showing under the first prong of the standard. The Baldus study demonstrates that black persons are a distinct group that are singled out for different treatment in the Georgia capital-sentencing system. The Court acknowledges, as it must, that the raw statistics included in the Baldus study and presented by petitioner indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. White-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases. The raw figures also indicate that even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death.
With respect to the second prong, McCleskey must prove that there is a substantial likelihood that his death sentence is due to racial factors.

McCleskey demonstrated the degree to which his death sentence was affected by racial factors by introducing multiple-regression analyses that explain how much of the statistical distribution of the cases analyzed is attributable to the racial factors. He established that because he was charged with killing a white person he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person. The most persuasive evidence of the constitutionally significant effect of racial factors in the Georgia capital-sentencing system is McCleskey's proof that the race of the victim is more important in explaining the imposition of a death sentence than is the factor whether the defendant was a prime mover in the homicide. Similarly, the race-of-victim factor is nearly as crucial as the statutory aggravating circumstance whether the defendant had a prior record of a conviction for a capital crime.

McCleskey established that the race of the victim is an especially significant factor at the point where the defendant has been convicted of murder and the prosecutor must choose whether to proceed to the penalty phase of the trial and create the possibility that a death sentence may be imposed or to accept the imposition of a sentence of life imprisonment. McCleskey demonstrated this effect at both the statewide level and in Fulton County where he was tried and sentenced. The statewide statistics indicated that black defendant/white victim cases advanced to the penalty trial at nearly five times the rate of the black defendant/black victim cases (70% vs. 15%), and over three times the rate of white defendant/black victim cases (70% vs. 19%).

As to the final element of the prima facie case, McCleskey showed that the process by which the State decided to seek a death penalty in his case and to pursue that sentence throughout the prosecution was susceptible to abuse. Petitioner submitted the deposition of the District Attorney for 18 years in the county in which McCleskey was tried and sentenced. He testified that during his years in the office, there were no guidelines informing the Assistant District Attorneys who handle the cases how they should proceed at any particular stage of the prosecution. There were no guidelines as to when they should seek an indictment for murder as opposed to lesser charges; when they should recommend acceptance of a guilty plea to murder, acceptance of a guilty plea to a lesser charge, reduction of charges, or dismissal of charges at the postindictment-preconviction stage; or when they should seek the death penalty.

The above-described evidence, considered in conjunction with the other record evidence outlined by Justice BRENNAN, gives rise to an inference of discriminatory purpose. McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence. The burden, therefore, shifts to the State to explain the racial selections. It must demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result.

The position adopted by the Court in McCleskey also appears to have been shared by many in Congress. During the long and contentious debate on the omnibus anticrime bill throughout much of 1994, provisions that would have permitted a convicted defendant at the sentencing phase to offer statistical evidence of racial disparity in the imposition of the
death penalty were stripped from the bill before the Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796, finally passed.

The dilemma identified by Justice White in Lockett and the troubling racial dimension raised by the data presented in arguing McCleskey had a pronounced effect on Justice Blackmun. Unique among the Nixon appointees from the start because he agonized publicly over the death penalty in Furman, he ultimately concluded that it posed an unresolvable constitutional conundrum: Although the death penalty in itself may not be unconstitutional, there was simply no way it could be constitutionally applied. Consequently, Justice Blackmun announced that, during his remaining months on the Court before retirement, he was no longer going to vote to uphold imposition of the death penalty. Dissenting from the denial of certiorari in Callins v. Collins, 510 U.S. 1141, 114 S.Ct. 1127 (1994), he explained, “Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing. A step toward consistency is a step away from fairness.” Justice Blackmun continued, “The arbitrariness inherent in the sentencer’s discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.” That most other members of the Court had long since stopped struggling with the dilemma and had chosen up sides appears to be confirmed by the trend of other death penalty rulings (p. 586).

However much disagreement there may be about whether the death penalty can be imposed fairly, few would quarrel with the principle that no punishment—much less death—should be imposed on innocent individuals. Of course, the most frequent assertion heard from inmates is the emphatic denial that they committed the crimes of which they stand convicted. But the customary cynicism that past declarations of this sort have elicited is belied by mounting evidence that the accuracy of the adversary system is far from what it should be. Perhaps the worst example we know about occurred in Illinois, where DNA analysis showed a majority of 25 prisoners awaiting their fate on death row since 1975 could not have committed the murders of which they had been convicted. After the thirteenth prisoner had been exonerated, Governor George Ryan announced a moratorium in January 2000 on the death penalty in Illinois. Three years later, on his way out of office, he commuted the sentences of all the state’s death-row inmates.

With the exception of Nebraska, which still uses the electric chair, all of the states and the federal government now employ lethal injection to carry out the sentence (although a few afford the defendant a choice about how he or she is to die). While the federal and state courts that have heard challenges to lethal injection on Eighth Amendment grounds have sustained its constitutionality, there is evidence that it has been administered in a manner that causes some prisoners excruciating pain. The prevailing assumption had been that by

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13. In one case—so gruesome it resulted in an immediate moratorium on executions in Florida by Gov. Jeb Bush—the prisoner, Angel Diaz, took 34 minutes to die (normally it takes 15–20 minutes) and required two drug cocktails. Because insertion of the IV was botched, the chemicals went into the flesh of his arm rather than the vein. Diaz “appeared to be moving 24 minutes after the first injection, grimacing, blinking, licking his lips, blowing and appearing to mouth words.” The medical examiner reported that Diaz had “a 12-inch chemical burn on his right arm and an 11-inch chemical burn on his left arm.” See “Executions Halted in Two States after Botched Injection,” http://www.cnn.com/2006/LAW/12/15/diaz.executions.ap/index.html. In another case, it took the execution team two hours and 10 tries before the condemned prisoner, Christopher Newton, died. The process took so long that the staff paused to allow Newton a break to use the bathroom. See http://www.cnn.com/2007/LAW/05/25/ohio.execution.ap/index.html. For a general discussion of problems with lethal injection, see Elizabeth Weil, “The Needle and the Damage Done,” New York Times Magazine, Feb. 11, 2007, pp. 46–51.
### Other Cases on the Imposition of Capital Punishment

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<td>Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984)</td>
<td>Although many states as a matter of their own law require disproportionality review, there is nothing in the Court's decisions interpreting the Eighth Amendment that requires a state appellate court, prior to affirming the death sentence, to compare the sentence in that case with the penalties imposed in similar cases if requested to do so by the prisoner.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td>Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716 (1987)</td>
<td>Because the Eighth Amendment requires careful consideration of the characteristics of the individual committing a capital offense and the crime, as well as any evidence of mitigating circumstances, executions cannot be made mandatory for murders committed by prisoners already serving life sentences without the possibility of parole.</td>
<td>6–3; Chief Justice Rehnquist and Justices White and Scalia dissented.</td>
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<td>Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988)</td>
<td>An Oklahoma statute allowing a jury to impose the death penalty if the murder committed by the defendant was &quot;especially heinous, atrocious, or cruel&quot; was constitutionally defective for its failure to sufficiently guide the jury's decision.</td>
<td>9–0.</td>
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<td>Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992)</td>
<td>A prospective juror in a capital case who indicates that he will automatically vote to impose the death penalty if the defendant is convicted may be challenged for cause and thereby removed. By indicating his intention to impose the death penalty automatically, such a juror demonstrates his willingness to disregard aggravating or mitigating circumstances, which constitutional instructions require him to consider. Consistent with the Sixth Amendment, jurors considering the sentence of a capital defendant must be impartial.</td>
<td>6–3; Chief Justice Rehnquist and Justices Scalia and Thomas dissented.</td>
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<td>Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993)</td>
<td>A state prisoner's claim of actual innocence based on newly discovered evidence is not grounds for federal habeas corpus relief, but is properly left to executive clemency at the state level, unless the criminal justice process has been so defective that it &quot;offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.&quot; Federal courts in habeas cases sit to correct constitutional violations, not factual errors.</td>
<td>6–3; Justices Blackmun, Stevens, and Souter dissented.</td>
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<td>Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534 (1993)</td>
<td>An Idaho law, identifying as an aggravating circumstance a killing committed by a defendant who showed &quot;utter disregard for human life,&quot; was not unconstitutionally vague where it was construed by the state supreme court to mean where the defendant had acted as a &quot;cold-blooded, pitiless slayer.&quot;</td>
<td>7–2; Justices Blackmun and Stevens dissented.</td>
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the time the fatal drugs were administered, the inmate would already have been rendered unconscious and, therefore, would not suffer. A three-drug combination is usually employed: the pain killer sodium pentothal is followed by pancuronium bromide, which paralyzes the prisoner, and that is followed by potassium chloride, which stops the heart.

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<td>Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994)</td>
<td>Where the prosecution argued that the defendant should be sentenced to death because he was too dangerous ever to be set free, failure or refusal to inform the jury that life imprisonment without parole was an option it could consider denied due process.</td>
<td>7–2; Justices Scalia and Thomas dissented.</td>
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<td>Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002)</td>
<td>Execution of mentally retarded individuals amounts to cruel and unusual punishment. A national consensus now exists (20 states forbid it) that such a sanction is indecent because mentally retarded offenders are significantly less morally blameworthy than ordinary criminals. Imposing the death penalty on them is both excessive and disproportionate.</td>
<td>6–3; Chief Justice Rehnquist and Justices Scalia and Thomas dissented.</td>
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<td>Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002)</td>
<td>Because the Sixth Amendment right to trial by jury in a criminal case requires that the jury determine the presence of every element essential to conviction for an offense and because the existence of an aggravating circumstance necessary to imposing the death penalty operates as the functional equivalent of an element of a greater offense, capital punishment may only be imposed by a jury or by a judge pursuant to the recommendation of a jury.</td>
<td>7–2; Chief Justice Rehnquist and Justice O'Connor dissented.</td>
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<td>Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005)</td>
<td>Imposing capital punishment on offenders who were under 18 years of age when they committed their crimes violates the Eighth and Fourteenth Amendments. Because of their susceptibility to immature and irresponsible conduct, the negative effect of peer and other outside pressure, and the less-fixed nature of their personality traits, individuals under 18 are now widely regarded as categorically less blameworthy than adults, so imposing the death penalty on them is grossly disproportionate. Objective indicators of this consensus are the rejection of capital punishment for those under 18 by 30 states, its infrequent use in the 20 states that retained it, and the clear trend among those to abolish it. Moreover, international opinion is overwhelmingly against it.</td>
<td>5–4; Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas dissented.</td>
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<td>Kansas v. Marsh, 548 U.S. —, 126 S.Ct. 2516 (2006)</td>
<td>A state law does not violate the Eighth and Fourteenth Amendments if it provides for the imposition of the death penalty in cases where the jury finds that the aggravating circumstances of the crime equally balance (rather than outweigh) any mitigating circumstances in the commission of the offense.</td>
<td>5–4; Justices Stevens, Souter, Ginsburg, and Breyer dissented.</td>
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Pancuronium bromide has been banned by 30 states for use as the sole euthanizing agent on animals because of the suffering it causes. Although 48 states require a veterinarian to be present when an animal is put down, there are no laws requiring the presence of doctors when a human being is executed. The allegation in the use of the three-agent death-penalty cocktail is that insufficient amounts of sodium pentothal have been used, thus imposing unnecessary suffering on the condemned prisoner. Rather than invalidate the death penalty, a federal judge in a California case gave the state the option of finding an anesthesiologist to be present in order to guarantee that the procedure will be conductedhumanely. Morales v. Hickman, 415 F.Supp.2d 1037 (N.D.Calif. 2006), affirmed, 438 F.3d 926 (9th Cir. 2006); Morales v. Tilton, 465 F.Supp.2d 972 (N.D.Calif. 2006). The problem has been the refusal of doctors to participate in the procedure on ethical grounds.

The U.S. Supreme Court has never ruled on the constitutionality of a specific manner of execution, but in Hill v. McDonough, 547 U.S. —, 126 S.Ct. 2096 (2006), the Justices unanimously held that an inmate may raise a last-minute claim that the chemicals used are too painful. The narrow question before the Court was whether Hill, who had been strapped onto a gurney with lines running into his arms to inject the drugs, could raise his constitutional claim under the civil rights statutes rather than by habeas corpus, which route he had already exhausted. The Court held that he could proceed under the civil rights statutes because he was not challenging the sentence itself but the manner in which it was to be carried out.

In a second capital punishment case decided the same day, House v. Bell, 547 U.S. —, 126 S.Ct. 2064 (2006), the Court held by a 5–3 vote that another death row inmate’s newly-acquired DNA evidence amounted to persuasive evidence of his actual innocence 20 years after he had been convicted of raping and murdering a neighbor. The ruling is seen as a reflection of the Court’s growing acceptance of DNA evidence as an important truth-telling tool. Testing in this case disclosed that the semen found on the victim’s nightgown was that of her husband, not House. The Court’s ruling, however, did not mean House would go free but only that, on remand, he would have the opportunity to meet the very heavy burden of showing that now, in light of all the evidence, “it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.”

Under the Justice For All Act of 2004, 118 Stat. 2260, courts would assume that federal inmates have a right to DNA testing within three years of conviction. DNA testing could be ordered if an inmate asserts, under penalty of perjury, that he is innocent. Application for DNA testing later than this would be presumed too late unless the inmate could show good cause for the delay. The government is forbidden to destroy DNA evidence in federal criminal cases while the defendant remains in prison. The law authorizes $151 million annually for five years to help states and localities speed processing of biological crime-scene evidence, and $5 million annually to the states until 2009 to help meet the cost of post-conviction DNA programs. Annual grants of $30 million for five years are earmarked for helping with medical personnel costs and DNA-sample preservation expense. Annual grants of $75 million are authorized to improve the representation of defendants in capital cases and improve the representation of the public in state capital cases. The law also guarantees specific rights to the victims of crime: the right to be reasonably protected from the accused, the right to be reasonably heard at proceedings, the right to full and timely restitution, the right to proceedings without unreasonable delay, and the opportunity to assert these rights in federal court.

Concern about the amount of suffering experienced by inmates put to death, awareness that use of DNA evidence has saved innocent individuals from execution, and realization that innocents have been executed by mistake, have combined to greatly diminish public support for the death penalty and the imposition of capital punishment. Although a little
more than one thousand people have been executed since the death penalty was restored in 1977— with Texas accounting for a third— "death sentences nationwide have dropped by 50 percent since the late 1990s, with executions carried out down by 40 percent * * *." The Gallup Poll reported in October 2005 that 64 percent of Americans supported capital punishment, "the lowest level in 27 years, down from a high of 80 percent in 1994." See "U.S. on Verge of 1,000th Execution," [link](http://www.cbsnews.com/stories/2005/11/25/national/main1075635.shtml). The death penalty has effectively been abolished in the Northeast and upper Midwest. New York Times, Nov. 21, 2004, p. 32.

**Victim Impact Evidence**

Because of the inflammatory potential and the likelihood that it would fuel arbitrariness in sentencing, the Supreme Court had ruled that statements and evidence about the character of the victim and the impact that the homicide had on the victim’s family were inadmissible. The Supreme Court decision in *Payne v. Tennessee* overruled two recent precedents and upheld the constitutionality of admitting victim impact evidence at the penalty phase of capital cases. *Payne* is important for two reasons, the first of which is the constitutionality of the policy itself. On this score, the Court’s opinion by Chief Justice Rehnquist and Justice Stevens’s dissent provide a sharp contrast. The second is the current Court’s treatment of civil libertarian precedents. In a pointed dissent that provided the swansong of his departure from the Court, Justice Marshall saw in *Payne* an ominous sign of things to come.

**PAYNE V. TENNESSEE**

Supreme Court of the United States, 1991
501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720

**BACKGROUND & FACTS** *Payne* was convicted by a jury of the brutal murders of Charisse Christopher and her two-year-old daughter and of first-degree assault on Nicholas, her three-year-old son. The defendant committed the crimes after Christopher refused his sexual advances. The stabbings were so numerous and widespread that blood covered the floors and walls of the victims’ apartment. At the penalty phase of the proceedings, Payne called his mother and father, his girlfriend, and a clinical psychologist, all of whom testified to various mitigating factors in his character and background. The state called Nicholas’s grandmother, who testified that the child continued to cry out for his mother and sister and that the experience had had a marked effect on the little boy and other family members. In his argument for the death penalty, the prosecutor commented upon the continuing effects of the episode on Nicholas and other relatives. The jury sentenced Payne to death on each of the murder counts. The Tennessee Supreme Court affirmed the imposition of the death penalty and rejected Payne’s contention that the grandmother’s testimony and prosecutor’s comments violated his Eighth Amendment rights under previous Supreme Court decisions. Payne then sought review by the U.S. Supreme Court.

Chief Justice REHNQUIST delivered the opinion of the court.

In this case we reconsider our holdings in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

* * *

This Court [in *Booth*] held by a 5-to-4 vote that the Eighth Amendment prohibits...
a jury from considering a victim impact statement at the sentencing phase of a capital trial. In Gathers, decided two years later, the Court extended the rule announced in Booth to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

Booth and Gathers were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim’s family do not in general reflect on the defendant’s “blameworthiness,” and that only evidence relating to “blameworthiness” is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment.

Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion. Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material.

Payne echoes the concern voiced in Booth’s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim’s “uniqueness as an individual human being,” whatever the jury might think the loss to the community resulting from his death might be.

Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. Booth, 482 U.S., at 517, 107 S.Ct., at 2540 (WHITE, J., dissenting). By turning the victim into a “faceless stranger at the penalty phase of a capital trial,” Gathers, 490 U.S., at 821, 109 S.Ct., at 2216 (O’CONNOR, J., dissenting), Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

We thus hold that if the State chooses to permit the admission of victim impact evidence simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

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evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne and his amicus argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers*, we should adhere to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. * * *

Adhering to precedent “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 447 (1932) (BRANDRETH, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, “this Court has never felt constrained to follow precedent.” * * *

Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, * * * the opposite is true in cases such as the present one involving procedural and evidentiary rules.

*** *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts. * * *

Reconsidering these decisions now, we conclude * * * that they were wrongly decided and should be, and now are, overruled. We accordingly affirm the judgment of the Supreme Court of Tennessee.

Affirmed.

Justice O’CONNOR, with whom Justice WHITE and Justice KENNEDY join, concurring.

* * *

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, “the Eighth Amendment erects no *per se* bar.” * * *

If, in a particular case, a witness’ testimony or a prosecutor’s remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

* * *

Justice MARSHALL, with whom Justice BLACKMUN joins, dissenting.

Power, not reason, is the new currency of this Court’s decisionmaking. * * *

Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.

In dispatching *Booth* and *Gathers* to their graves, today’s majority ominously suggests that an even more extensive upheaval of this Court’s precedents may be in store. Renouncing this Court’s historical commitment to a conception of “the judiciary as a source of impersonal and reasoned judgments,” *Moragne v. States Marine Lines*, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789 (1970), the majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices now disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case. * * *

* * *

This truncation of the Court’s duty to stand by its own precedents is astonishing.
By limiting full protection of the doctrine of stare decisis to "cases involving property and contract rights," the majority sends a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination. Taking into account the majority's additional criterion for overruling—a case either was decided or reaffirmed by a 5–4 margin "over spirited dissent,"—the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this Court. * * *

[The] function of stare decisis is in many respects even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements. Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing "principles * * * founded in the law rather than in the proclivities of individuals." * * * "It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law." * * *

Carried to its logical conclusion, the majority's debilitated conception of stare decisis would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. * * * By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5–4 vote "over spirited dissent," the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question. * * *

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting. * * *

* * * Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible. Thus, if a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty. * * *

Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in Lockett * * * recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the victim. * * * This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance. Even if introduction of evidence about the victim could be equated with introduction of evidence about the defendant, the argument would remain flawed in both its premise and its conclusion. The conclusion that exclusion of victim impact evidence results in a significantly imbalanced sentencing procedure is simply inaccurate. Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence and may designate any relevant conduct to be an aggravating factor provided that the factor is sufficiently well defined and consistently applied to cabin the sentencer's discretion.

The premise that a criminal prosecution requires an evenhanded balance between
the State and the defendant is also incor-
rect. The Constitution grants certain rights
to the criminal defendant and imposes
special limitations on the State designed
to protect the individual from overreaching
by the disproportionately powerful State.
Thus, the State must prove a defendant’s
guilt beyond a reasonable doubt. * * *

Victim impact evidence, as used in this
case, has two flaws, both related to the
Eighth Amendment’s command that the
punishment of death may not be meted out
arbitrarily or capriciously. First, aspects of
the character of the victim unforeseeable to
the defendant at the time of his crime are
irrelevant to the defendant’s "personal
responsibility and moral guilt" and therefore
cannot justify a death sentence. * * *

Second, * * * [o]nopen-ended reliance by a
capital sentencer on victim impact evidence
simply does not provide a “principled way to
distinguish [cases], in which the death
penalty [i]s imposed, from the many cases
in which it [i]s not.” Godfrey v. Georgia,
446 U.S. 420, 433, 96 S.Ct. 2909, 2932

Mandatory Life Imprisonment

Although Robinson initially presented the prospect that the Eighth Amendment might be
read to require generally that the punishment fit the crime, in fact the Court has almost
exclusively limited the application of this principle to cases in which the defendant was
set the tone for future rulings when it held that federal courts should be "reluctan[t] to
review legislatively mandated terms of imprisonment" and that "successful challenges to the
proportionality of particular sentences" should be "exceedingly rare." Consequently, in
Rummel the Court upheld a mandatory life sentence for a third felony conviction (even
though the third offense consisted of fraudulently obtaining only $120); in Hutro v. Davis,
454 U.S. 370, 102 S.Ct. 703 (1982), two years later, it sustained a sentence of 40 years
imprisonment and a $20,000 fine for possessing and distributing marijuana; and in
Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991), it affirmed a mandatory life
sentence without the possibility of parole for possessing 650 grams of cocaine. Thus it
hardly came as a surprise when, in Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179 (2003),
the Court upheld California’s three-strikes law. The law provided that, if the defendant had
one prior conviction for a “serious” or “violent” felony, he must be sentenced to twice the
term otherwise provided as punishment for the current felony conviction; and, if the
defendant had two or more prior “serious” or “violent” felony convictions, he must receive a
life sentence. The four Justices who dissented in Ewing, however, could not find a fifth who
would agree that the mandatory imposition of life imprisonment was a “grossly
disproportionate” sentence for the recidivist’s offense of shoplifting three golf clubs.

The only contrary ruling came in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983), where a bare majority of the Court struck down a South Dakota statute which provided that, where a defendant had three prior convictions in addition to the principal felony, the sentence for the principal felony shall automatically be enhanced to that for a Class-1 felony. During the 1960s, Helm was convicted of three nonviolent felonies. In 1972, 1973, and 1975, he was convicted respectively of obtaining money under false pretenses, grand larceny, and third-offense drunken driving. In 1979, he pleaded guilty to passing a “no account check” for $100, thus triggering the Class-1 felony penalty of a life sentence without the possibility of parole. Speaking for the majority, Justice Powell concluded that this sentence was unconstitutionally disproportional in light of “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions.” But, Justice Powell, the member of the Court keenest on developing proportionality jurisprudence, left the Court in 1987. Justice Stevens is now the sole remaining advocate of proportionality from the series of cases running from Rummel to Harmelin.

Although Justice Stevens was joined by Justices Ginsburg, Breyer, and Souter in Ewing, it was nevertheless in dissent, and recent appointments to the Court (Chief Justice Roberts and Justice Alito) make it unlikely that a majority on the current Court is interested in expanding the “gross disproportionality” test of sentences beyond capital cases. Indeed, Justices Scalia and Thomas (like the late Chief Justice Rehnquist) are of the even more restrictive view that the guarantee against cruel and unusual punishment has nothing whatever to say about the proportionality of sentences, only about particular modes of punishment. In their opinion, judges have no manageable standards by which to evaluate the severity of sentences. In rebuttal, the Ewing dissenters argued that a prohibition on cruel and unusual punishments necessarily includes a ban on excessive ones, and that judges must draw lines, just as they do in all other areas of law. Summing up, it seems fair to say the Court has concluded that making the punishment fit the crime is limited to capital cases, and it is only in death penalty cases that individualized sentencing is required (that is, where automatic imposition of the maximum sentence is forbidden).

Forfeiture

Punishment, whether by imposing a fine, imprisonment, or the death penalty, does not exhaust the options available to the government in the war against crime. Congress’s enactment of the Racketeer Influenced and Corrupt Organizations Act, better known as RICO, evidenced a reemerging enthusiasm for combating crime by making the price paid for committing the offense particularly high. RICO and various other federal and state versions of statutes employing forfeiture allow the government to take by civil suit property used in perpetrating the offense. Indeed, the essential logic behind RICO was that merely punishing offenders did little to deal with the malignancy of racketeering, since those mobsters who had been convicted and sent away were speedily replaced by others who continued with business as usual. Confiscating the wherewithal to recommit the offenses was viewed as essential to effectively uprooting criminal enterprises.

In United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135 (1996), the Supreme Court held that forfeiture of the property used to commit the offense, imposed in addition to punishment for having committed the crime, did not violate the Double Jeopardy Clause of the Fifth Amendment because confiscation of the property did not constitute “punishment” within the meaning of the Clause. Ursery’s house had been declared forfeit because he had
manufactured marijuana there. Arlt, whose case was argued to the Court at the same time as
Ursery's, had seen his corporation's assets confiscated because the company had been
involved in laundering drug money. The Court held that forfeiture was a well-established
practice, long sanctioned by precedent as a civil action. The fact that forfeiture was
triggered by criminal activity, said the Court, was insufficient in itself to render it punitive
given its remedial and deterrent functions as well.

Forfeiture has been a critical issue in the disposition of several other constitutional
matters. In Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994 (1996), for example, the
Court held that a state law did not violate either the Takings Clause of the Fifth
Amendment or the Due Process Clause of the Fourteenth Amendment when it required
the forfeiture of property used in criminal activity, even though the property used was
owned by someone not implicated in the criminal conduct. In that case, Mrs. Bennis was
compelled to give up the value of her part ownership of the family car after her husband had
been caught having sex in the car with a prostitute. In addition to punishment for engaging
in an act of prostitution, state law required forfeiture of the vehicle as an instrument of the
crime. The Court upheld such forfeitures generally on the basis of an unbroken line of
precedent, the difficulty sometimes of accurately assessing whether the property owner
really was without fault, and governmental interests in preventing further illicit use of the
property and in making crime unprofitable. Bennis was a 5–4 decision (Justices Stevens,
Kennedy, Souter, and Breyer dissented). For discussion of forfeiture amounting to an
excessive fine, see United States v. Bajakajian, p. 603. For discussion of the First Amendment
implications of forfeiture, as when a bookstore operator is convicted of selling obscene
materials, see Alexander v. United States, p. 940.

The Ex Post Facto Clause and Sex Offenders
Also aimed at preventing unlawful punishment, yet explicitly provided for in the main
body of the Constitution rather than the Eighth Amendment, are the prohibitions on ex post
facto laws. Article I, section 9, clause 3, and Article I, section 10, clause 1, bar the
federal government and the states, respectively, from passing such legislation. An ex post
facto law is a retroactive law, but not all retroactive laws are ex post facto. An ex post facto
law is a retroactive law involving punishment for a crime. Thus the Supreme Court held in
Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), that a state law affording a new
opportunity to probate a will after it had been invalidated was not ex post facto because,
although retroactive, the law had nothing to do with punishment for a crime. Likewise, a
tax law that retroactively imposed a levy on money earned before its enactment — or which
increased the rate of taxation — would not be an ex post facto law.

Probably the most common understanding of an ex post facto law is that it is a statute that
makes something a crime after the act has been committed, but the principle encompasses
more than that. The most definitive statement, acknowledged as such by the Court, is that
provided by Justice Chase in Calder. He wrote:

I will state what laws I consider ex post facto laws, within the words and the intent of the
prohibition. 1st. Every law that makes an action done before the passing of the law, and which
was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a
crime, or makes it greater than it was, when committed. 3d. Every law that changes the
punishment, and inflicts a greater punishment, than the law annexed to the crime, when
committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different,
testimony, than the law required at the time of the commission of the offence, in order to
convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

In Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446 (2003), the Court, relying upon
Justice Chase's definition, struck down a law passed by the California legislature in 1993
that imposed a new statute of limitations on the prosecution of child sexual abuse offenses. The new law permitted prosecution for those crimes where the limitation period on their prosecution had expired, if: a victim reported the allegation of abuse to the police; there was "independent evidence that clearly and convincingly corroborate[d] the victim’s allegation"; and the prosecution was begun within a year of the victim’s report. In 1998, Marion Stogner was charged with a sex-related child abuse offense that had occurred sometime between 1955 and 1973. Under the statute of limitations at that time, the state had a three-year window of opportunity to prosecute. Stogner argued that the 1993 law which permitted him to be charged in 1998 was an ex post facto law because it reopened the window that had been closed. By a 5–4 vote, the Court held that “a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.” Justice Breyer, speaking for the Court, reasoned that the law violated Chase’s second and fourth definitions: it increased Stogner’s criminal liability from what it was before 1993, and it changed the amount of evidence necessary to convict him (as it was likely to be evidence of poorer quality, since memories would have faded by then and some witnesses might no longer be available).

Recently, ex post facto challenges have frequently been raised by former child molesters where states have required that sex offenders register with local law enforcement authorities, after their release from prison, and notify the community where they are planning to reside (although if posted on a website, the whole world would be notified). Popularly known as a “Megan’s Law” because New Jersey enacted such a statute following the abduction, molestation, and strangulation of a seven-year-old girl at the hands of a previously-convicted pedophile, these statutes also have been challenged — with little success — as inflicting cruel and unusual punishment, infringing privacy, imposing double jeopardy, constituting a bill of attainder, and denying equal protection of the law. In Smith v. Doe, which follows, the Supreme Court addressed an ex post facto challenge to Alaska’s law.

**Smith v. Doe**

Supreme Court of the United States, 2003

538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164

**BACKGROUND & FACTS**  Within two years of the 1994 sexual assault and murder of seven-year-old Megan Kanka in New Jersey, every state enacted a version of “Megan’s Law,” which requires the registration of convicted sex offenders and public notification of their whereabouts. The Alaska law requires the registration of any “sex offender or child kidnapper” present in the state and that anyone being released from state custody for commission of these offenses register at least 30 days prior to his release. In addition to the offender’s name, the information to be provided includes his address, place of employment, all aliases, identifying features, vehicle license number, and treatment history. Registration is required for 15 years, except that repeat offenders and anyone convicted of an aggravated sex offense must register for life and provide verification of this information quarterly. The Alaska law is effective retroactively, so that offenders convicted before the law was enacted are subject to its provisions.

John Doe I was convicted of sexually abusing a 14-year old and John Doe II pleaded no-contest to a finding that he had abused his daughter when she was between 9 and 11 years old. Both, aggravated sex offenders, convicted before the
Alaska Megan’s Law was enacted, challenged its retroactive application as a violation of the Ex Post Facto Clause of the Constitution. A federal district court so held and judgment in the plaintiffs’ favor was affirmed by a federal appeals court. The Alaska Commissioner of Public Safety and the state attorney general successfully sought review by the U.S. Supreme Court.

Justice KENNEDY delivered the opinion of the Court.

The Alaska Sex Offender Registration Act requires convicted sex offenders to register with law enforcement authorities, and much of the information is made public. We must decide whether the registration requirement is a retroactive punishment prohibited by the Ex Post Facto Clause.

We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention" to deem it 'civil.' " * * * Because we "ordinarily defer to the legislature's stated intent," * * * "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." * * *

We conclude * * * that the intent of the Alaska Legislature was to create a civil, nonpunitive regime.

Some colonial punishments * * * were meant to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." * * *

Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved
more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. * * * By contrast, the stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. * * * The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

The fact that Alaska posts the information on the Internet does not alter our conclusion. * * * The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation. * * * The State’s Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety’s Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. * * * * * * The Act’s obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. * * * The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.

The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, “Contrary to conventional wisdom, most reoffenses do not occur within the first several years after release,” but may occur “as late as 20 years following release.” * * * * * * Alaska’s * * * [law] establish[es] a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, concurring in the judgment.

I agree with the Court that Alaska’s Sex Offender Registration Act does not amount to an ex post facto law. * * * * * * To me, the indications of punitive character * * * and the civil indications weighed heavily by the Court are in rough equipoise. * * * What tips the scale for me is the presumption of constitutionality normally accorded a State’s law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court’s judgment.


* * * * * * In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person’s liberty is punishment.

It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. * * * [R]etroactive application of these statutes constitutes a flagrant violation of the protections afforded
by the Double Jeopardy and Ex Post Facto Clauses of the Constitution.

I think it equally clear, however, that the State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants. * * *

As a matter of procedural fairness, Alaska requires its judges to include notice of the registration requirements in judgments imposing sentences on convicted sex offenders and in the colloquy preceding the acceptance of a plea of guilty to such an offense. * * * Thus, I agree with the Court that these statutes are constitutional as applied to postenactment offenses. [Emphasis supplied.]

* * * [For those convicted of offenses committed after the effective date of such legislation, there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial. * * *

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

* * * I would hold Alaska’s Act punitive in effect. Beyond doubt, the Act involves an “affirmative disability or restraint.” * * * Alaska’s Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism. * * *

Furthermore, the Act’s requirements resemble historically common forms of punishment. * * * Its registration and reporting provisions are comparable to conditions of supervised release or parole; its public notification regimen, which permits placement of the registrant’s face on a webpage under the label “Registered Sex Offender,” calls to mind shaming punishments once used to mark an offender as someone to be shunned. * * *

[T]he Act retributively targets past guilt, i.e., * * * it “revisit[s] past crimes [more than it] prevent[s] future ones.” * * *

* * *

[T]he Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. * * * But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender’s risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. * * * And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.

* * *

[The Act’s] retroactive application [is] incompatible with the Ex Post Facto Clause * * *.

In a companion case, Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160 (2003), the Supreme Court unanimously rejected the contention that Connecticut’s Megan’s Law violated the Due Process Clause of the Fourteenth Amendment because it did not provide for a hearing to determine the current dangerousness of an individual convicted of offenses that triggered the registration and notification requirements. The Court held that, even if injury to one’s reputation from the public notification requirement constituted the deprivation of a liberty interest within the protection of the Fourteenth Amendment, due process did not require the government to prove a fact that was not relevant. Under the statute, proof of conviction sufficed to impose the registration and notification
requirements, and the state was under no obligation to show additionally that the offender still posed a risk of reoffending.

Justice Ginsburg’s criticisms of state sex offender registries in her Smith dissent were brutally confirmed in April 2006 when a 20-year-old man trolled the Maine sex offender website, made a list of the names and addresses of more than two dozen registrants, stalked half-a-dozen of them, and then killed two, before turning the gun on himself when police caught up with him. Especially on point in light of Justice Ginsburg’s overbreadth concerns was the death of one of the victims, who had had sex with a 15-year-old girl when he was 20 himself. Although she was technically underage at the time (by less than a year), the sex was consensual and the two had known each other for years. The victim, who posed no danger, was compelled by Maine law to register for 10 years. See “Sex Offender Registry to Remain As Is for Now,” Bangor Daily News, Apr. 26, 2006.

Moreover, many municipalities and states impose zoning requirements which restrict where sex offenders can live. Typically, these require that a buffer of 1,000 feet—or even 2,500 feet—be maintained between the offender’s residence and any school, church, playground, or sports facility. As a practical matter, the greater the distance to be maintained, the greater the effect of ghettoizing urban registrants. Restrictive zoning may, in fact, proceed from a faulty premise: Experts in the field say that fully 90% of child molesters abuse relatives or friends. “Most of the laws are passed on the basis of the repulsive-stranger image, when in most cases the offender knows the victim.” New York Times, Nov. 27, 2006, pp. A1, A21.

In July 2006, Congress enacted The Adam Walsh Child Protection and Safety Act, 120 Stat. 587. (The law was named to commemorate the 25th anniversary of the abduction and murder of the son of John Walsh, host of the television program “America’s Most Wanted.”) The purpose of the statute, the most sweeping sex offender legislation to target pedophiles, is to prevent sex offenders from eluding detection by moving from one state to another. The law aims at helping law enforcement officers track more than 100,000 sex offenders by creating a national online listing, available to the public and searchable by ZIP code. It will assist in background checks on adoptive and foster parents and give child-protection agencies access to information to improve their ability to investigate child abuse cases. In addition to establishing a national child-abuse registry, the law creates a comprehensive federal DNA database of material collected from convicted molesters and establishes uniform procedures for routine DNA collection and comparison when someone has been convicted. It also provides federal money to help states track pedophiles using global positioning devices and allows victims of child abuse to sue their molesters. The statute imposes a mandatory minimum sentence of 30 years for raping a child, an automatic 10-year penalty for sex trafficking in children and for coercing child prostitution, and increases minimum sentences for child molesters who travel interstate. Finally, the law hikes the penalties for anyone downloading child pornography on the Internet from $50,000 to $150,000 and permits victims whose images have been downloaded to recover damages.

**Confining Dangerous Persons Other Than Upon Criminal Conviction**

Although the imposition of punishment is uniquely associated with the criminal justice process, the possibilities of confinement are not. Since the last century, the states have subjected certain individuals to civil procedures resulting in their detention—commitment of the emotionally disturbed or retarded to mental institutions and confinement of delinquent juveniles in industrial schools (once called reformatories)—both for their own welfare and because they were deemed not capable of being held legally responsible for their actions. In the case of the mentally ill or retarded, this confinement is accomplished by civil commitment proceedings that are surrounded with various procedural safeguards and that,
according to O’Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486 (1975), require the state to show that the individual it seeks to confine poses a danger to himself or herself or to others. Exactly how much treatment this ruling obligates the state to provide is an open question, but Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982), held that the state must provide “minimally adequate training,” that is, “such training as may be reasonable in light of the [patient’s] liberty interests in safety and freedom from unreasonable restraints.” Likewise, the Supreme Court held in In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967), that juvenile delinquency proceedings must be accompanied by certain procedural safeguards such as notice of the charges, the right to counsel, the right against self-incrimination, and the right to confront opposing witnesses. As contrasted with civil commitment proceedings, which, according to Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979), require that the state establish the dangerousness of the mentally ill person by clear and convincing evidence, juvenile delinquency proceedings constitutionally require that confinement cannot occur unless there is proof beyond a reasonable doubt; see In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). It bears emphasis that these other contexts leading to confinement are, legally speaking, outside of the criminal justice system and thus lack some of the adversary protections constitutionally required of a criminal trial, for example, trial by jury.

Other instances of confinement have emerged that seem particularly controversial because they are much more closely associated with the operation of the criminal justice system, yet appear to be wanting in necessary constitutional safeguards. In United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987), the Supreme Court upheld, against an Eighth Amendment challenge, a provision of the Bail Reform Act of 1984 that permitted preventive detention. The provision in question permitted federal judges to deny pretrial release to an individual accused of certain serious felonies based on a finding that no combination of conditions could reasonably assure the community’s safety.

More recently, there has been heightened concern about keeping children safe from predatory sex offenders. As discussed earlier, this led to the creation of state and federal registries and public notification as to the whereabouts of predators who have been released. Some states, however, have responded to the alarm over child safety by not releasing dangerous offenders at all. Illustrative is a Kansas statute that establishes procedures for the civil commitment of individuals who, due to “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.” Tracking the facts in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997), the state, pursuant to the law, filed a petition to commit Hendricks, who had a long history of sexually molesting children, shortly before he was due to be released from prison. Hendricks admitted he suffered from pedophilia, had not been cured, and that he continued to harbor desires to engage in sexual relations with children, especially when he was under stress. After a judge determined that pedophilia was a “mental abnormality” within the meaning of the statute, the jury determined that he was a sexually violent predator, and Hendricks was ordered committed. He challenged the decision because he had not been found to be mentally ill—a constitutional prerequisite, he contended, for involuntary civil commitment. He also argued that the statute imposed double jeopardy and that it violated the Ex Post Facto Clause (since the Kansas legislature enacted the statute after he had been convicted of his most recent child-molestation offense).

Speaking through Justice Thomas, the five-Justice majority in Kansas v. Hendricks concluded that the law neither subjected Hendricks to double jeopardy nor imposed punishment ex post facto. The Court ruled that the law was not a criminal statute and that the involuntary commitment was not punitive. As Justice Thomas explained: “We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some
additional factor, such as a 'mental illness' or 'mental abnormality.' These requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." This did not amount to punishment for past conduct because: (1) it did not affix blameworthiness for prior criminal conduct; and (2) it did not make a criminal conviction a requirement for commitment. Instead, evidence of criminal conduct was used only to demonstrate the existence of a "mental abnormality" and/or to support a finding of future dangerousness. He noted that proof of intent is an important element customarily distinguishing criminal from civil statutes, but no proof of intent was required here. Moreover, individuals committed under this statute were not treated punitively, since they experienced no greater restrictions than did involuntarily committed patients placed in state mental institutions. Finally, continuation of confinement was dependent upon a showing by the state every year that the affected individual still posed a danger to others; whenever he was adjudged to be "safe at large," he was entitled by law to immediate release.

Justice Breyer, speaking for the dissenters, argued that the state scheme was, in fact, punitive because Kansas provided Hendricks with no treatment, even though it conceded that his condition was treatable. Moreover, Breyer pointed out, the punitive purpose of the approach was obvious because the state explicitly deferred the diagnosis, evaluation, and commitment proceedings until the inmate had served virtually his entire criminal sentence. In short, the dissenters concluded, the state scheme functioned as punishment because "the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment * * * ."

Excessive Fines and Excessive Bail

Although the prohibition on cruel and unusual punishments counts for the lion's share of Eighth Amendment jurisprudence, excessive fines and excessive bail are forbidden as well. While the Supreme Court has never actually held that the Excessive Bail Clause applies to the states, a federal appeals court has so held (Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963)), and the Court has assumed that it does (Schilb v. Kuebel, 404 U.S. 357, 365, 92 S.Ct. 479, 484 (1971)). In Stack v. Boyle, 342 U.S. 1, 5, 72 S.Ct. 1, 3 (1951), the Court stated that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." However, in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987), it sustained the preventive detention authorized by the Bail Reform Act of 1984, 98 Stat. 1976, against constitutional challenge. That statute empowers federal courts to detain prior to trial individuals who have been arrested and charged with crimes of violence, offenses for which the punishment was life imprisonment or death, or serious drug offenses or who are certain repeat offenders if the government demonstrates by clear and convincing evidence in an adversary hearing that no conditions of release "will reasonably assure * * * the safety of any other person and the community." In addition, the court has to give written reasons for denying bail, and the decision is reviewable immediately.

14. With New York's announcement that it intends to be the twentieth state to adopt a civil commitment program for sex offenders, there is mounting evidence that programs in other states do not provide treatment (despite statements to the contrary) and, when provided, it is costly and largely unsuccessful. See the three-part "Locked Away" series in the New York Times by Abby Goodnough and Monica Davey: "Doubts Rise as States Hold Sex Offenders in Prison," Mar. 4, 2007, pp. A1, A18-A19; "A Record of Failure at Center for Sex Offenders," Mar. 5, 2007, pp. A1, A16; "For Sex Offenders, Dispute on Therapy's Benefits," Mar. 6, 2007, pp. A1, A18.
The Supreme Court did not have cause to consider the application or incorporation of the Excessive Fines Clause in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909 (1989), because it concluded the Clause “was intended to limit only those fines directly imposed by, and payable to, the government,” and thus did not apply to limit punitive damages awards in cases between private parties. Nevertheless, Justice O’Connor, concurring and dissenting, was of the view that there was “no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation,” and thus would have held “that the * * * Excessive Fines Clause * * * applies to the States.” 15 Although incorporation of the right was not at issue in United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028 (1998), the Court for the first time in history struck down a fine as excessive.

Federal law requires that anyone leaving the United States with more than $10,000 in currency report it. Another section of the law provides that anyone violating this reporting requirement forfeit “any property * * * involved in such an offense.” Bajakajian and his family were waiting to board an international flight at Los Angeles International Airport. After dogs trained to sniff out currency led federal agents to the Bajakajians’ checked luggage, which contained $230,000 in cash, the agents approached Bajakajian and his wife, apprised them of the reporting requirement, and asked them how much currency they were carrying. He said that he had $8,000 and his wife had $7,000 and that he had no additional cash to declare. A search of their carry-on bags, purse, and wallet revealed substantially more currency than that. A final accounting indicated that the Bajakajians were transporting a total of $357,144 in cash out of the country. Bajakajian was subsequently convicted of violating the reporting requirement, but instead of ordering forfeiture of the entire sum to the government, the federal district judge imposed a forfeiture of only $15,000 in addition to three years probation and the $5,000 maximum fine under federal sentencing guidelines. The district judge concluded that forfeiture of the entire sum would be “excessive” and thus a violation of the Eighth Amendment. After a federal appeals court affirmed this judgment, the Supreme Court granted the government’s petition for certiorari.

Speaking for a bare majority, Justice Thomas “ha[d] little trouble concluding that the forfeiture of currency ordered * * * constitute[d] punishment[,]” since it was an additional penalty imposed on an individual convicted of a willful violation of the reporting requirement and a sanction that could not be imposed upon “an innocent owner of unreported currency * * *.” That settled, Justice Thomas found neither the text nor the history of the Clause helpful in understanding what made a fine “excessive.” He noted that any such determination should be mindful that “judgments about the appropriate punishment for an offense belong to the legislature[,]” and that “any judicial determination regarding the gravity of a particular offense will be inherently imprecise.” The standard

15 Although the Excessive Fines Clause does not apply to punitive damage awards in cases between private parties, the Due Process Clause does limit punitive damage judgments that the state may permit. For example, a state must allow appellate review of punitive damage awards for their excessiveness, a notable limitation in light of their skyrocketing size. Moreover, punitive damages can only be awarded to punish a defendant for conduct that affected plaintiffs in the suit at hand, not for conduct that injured persons not named as parties to the litigation. Thus, in Philip Morris USA v. Williams, 549 U.S. —, 127 S.Ct. 1057 (2007), the Court ruled that punitive damages of $79.5 million imposed on a cigarette manufacturer — 100 times greater than the $821,000 awarded in compensatory damages — were excessive for the injury done to the plaintiff (who had been a heavy smoker) and could not be justified, alternatively, on the ground that the public at large was also injured by the company’s deliberately deceptive claim that smoking was safe. The plaintiff’s attorney had told the jury to “think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been.” Imposing punitive damages for injury inflicted on bystanders to the litigation, the Court held, violated due process because it denied the opportunity for a hearing with a scope broad enough for Philip Morris to defend itself.
applied by the majority, drawing upon its “Cruel and Unusual Punishments Clause precedents[,]” was whether “the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense * * *.”

Applying this standard, the Court found that forfeiture of the entire $357,144 would be unconstitutional because (1) the crime was solely a reporting offense; (2) the defendant was not “a money launderer, a drug trafficker, or a tax evader,” or any other of the class of persons for whom the statute was principally designed (the money in this instance was being used to repay a lawful debt); and (3) the small amount of harm done, had the offense gone undetected, was only to deny the government some information. In light of these factors, forfeiture of all the money was grossly disproportional to the offense.

Speaking also for Chief Justice Rehnquist and Justices O’Connor and Scalia, Justice Kennedy argued that the majority had simply announced a conclusion that the fine was “excessive” without identifying any standard according to which it reached that conclusion. Since no measure of proportionality had been established, how could one know whether the fine was “excessive”? Moreover, Justice Kennedy criticized the majority for a lack of fidelity to one of the limiting principles it did identify—deference to the legislature’s judgment about what punishment should be imposed for an offense. Justice Kennedy wrote:

Congress enacted the reporting requirement because secret exports of money were being used in organized crime, drug trafficking, money laundering, and other crimes. * * * Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government. * * *

The Court does not deny the importance of these interests but claims they are not implicated here because respondent managed to disprove any link to other crimes. Here, to be sure, the Government had no affirmative proof that the money was from an illegal source or for an illegal purpose. This will often be the case, however. By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean. The point of the statute, which provides for even heavier penalties if a second crime can be proved, is to mandate forfeiture regardless. * * *

Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment. * * * One of the few reliable warning signs of some serious crimes is the use of large sums of cash. * * * So Congress punished all cash smuggling or non-reporting, authorizing single penalties for the offense alone and double penalties for the offense coupled with proof of other crimes. * * * The requirement of willfulness, it judged, would be enough to protect the innocent. * * * The majority second-guesses this judgment without explaining why Congress’ blanket approach was unreasonable.

On a related matter involving fines, the Court, construing the Equal Protection Clause, has held that, although a state has a valid interest in the collection of fines, it may not send an indigent to jail because he or she is too poor to pay a fine. In short, government may not subject offenders to incarceration solely because of their indigency. See Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1971).
Chapter 9

Obtaining Evidence

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” By its terms, people cannot claim immunity from all searches and seizures, but only those falling short of a standard of reasonableness. Even so staunch an absolutist as Justice Black readily conceded that the Fourth Amendment afforded judges much greater discretion than did the First Amendment. This wording obliges the Supreme Court to strike a balance between the competing paradigms of the criminal justice process and thus continues our consideration of the tension between crime control and due process values discussed by Packer (see pp. 506–511) and illustrated in the preceding chapter. As in other areas of criminal procedure, the Court’s search and seizure rulings of the last three and a half decades reflect the increasing ascendency of crime control values.

A. The Exclusionary Rule

The general command of the Fourth Amendment is that evidence be obtained in a reasonable fashion and, more specifically, that warrants—for both searches and arrests—not be issued unless probable cause has first been established. The ratification of the amendment, of course, made these limitations operative against the national government. It is a comparatively modern development, though, that constitutional standards contained in the amendment were held to be equally applicable to state systems of criminal justice. Indeed, the Fourth Amendment was not incorporated into the Due Process Clause of the Fourteenth Amendment until the Court’s decision in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949). However, this amounted to little more than the incorporation of rhetoric, since no mechanism was identified to secure compliance by state law enforcement officers.

At common law, seizure of evidence by illegal means did not affect its admissibility at trial because of the view that physical evidence was the same however it was obtained.
Unlike a coerced confession, seizure of physical evidence by illegal means did not impeach its authenticity or reliability. And this view prevailed until the Supreme Court ruled in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914), that evidence obtained in disregard of Fourth Amendment standards was inadmissible in federal court because it amounted to theft by agents of the government. This sanction came to be known as the exclusionary rule and was thought to deter federal law enforcement personnel from violating the amendment by disqualifying the fruit of illegal conduct.

Although the Court’s decision in Wolf incorporated the right to be free of unreasonable searches and seizures, it specifically rejected any incorporation of the exclusionary rule. Using language that today seems remarkable—almost naive—Justice Frankfurter, speaking for the Court, said:

The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we 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. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

***

***We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

According to Justice Frankfurter, at the time Wolf was decided, 17 states followed the Weeks doctrine and imposed an exclusionary rule; 30 states did not. However, 12 years later, in Mapp v. Ohio (p. 607), the Court reversed itself and incorporated the exclusionary rule as necessary to enforce Fourth Amendment guarantees. As the majority in Mapp indicated, the exclusionary rule was incorporated because other means of controlling illegal police behavior had failed. Why might such alternatives as suits for damages and review boards fail to deter police illegalities?

Mapp helped to close a loophole created by the Court’s earlier decision in Weeks. Until the Supreme Court made illegally seized evidence inadmissible in both federal and state courts, law enforcement agents at both levels took advantage of what came to be known as the “silver platter” doctrine. In this unusual and unanticipated version of “cooperative federalism,” state law enforcement agents provided federal officers with illegally seized evidence, which was then admissible in federal court because, as with evidence seized by private citizens, federal officers were not implicated in obtaining it. Thus, it could be said that state law enforcement officers had served up the evidence in federal cases on a “silver platter.” The admissibility of such tainted evidence in federal courts finally ended with the Supreme Court’s decision in Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960). But, as the discussion of wiretapping and eavesdropping later in this chapter (see section D) also shows, this sort of cooperation between state and federal agents worked both ways. Before Mapp, states that had an exclusionary rule as a matter of state constitutional law
found they were vulnerable to a similar end run. After Mapp, state law enforcement officers in states with a state exclusionary rule could no longer use evidence illegally seized by federal agents in state criminal prosecutions.

**Mapp v. Ohio**

Supreme Court of the United States, 1961
367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081

**BACKGROUND & FACTS** Dollree Mapp was convicted under Ohio law for possession of obscene books, pictures, and photographs. She challenged the conviction on the grounds that the evidence used against her was unlawfully seized.

One day in May 1957, several Cleveland police officers came to Miss Mapp’s residence looking for a fugitive who was believed to be hiding out in her home. They requested entrance, but Miss Mapp refused to admit them without a search warrant. After she refused a second time, the police broke into the apartment and then physically assaulted and handcuffed her when she grabbed a piece of paper that they told her was a valid search warrant. No warrant was later produced at trial. The officers searched the entire residence and discovered the obscene materials, which were later used to convict her. The Ohio Supreme Court affirmed the conviction, and the U.S. Supreme Court granted certiorari.

Mr. Justice CLARK delivered the opinion of the Court.

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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. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949), 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.”

Less than 30 years after Boyd, this Court, in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914), stated that

“the 4th 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.”

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A. THE EXCLUSIONARY RULE
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." 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—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words."

In 1949, 35 years after Weeks was announced, this Court, in Wolf v. People of State of 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:

"We 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.* * * and announcing that it "stoutly adhere[d]" to the Weeks exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right."

The Court in Wolf first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of Weeks was "particularly impressive" and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy by overriding the [States'] relevant rules of evidence." While in 1949, prior to the Wolf case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions." In connection with this California case, we note that the second basis elaborated in Wolf in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.

Today we hold that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. Were it otherwise, 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. [W]ithout that rule the freedom from state invasions of privacy would be so ephemeral and so nearly 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."

The applicability of the right against unreasonable searches and seizures to the states 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.”

Indeed, we are aware of no restraint, similar to that rejected today, limiting 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.”

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. 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 unconstitutional seizure of goods, papers, effects, documents, etc.?

Our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State’s attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State’s attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine “the criminal is to go free because the constable has blundered.” In some cases this will undoubtedly be the result. But, as was said in Elkins v. United States, “there is another consideration—the imperative of judicial integrity.” 364 U.S. at 222, 80 S.Ct. at 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no
more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

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

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Mr. Justice BLACK, concurring.
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I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.

*** But *** when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

***

Memorandum of Mr. Justice STEWART.

*** I would *** reverse the judgment in this case, because I am persuaded that the provision of *** the Ohio [obscenity law] upon which the petitioner’s conviction was based, is *** not “consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.”

Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER and Mr. Justice WHITAKER join, dissenting:

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*** [Although *** [the question of the exclusionary rule] was *** raised here and below among appellant’s subordinate points, the *** pivotal issue brought to the Court by this appeal is whether *** the Ohio *** [law] making criminal the mere knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. That was the principal issue which was decided by the Ohio Supreme Court *** and which was briefed and argued in this Court.

In this posture of things, I think it fair to say that five members of this Court have simply “reached out” to overrule Wolf. With all respect for the views of the majority, and recognizing that stare decisis carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining Wolf.

***

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on Wolf seem to me notably unconvincing.

First, it is said that “the factual grounds upon which Wolf was based” have since changed, in that more States now follow the Weeks exclusionary rule than was so at the time Wolf was decided. While that is true, a recent survey indicates that at present one-half of the States still adhere to the common-law non-exclusionary rule. ***

Our concern here, as it was in Wolf, is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one.

***

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice...
demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. * * *

Justice Harlan's dissent in Mapp was largely concerned that imposing the exclusionary rule on the states would weaken federalism; opponents of the rule, who sometimes also refer to it as "the suppression doctrine," have taken a very different tack since then. Critics now usually argue that the costs imposed by the rule are grossly disproportional to any asserted benefits, and even the benefits are speculative. Indeed, dissenting in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 416–418, 91 S.Ct. 1999, 2014–2015 (1971), a decade later, Chief Justice Burger even questioned the logic by which the exclusionary rule could be expected to deter illegal police conduct:

The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. * * * The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. * * * But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. * * * Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—hence the rule has virtually no applicability and no effect in such situations. * * *

Although the Court has not overruled Mapp, it has increasingly limited application of the rule, which is consistent with its advancement of crime control values in other areas of criminal procedure. Two principal efforts in limiting the reach of the rule are illustrated here.

The first of these efforts entailed a revised interpretation of the habeas corpus jurisdiction possessed by federal district courts. Recall that a writ of habeas corpus is a court order releasing someone from confinement who is judged to have been illegally detained. Petitioning a court for the writ has been a longstanding means of getting a court to determine whether someone in custody is being held unlawfully. Thus, defendants found guilty in state courts of violations of state criminal law could secure a judicial determination about whether they had been unlawfully convicted even though state appellate courts had subsequently rejected their arguments on direct appeal. By petitioning courts—usually
federal courts—convicted defendants, sitting in their prison cells, could still secure a
determination about whether their federal constitutional rights had been violated by some
occurrence at trial, whether it was the admission of a coerced confession, the admission of
fruits of an alleged illegal search or seizure, or some other asserted defect perhaps in the
conduct of the trial itself. Federal habeas corpus jurisdiction thus became a valuable
mechanism to assure that state authorities honored the federal constitutional rights of state
defendants because it provided an avenue for asserting those rights if state judges turned a
defeat to infringements of those rights on direct appeal.

By its decision in Stone v. Powell below, reinterpreting federal habeas corpus
jurisdiction possessed by the federal district courts, the Supreme Court precluded lower
federal courts from rehearing claims of state prisoners that their Fourth Amendment rights
had been violated by the introduction at trial of unlawfully obtained physical evidence.
The Court held that, where a state defendant has had a full and fair opportunity to argue
that his or her Fourth Amendment rights had been violated on direct appeal and state
appellate courts have ruled against those claims, such matters could not be reopened by the
state prisoner in a subsequent petition for habeas corpus to a federal district court.
Although on the surface this appears to be a discussion of federal habeas corpus jurisdiction,
it is really about the reach of the exclusionary rule. If a federal district court held that a
Fourth Amendment violation did occur and it vacated the defendant’s conviction, such a
judgment would mean that the evidence obtained by an illegal search or seizure should not
have been admitted in the first place. The prospect of having a state criminal conviction
overturned later in a federal habeas suit would thus deter state officials from turning a blind
eye to infringements of federal constitutional law at the state level. Notice that the
arguments cited by the majority are familiar ones: The costs of the exclusionary rule are
disproportional to any asserted benefits, and physical evidence is still the same however it is
obtained. Here and elsewhere, Justices arguing against the exclusionary rule convey the
dual impressions that motions to suppress evidence regularly succeed in ordinary criminal
cases and that this results in flinging open the jailhouse door on a broad scale. It is worth
noting that there is little empirical support for either of these propositions, as the very low
figures presented in two footnotes to the majority and dissenting opinions in the Leon case
(see p. 617) show.

STONE V. POWELL

Supreme Court of the United States, 1976
428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067

BACKGROUND & FACTS: Powell and three friends entered a liquor store
and soon became involved in a fight with the manager over the theft of a bottle of
wine. In the ruckus that ensued, Powell shot and killed the store manager’s wife. Ten
hours later and miles away, Powell was arrested for violation of a town vagrancy
ordinance. In a search incident to arrest, it was discovered that he was carrying a .38
caliber revolver with six expended cartridges in the cylinder. At trial, a criminologist
subsequently identified the gun as that which killed the store manager’s wife, and
Powell was convicted of second-degree murder. The conviction was affirmed on
appeal, and later the California Supreme Court denied habeas corpus relief. While in
prison, Powell next instituted an action for federal habeas corpus against his warden,
alleging that he was illegally confined because the vagrancy ordinance was
unconstitutionally vague and, therefore, admission of the revolver into evidence
was error, since it was the fruit of an unlawful search, the search being incident to an
unlawful arrest. A federal district court rejected Powell's argument, concluding that the officer had probable cause, and even if the vagrancy ordinance was void for vagueness, the deterrent purpose of the exclusionary rule would not be served by ruling the revolver inadmissible. Moreover, even if this argument failed, the court continued, admission of the revolver was harmless error in the face of other uncontrovertible evidence given at trial. A federal appeals court reversed the district court's judgment, and the government appealed.

Mr. Justice POWELL delivered the opinion of the Court.

***

* * * The question is whether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.

The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. As Mr. Justice Black emphasized in his dissent in Kaufman [v. United States]:

"A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." 394 U.S., at 237, 89 S.Ct., at 1079.

Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. These long-recognized costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts.

Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. * * *

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. * * *

There is no reason to believe [state law enforcement authorities would be appreciably deterred from acting unlawfully by the prospect that] a conviction obtained in state
court and affirmed on direct review might be overturned in federal habeas corpus proceedings] often occurring years after the incarceration of the defendant. * * *

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. * * *

In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.

Accordingly, the judgments of the Courts of Appeals are Reversed.

Mr. Chief Justice BURGER, concurring.

***

In evaluating the exclusionary rule, it is important to bear in mind exactly what the rule accomplishes. Its function is simple—the exclusion of truth from the factfinding process. * * * The operation of the rule is therefore unlike that of the Fifth Amendment’s protection against compelled self-incrimination. A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect’s will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability. This is not the case as to reliable evidence—a pistol, a packet of heroin, counterfeit money, or the body of a murder victim—which may be judicially declared to be the result of an “unreasonable” search. The reliability of such evidence is beyond question; its probative value is certain.

***

* * * Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge-created device based on “hard cases,” serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect. * * *

To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its extension—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule’s heavy costs to rational enforcement of the criminal law. * * *

***

* * * I venture to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for [innocent] persons injured by police mistakes or misconduct.

***

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL, concurs, dissenting.

***

* * * The procedural safeguards mandated in the Framers’ Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the “guilty” are punished and the “innocent” freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty. Particular constitutional rights that do not affect the fairness of fact-finding procedures cannot for that reason be denied at the trial itself. What possible justification then can there be for denying vindication of such rights on federal habeas when state courts do deny those rights at trial? To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend. * * *

Enforcement of federal constitutional rights that redress constitutional violations directed against the “guilty” is a particular
function of federal habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the Congressional judgment that such detached federal review is a salutary safeguard against any detention of an individual "in violation of the Constitution or laws * * * of the United States."

While unlike the Court I consider that the exclusionary rule is a constitutional ingredient of the Fourth Amendment, any modification of that rule should at least be accomplished with some modicum of logic and justification not provided today. * * *
The Court does not disturb the holding of Mapp v. Ohio that, as a matter of federal constitutional law, illegally obtained evidence must be excluded from the trial of a criminal defendant whose rights were transgressed during the search that resulted in acquisition of the evidence. In light of that constitutional rule it is a matter for Congress, not this Court, to prescribe what federal courts are to review state prisoners' claims of constitutional error committed by state courts. Until this decision, our cases have never departed from the construction of the habeas statutes as embodying a congressional intent that, however substantive constitutional rights are delineated or expanded, those rights may be asserted as a procedural matter under federal habeas jurisdiction. Employing the transparent tactic that today's is a decision construing the Constitution, the Court usurps the authority—vested by the Constitution in the Congress—to reassign federal judicial responsibility for reviewing state prisoners' claims of failure of state courts to redress violations of their Fourth Amendment rights. Our jurisdiction is eminently unsuited for that task, and as a practical matter the only result of today's holding will be that denials by the state courts of claims by state prisoners of violations of their Fourth Amendment rights will go unreviewed by a federal tribunal. I fear that the same treatment ultimately will be accorded state prisoners' claims of violations of other constitutional rights; thus the potential ramifications of this case for federal habeas jurisdiction generally are ominous. The Court, no longer content just to restrict forthrightly the constitutional rights of the citizenry, has embarked on a campaign to water down even such constitutional rights as it purports to acknowledge by the device of foreclosing resort to the federal habeas remedy for their redress. I would affirm the judgments of the Courts of Appeals.

Mr. Justice WHITE, dissenting.

For many of the reasons stated by Mr. Justice BRENNAN, I cannot agree that the writ of habeas corpus should be any less available to those convicted of state crimes where other constitutional issues are presented to the federal court. * * *

I feel constrained to say, however, that I would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials.

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.
In addition to disputing the arguments against the exclusionary rule, Justices Brennan and Marshall in dissent focused upon the effect the ruling in Powell would have on the capacity of the federal judiciary to make state officials respect federal constitutional standards in state criminal cases. By its terms, the ruling in Powell shuts off any federal habeas corpus review if the defendant’s Fourth Amendment claims have been fully aired and rejected on direct appeal. This leaves determinations of federal constitutional rights—here Fourth Amendment rights—almost exclusively in the hands of state judges. But, as Justice Brennan points out, unlike federal judges who have lifetime tenure, most state judges are elected. A state judge might well think twice about upholding the federal constitutional rights of criminal defendants if he or she faces the prospect of a reelection campaign in which a ruthless political opponent might seek to whip up public anger by charging that the judge is “soft on crime.” Therefore, the only way for the Court to be sure that state officers are acting in accordance with the Fourth Amendment is to grant certiorari in all the search and seizure cases coming up on direct appeal. But this is very impractical, as Justice Marshall explained concurring in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978), a run-of-the-mill search and seizure case that raised no new, unusual, or even interesting constitutional question:

Prior to Stone v. Powell, there would have been no need to grant certiorari in a case such as this, since the federal habeas remedy would have been available to the defendant. Indeed, prior to Stone petitioner here probably would not even have had to utilize federal habeas, since the Arizona courts were at that earlier time more inclined to follow the federal constitutional pronouncements of the Ninth Circuit. * * * But Stone eliminated the habeas remedy with regard to Fourth Amendment violations, thus allowing state court rulings to diverge from lower federal court rulings on these issues and placing a correspondingly greater burden on this Court to ensure uniform federal law in the Fourth Amendment area.

At the time of Stone my Brother Brennan wrote that “institutional constraints totally preclude any possibility that his Court can adequately oversee whether state courts have properly applied federal law.” * * * Because of these constraints, we will often be faced with a Hobson’s choice in cases of less than national significance that could formerly have been left to the lower federal courts: either to deny certiorari and thereby let stand divergent state and federal decisions with regard to Fourth Amendment rights; or to grant certiorari and thereby add to our calendar, which many believe is already overcrowded, cases that might better have been resolved elsewhere. In view of this problem and others, I hope that the Court will at some point reconsider the wisdom of Stone v. Powell.

In addition to generally ending federal habeas corpus review of the illegal search and seizure practices by state law enforcement officials, the Supreme Court has also declared (over dissent in each instance by at least a third of the Justices) that the Fourth Amendment exclusionary rule does not bar the admission of illegally seized evidence in grand jury investigations (United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974)), in civil cases (United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021 (1976)), in deportation proceedings (Immigration & Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479 (1984)), and in parole revocation hearings (Pennsylvania Board of Probation & Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998)).

A second and more direct limitation on the exclusionary rule was the creation of a good-faith exception. Justice White’s dissent in Powell noted that what he objected to was the surgery the Court performed on federal habeas jurisdiction, not the idea of limiting the reach of the rule. Indeed, he said he favored a good-faith exception. In United States v. Leon (p. 617), eight years later, the Court created one and has applied it in more recent cases (p. 624). The full-blown discussion of the asserted merits and disabilities of the exclusionary rule in Leon is particularly revealing. Given the difficulty of proving that the exclusionary rule
actually deters police misconduct and the way the majority casts the burden of proof on
the matter, the change in justification adopted by proponents of the rule is worth noting.
In this respect, compare Justice Clark’s argument in behalf of the rule in Mapp with the
argument advanced in support of the rule by Justice Brennan in Leon. In an effort to
outflank the critics, advocates of the rule appear to have moved from a policy argument
about deterrence to an argument of principle rooted in the text of the amendment. (See
also Yale Kamisar, “Does (Did) (Should) the Exclusionary Rule Rest on a ’Principled
Basis’ Rather Than an Empirical Proposition?” 16 Creighton Law Review 565 (1983)).

UNITED STATES V. LEON
Supreme Court of the United States, 1984
468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677

BACKGROUND & FACTS On the basis of information furnished by a
confidential informant of unproved reliability, officers of the Burbank (California)
Police Department initiated an investigation into Leon’s and others’ alleged drug
trafficking. After conducting surveillance of the defendants’ activities and on the
basis of an affidavit summarizing the police officers’ observations, Officer Rombach
prepared an application for a warrant to search three private residences and the
defendants’ automobiles for an extensive number of items. The application was
reviewed by several deputy district attorneys, and a federal magistrate signed the
warrant. The searches that followed turned up large quantities of drugs and some
narcotics paraphernalia. After indictment on federal drug charges, the defendants
filed motions to suppress the evidence. After a hearing, a federal district judge
granted the motions in part on the grounds that the affidavit was insufficient to
establish probable cause. Although Officer Rombach had acted in good faith, the
district judge held that this did not prevent the application of the exclusionary rule.
A federal appeals court affirmed, and the government sought certiorari limited to
the issue of whether a good-faith exception to the exclusionary rule should be
recognized.

Justice WHITE delivered the opinion of
the Court.

This case presents the question whether
the Fourth Amendment exclusionary rule
should be modified so as not to bar the use in
the prosecution’s case-in-chief of evidence
obtained by officers acting in reasonable
reliance on a search warrant issued by a
detached and neutral magistrate but ulti-
mately found to be unsupported by probable
cause. * * *

* * * The [exclusionary] rule * * * operates as “a judicially created remedy
designed to safeguard Fourth Amendment
rights generally through its deterrent effect,
rather than a personal constitutional right of
the person aggrieved.” United States v.
Calandra, [414 U.S.,] at 348, 94 S.Ct.,
at 620.

The * * * question * * * before us * * *
must be resolved by weighing the costs and
benefits of preventing the use in the
prosecution’s case-in-chief of inherently
trustworthy tangible evidence obtained in
reliance on a search warrant issued by a
detached and neutral magistrate that ulti-
mately is found to be defective.

The substantial social costs exacted by
the exclusionary rule for the vindication
of Fourth Amendment rights have long
been a source of concern. “Our cases have
consistently recognized that unbending
application of the exclusionary sanction to
enforce ideals of governmental rectitude
would impede unacceptably the truth-
finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445 (1980). An objectionable collateral consequence of this interference with the criminal justice system’s truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.1 Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. * * * Indiscriminate application of the exclusionary rule, therefore, may well “generate disrespect for the law and the administration of justice.” [Stone v. Powell, 428 U.S.,] at 491, 96 S.Ct., at 3051. * * *

** * * * Because a search warrant “provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime,’ ” United States v. Chadwick, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482 (1971) * * * we have expressed a strong preference for warrants and declared that “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.” United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 744 (1965). * * * [T]he preference for warrants is most appropriately effectuated by according “great deference” to a magistrate’s determination. * * *

** * * *

* * * To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates[,] * * * their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. * * * Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. * * *

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or “magistrate shopping” and thus promotes the ends of the Fourth Amendment. Suppressing

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1. Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. Davies, A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NJ Study and Other Studies of “Lost” Arrests, 1983 A.B.F. Res.J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. * * * Davies’ analysis of California data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, * * * that 0.9% of felony arrestees are released, because of illegal searches or seizures, at the preliminary hearing or after trial, * * * and that roughly 25% of all felony arrestees benefit from reversals on appeal because of illegal searches. * * *

Many * * * researchers [studying it] have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. * * * [Footnote by Justice White.]
evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. * * * But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

As we observed in Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365 (1974), and reiterated in United States v. Peltier, 422 U.S., at 539, 95 S.Ct., at 2318:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The Peltier Court continued, * * * [422 U.S.], at 542, 95 S.Ct., at 2320:

"If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

* * * This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable-cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. * * * Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. * * * [T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, * * * and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. * * *

In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. * * * The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the
Fourth Amendment, and we do not believe that it will have this effect. 

In the absence of an allegation that the magistrate abandoned his detached and neutral role, 
* * * 
suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause [or if the executing officer could not reasonably presume it to be valid because it was clearly deficient on its face, say, “in failing to particularize the place to be searched or the things to be seized”]. 
* * * Officer Rombach’s application for a warrant clearly 
* * * related the results of an extensive investigation and 
* * * provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers’ reliance on the magistrate’s determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Accordingly, the judgment of the Court of Appeals is 
Reversed.

Justice BLACKMUN, concurring. 
* * * 
[A]ny empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. 
* * * If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less. 
* * *

2. As an example, the Court cited the behavior of a town justice condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319 (1979), who accompanied police on a raid to a local bookstore and filled in blank spaces on the warrant after pornographic items had been seized.
Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment. Once the connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court’s interpretation becomes more suspect. Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.

The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual’s privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

Such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures” comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right to exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures.

No other explanation suffices to account for the Court’s holding in Mapp, since the only possible predicate for the Court’s conclusion that the States were bound by the Fourteenth Amendment to honor the Weeks doctrine is that the exclusionary rule was “part and parcel of the Fourth Amendment’s limitation upon [governmental] encroachment of individual privacy.”

The Court has frequently bewailed the “cost” of excluding reliable evidence. The [Fourth] Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the “price” our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment.

In addition, the Court’s decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court’s language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court’s opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. To the extent empirical data are available regarding the general costs.
and benefits of the exclusionary rule, it has shown, on the one hand, as the Court acknowledges today, that the costs are not as sub-

3. In the text of his dissenting opinion, Justice Brennan observed:

[F]ederal and state prosecutors very rarely drop cases because of potential search and seizure problems. For example, a 1979 study prepared at the request of Congress by the General Accounting Office reported that only 2.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979). If the GAO data are restated as a percentage of all arrests, the study shows that only 0.2% of all felony arrests are declined for prosecution because of potential exclusionary rule problems.

And in a footnote describing results reported by researchers attempting to "quantify the actual costs of the rule," Justice Brennan wrote:

A recent National Institute of Justice study based on data for the 4-year period 1976–1979 gathered by the California Bureau of Criminal Statistics showed that 4.8% of all cases that were declined for prosecution by California prosecutors were rejected because of illegally seized evidence. National Institute of Justice, Criminal Justice Research Report—The Effects of the Exclusionary Rule: A Study in California 1 (1982). However, if these data are calculated as a percentage of all arrests, they show that only 0.8% of all arrests were rejected for prosecution because of illegally seized evidence.***

In another measure of the rule's impact—the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded—the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example, a study based on data from nine mid-sized counties in Illinois, Michigan, and Pennsylvania reveals that motions to suppress physical evidence were filed in approximately 5% of the 7,500 cases studied, but that such motions were successful in only 0.7% of all these cases. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A.B.F. Res.J. 585, 596. The study also shows that only 0.6% of all cases resulted in acquittals because evidence had been excluded. ** In the GAO study, suppression motions were filed in 10.5% of all federal criminal cases surveyed, but of the motions filed, approximately 90–90% were denied. ** Evidence was actually excluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in acquittals or dismissals after evidence was excluded.

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4. In the text of his dissenting opinion, Justice Brennan wrote:

Evidence was actually excluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in acquittals or dismissals after evidence was excluded.
Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a “let’s-wait-until-it’s-decided” approach in situations in which there is a question about a warrant’s validity or the basis for its issuance. * * *

Although the Court brushes these concerns aside, a host of grave consequences can be expected to result from its decision to carve this new exception out of the exclusionary rule. A chief consequence of today’s decision will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. Creation of this new exception for good faith reliance upon a warrant implic- itly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted. * * *

Moreover, the good faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not “entirely unreasonable,” * * * all police conduct pursuant to that warrant will be protected from further judicial review. The clear incentive that operated in the past to establish probable cause adequately because reviewing courts would examine the magistrate’s judgment carefully * * * has now been * * * completely viti- ated * * *. The long-run effect unquestionably will be to undermine the integrity of the warrant process.

* * *

[Justice STEVENS also dissented.]

It is also important to understand that Mapp did not bind the states to follow all interpretations of the federal judiciary in the area of criminal procedure, but only those rulings that stemmed from constitutional guarantees. As the Court itself subsequently pointed out in Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), the Supreme Court is also authorized by statute to promulgate rules for the supervision of federal law enforcement. Rulings that it hands down based on this statutory authority apply only in federal courts. Consequently, you will want to examine the Court’s holdings on questions of criminal procedure very carefully so as to ascertain whether the Court’s decision is based on constitutional or statutory authority in order to be sure of the scope of its application.

The application of the exclusionary rule, moreover, is not limited to evidence that is directly seized in unconstitutional fashion by the police. Under the “fruit of the poisonous tree” doctrine, which the Court first espoused in cases such as Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182 (1920), and Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939), evidence that is obtained through tips resulting from illegally seized evidence is also inadmissible. The doctrine also came to be applied to evidence gained as a result of leads that are produced by coerced confessions. In other words, if the government still wants to proceed against a defendant on a criminal charge and the evidence that it has dug up so far is the product of an illegal search or a coerced confession, it will have to find other evidence to prove its charges—evidence sufficiently removed from the context of its own illegal activities as to dissipate any taint of illegality. Here, too, recent Court decisions have constrained the broad reach of this doctrine. For example, in Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984) (noted in the preceding chapter at p. 536), the Court held that where a search party would have ultimately or inevitably discovered the victim’s body, even if the defendant, as a result of
postarrest interrogation conducted in violation of the right to counsel, had not directed police to the site where it could be found, such evidence was admissible anyway. The crafting of this “inevitable discovery” exception to the “fruit of the poisonous tree” doctrine likewise reflects the extent to which crime control values have been put at a premium.

Likewise, in Hudson v. Michigan, 547 U.S. —, 126 S.Ct. 2159 (2006), the Court ruled that the social costs of applying the exclusionary rule outweighed any purpose that might be served by suppressing evidence obtained by the police who failed to first knock and announce their presence before executing a search warrant. Writing for the Court, Justice Scalia reasoned that, regardless of whether the proper announcement had been made, police would still have seized the guns and drugs inside the house in the course of executing the warrant. In light of this inevitable discovery, he declared, barring the admissibility of the evidence just because police didn’t knock beforehand would give the offender the equivalent of “a get-out-of-jail-free card.” Justice Kennedy, the decisive fifth vote for the majority, reaffirmed the importance of the knock-and-announce rule in a concurring opinion and observed that inevitable discovery in these circumstances simply made excluding the evidence disproportionate to any harm done.

**Other “Honest Mistake” Rulings**

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<td>Illinois v. Knall, 480 U.S. 340, 107 S.Ct. 1160 (1987)</td>
<td>The exclusionary rule does not extend to bar the admissibility of evidence seized in good-faith reliance upon a statute authorizing warrantless administrative searches that is subsequently found to violate the Fourth Amendment.</td>
<td>5-4; Justices Brennan, Marshall, Stevens, and O'Connor dissented.</td>
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<td>Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013 (1987)</td>
<td>Where police, armed with a warrant to search an apartment on the third floor, by honest mistake also searched the premises of a second apartment on that floor, the existence of which was unknown to them beforehand, the search of the adjoining apartment was valid, and the heroin found was admissible.</td>
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<tr>
<td>Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185 (1995)</td>
<td>After a routine traffic stop, a check of the police car’s computer showed there was an outstanding misdemeanor warrant on the defendant. He was arrested, and a subsequent search of the vehicle turned up a bag of marijuana. The exclusionary rule was held not to bar the admission of the marijuana in support of the defendant’s conviction on a drug charge, although it was later determined that the misdemeanor warrant triggering his initial arrest had been quashed and its listing in the computer was the result of an error by employees not associated with the arresting police department.</td>
<td>7-2; Justices Stevens and Ginsburg dissented.</td>
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B. WARRANTLESS SEARCHES AND SEIZURES

It is clear that the general rule with regard to the conduct of searches and seizures is that they are to be executed pursuant to a warrant. The Court, however, has recognized a number of exceptions, any one of which can justify a departure from this procedure. But what is required to obtain a warrant? Briefly, the procedure requires the police officer to fill out an application that particularly describes what the authorities expect to find and where they expect to find it. Not only must this affidavit deal in specifics, but also it must set them out to the extent that a neutral and detached magistrate can independently determine if such information demonstrates that there is “probable cause” to justify the issuing of the warrant. The affidavit may not merely recite conclusions that the police believe to be true; it must set out sufficient facts to enable the judge to reach an independent conclusion that probable cause exists. As the Court made clear in *Coolidge v. New Hampshire* (p. 634), the independent role of the magistrate must be preserved to ensure judicial oversight of police operations so that constitutional guarantees may be scrupulously observed. Accordingly, where a town justice accompanied police on a raid of a local bookstore and filled in blank spaces on the search warrant after the items had been seized, the Court held in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319 (1979), that the neutral and detached role of a judicial officer had been breached. Warrant procedures also provide that, after a search has been conducted and materials seized, a copy of the warrant is to be returned to the magistrate with an account of the evidence obtained so that judicial supervision can be continually maintained. In executing a search pursuant to a warrant, law enforcement officers are limited to searching in areas where the items identified in the warrant might logically be found and are not entitled to enlarge the scope of the search into a general hunt for evidence.

While the Warren Court made it abundantly clear in *Chimel v. California* (p. 630) that getting a warrant is the rule, it did recognize some exceptions to this requirement, though it also pointed out that these exceptions are to be interpreted narrowly. As crime control values have gained greater favor with the Court, the exceptions instead have been interpreted with such ever-increasing leniency that they now threaten to devour the rule.

Consent

The Court has always recognized the legality of a search to which the suspect has consented. The Justices all agree that such consent must be voluntary and given free from any intimidation. Yet the Burger Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973), took the view that voluntariness does not necessitate an explicit notice to the suspect that he or she has the right to refuse consent. Casualness in request belies the seriousness of the matter. Where such notice has been given, however, and an affirmative response has subsequently been received, the Court has been inclined to regard the matter as settled. While the Court has said that consent is to be assessed in light of the totality of the circumstances, encounters with the police are likely to be regarded by many—perhaps most—citizens as intimidating anyway. Therefore, it may be far from clear to the average person, confronted by a question from the police, when that person is—to use the Court’s words—“at liberty to ignore the police presence and go about his business.” A perfect illustration is that provided in *United States v. Drayton* (p. 626). In your judgment, was there voluntary consent in this case?
BACKGROUND & FACTS A bus driver permitted three police officers to board the bus as part of a routine effort at intercepting drugs and guns. After the driver left the bus, one officer knelt on the driver’s seat and kept his eyes on the passengers while a second policeman went to the rear of the bus and faced forward. A third policeman, Officer Lang, then worked his way down the aisle from back to front speaking to individual passengers. Officer Lang later testified that any passengers who chose not to cooperate and who decided to get off the bus would have been allowed to do so. As Lang approached passengers Drayton and Brown, he held up his badge, announced in a low voice that the officers were looking for any drugs and weapons, and asked if they had any baggage. After Brown agreed to a search of his bag, which turned up no contraband, Lang asked if Brown would mind if he patted him down. Brown agreed, the pat-down turned up two hard objects around his thighs, and Brown was arrested for possessing cocaine. Lang then turned to Drayton and asked, “Mind if I check you?” Drayton agreed, and the frisk that followed revealed that he, too, was carrying cocaine. After both men were charged with federal drug offenses, they moved to have the evidence suppressed. A federal district court denied the motion on grounds the consent given was voluntary and the police had not behaved in a coercive manner. The U.S. Court of Appeals for the Eleventh Circuit reversed, and the government successfully petitioned the Supreme Court for certiorari.

Justice KENNEDY delivered the opinion of the Court.

** Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. ** Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. ** If a reasonable person would feel free to terminate the encounter, then he or she has not been seized. **

The Court has [previously] addressed ** the specific question of drug interdiction efforts on buses. In [*Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991)](https://digital.library.unt.edu/ark:/67531/metadc98206/), two police officers requested a bus passenger’s consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine. In doing so it adopted a *per se* rule that due to the cramped confines onboard a bus the act of questioning would deprive a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment.

This Court reversed. Bostick first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of “all the circumstances surrounding the encounter.” The proper inquiry “is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” ** Finally, the Court rejected Bostick’s argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. The reasonable person test, the Court explained, is objective and “presupposes an innocent person.” **

In ** Bostick [we] refrained from deciding whether a seizure occurred. ** The Court, however, identified two factors
particularly worth noting” on remand. * * * First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search. * * *

Relying upon the latter factor, the Eleventh Circuit * * * adopted what is in effect a per se rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. * * *

* * * The Court of Appeals erred in adopting this approach.

Applying the Bostick framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers’ questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter. * * *

[The District Court * * * correctly] conclude[d] that “everything that took place between Officer Lang and [respondents] suggests that it was cooperative” and that there “was nothing coercive [or] confrontational” about the encounter. * * * There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. * * * Indeed, because many fellow passengers are present to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.

* * * Officer Hoover’s position at the front of the bus also does not tip the scale in respondents’ favor. Hoover did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear. * * *

Finally, the fact that in Officer Lang’s experience only a few passengers have refused to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. In Lang’s experience it was common for passengers to leave the bus for a cigarette or a snack while the officers were questioning passengers. * * * And of more importance, bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.

Drayton contends that even if Brown’s cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter with the officers after Brown had been arrested. * * * The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown’s arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers’ questions. Even after arresting Brown, Lang addressed Drayton in a polite manner and provided him with no indication that he was required to answer Lang’s questions.

We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, i.e., whether their consent to the suspicionless search was involuntary. * * * [A]s the facts above suggest, respondents’ consent to the
search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton’s persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton’s permission to search him ("Mind if I check you?"), and Drayton agreed.

The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. * * * Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041 (1973). * * * * * * The judgment of the Court of Appeals is reversed, and the case is remanded * * *

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, dissenting.

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court’s explanation that bus passengers consent to searches of their luggage to “enhanc[e] their own safety and the safety of those around them.” * * * * * *

[W]hen Brown and Drayton were called upon to respond, each one was presumably conscious of an officer in front watching, one at his side questioning him, and one behind for cover, in case he became unruly, perhaps, or “cooperation” was not forthcoming. * * * While I am not prepared to say that no bus interrogation and search can pass the Bostick test without a warning that passengers are free to say no, the facts here surely required more from the officers than a quiet tone of voice. A police officer who is certain to get his way has no need to shout.

It is true of course that the police testified that a bus passenger sometimes says no, * * * but that evidence does nothing to cast
the facts here in a different light. We have no way of knowing the circumstances in which a passenger elsewhere refused a request; maybe that has happened only when the police have told passengers they had a right to refuse (as the officers sometimes advised them). Brown and Drayton were seemingly pinned-in by the officers, the bus was going nowhere, and with one officer in the driver’s seat, it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him.

* * * I apply Bostick’s totality of circumstances test, and ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter. In my view the answer is clear. * * *

Drayton, like Court rulings before it, made clear that consent is to be imputed in light of the totality of the circumstances, not by any automatic rule. There may be lack of consent to a search or interrogation even if the individual makes no attempt to leave or does not refuse to cooperate. Lack of consent, the Court has said, could be inferred from any of the following circumstances: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980).

All of this seems clear enough when it comes to searching a person or his luggage, but what if the issue is searching a house or an apartment and two joint occupants of the property differ in their willingness to consent? The answer seems to depend on whether both are physically present when the police seek to search the property. In United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974), the Supreme Court held that, if the consenting individual was physically present but the non-consenting occupant was not, consent would be deemed to have been given. But what if both are present and they disagree about consenting to the search—an admittedly rare event? In Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006), the Court held that a co-occupant of the premises (in this case, the husband) who is physically present and unambiguously “refuses to permit [police] entry prevails, rendering the warrantless search unreasonable as to him.” Justice Souter, speaking for the Court, reasoned that “a disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all” and “is no match for the central value of the Fourth Amendment’ that ‘a man’s home is his castle.’”

These principles do not constrain government from requiring an offender’s automatic consent to a search lacking probable cause—or even reasonable suspicion—as a condition of his parole or probation. See Samson v. California, 547 U.S. —, 126 S.Ct. 2193 (2006). Unlike probationers and parolees—who are convicted defendants—individuals awaiting trial on criminal charges cannot be required to submit to searches without probable cause as a condition of remaining free. See United States v. Scott, 450 F.3d 863 (9th Cir. 2006).

Search Incident to Arrest

A second exception is a search conducted incident to an arrest. This kind of search has been justified on two grounds: (1) to protect the officer’s life by allowing a search for possible weapons the suspect may use to resist arrest, and (2) to prevent the destruction of evidence by the suspect. After these exceptions had been recognized by the Court in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950), the scope of such searches increased until the situation reached a paradoxical point: An individual was generally safer
in the privacy of his possessions when he was not at home (since probable cause would have to be established for a warrant to issue) than when he was (since searches incident to arrest sometimes ballooned to become general exploratory searches). As a result, in Chimel v. California, the Court clearly indicated that this exception extends only to those areas within the possible reach of the defendant.

**CHIMEL v. CALIFORNIA**

Supreme Court of the United States, 1969
395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685

**BACKGROUND & FACTS**

Carrying a warrant for arrest in connection with the burglary of a coin shop, three police officers arrived one afternoon to serve it on Chimel at his home. They were admitted to the house by his wife and waited there for a few minutes until he returned from work. After serving the arrest warrant, the policemen conducted a search of the house lasting about an hour, which turned up several items—mostly coins. These items were later admitted into evidence at Chimel's trial over his objection, and he was subsequently convicted. The California Supreme Court affirmed the conviction, and the defendant appealed.

Mr. Justice STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

* * *

In 1950, [the Court announced its ruling in] United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, the decision upon which California primarily relies in the case now before us. In Rabinowitz, federal authorities had been informed that the defendant was dealing in stamps bearing forged overprints. On the basis of that information they secured a warrant for his arrest, which they executed at his one-room business office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half," and seized 573 stamps with forged overprints. The stamps were admitted into evidence at the defendant's trial, and this Court affirmed his conviction, rejecting the contention that the warrantless search had been unlawful. The Court held that the search in its entirety fell within the principle giving law enforcement authorities "[t]he right to search the place where the arrest is made in order to find and seize things connected with the crime.'" * * * The test, said the Court, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." * * *

Rabinowitz has come to stand for the proposition * * * that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested. And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case. That doctrine, however, * * * can withstand neither historical nor rational analysis.

* * *

* * * When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like
rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. * * *

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest. * * *

The petitioner correctly points out that one result of decisions such as Rabinowitz and Harris [v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947)] is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here, but the fact remains that had he been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant. * * *

Rabinowitz and Harris have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments and the petitioner's conviction cannot stand.

Reversed.

Mr. Justice HARLAN, concurring.

The only thing that has given me pause in voting to overrule Harris and Rabinowitz is that as a result of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961), and Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment. * * *
This federal-state factor has not been an easy one for me to resolve, but in the last analysis I cannot in good conscience vote to perpetuate bad Fourth Amendment law.

Legitimate expectations of privacy are at or near the maximum where, as in Chimel, the police search a private residence. Does that legitimate expectation, however, obligate the police to knock first and announce the purpose of their visit? In Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914 (1995), a unanimous Court held that the Fourth Amendment includes the common law requirement that police first knock and announce before entering a dwelling. The Court took care to point out that this was not an absolute rule, but it was a

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<td>Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980)</td>
<td>In the absence of exigent circumstances, police may not make a nonconsensual entry of a private residence without a warrant to effect a routine felony arrest.</td>
<td>6–3; Chief Justice Burger and Justices White and Rehnquist dissented.</td>
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<td>Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981)</td>
<td>In the absence of consent or emergency circumstances, a law enforcement officer may not constitutionally search for an individual named in an arrest warrant in the home of a third party without first obtaining a search warrant.</td>
<td>7–2; Justices White and Rehnquist dissented.</td>
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<td>Michigan v. Summen, 452 U.S. 692, 101 S.Ct. 2587 (1981)</td>
<td>Where police officers executing a warrant to search a house for narcotics ran into the defendant coming down the front steps and requested his aid in gaining entry, their detention of him inside while they searched the premises until they turned up evidence establishing probable cause to arrest him did not violate the Fourth Amendment, since a warrant to search for contraband implicitly carries with it limited authority to detain occupants of the premises while the search is being conducted. The arrest of the defendant and subsequent search of his person (which turned up some heroin in his coat pocket) was constitutional.</td>
<td>6–3; Justices Brennan, Stewart, and Marshall dissented.</td>
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<td>Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 798 (1984)</td>
<td>Absent emergency circumstances, the warrantless nighttime entry of a suspect’s home to arrest him for a nonjailable traffic offense is prohibited by the special protection the Fourth Amendment affords an individual in his home.</td>
<td>7–2; Justices White and Rehnquist dissented.</td>
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<td>Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990)</td>
<td>A limited protective sweep through the premises in conjunction with an in-the-home arrest is legitimate under the Fourth Amendment when the searching police officer has reasonable belief based on specific and articulable facts that the area of the premises where the sweep is to occur harbors an individual who poses a danger to individuals at the scene.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td>Illinois v. McArthur, 532 U.S. 946, 121 S.Ct. 946 (2001)</td>
<td>Because they feared he might destroy the evidence, police officers, with probable cause to believe that an individual bad marijuana hidden in his house, could constitutionally prevent the man from entering his house for two hours while they obtained a search warrant.</td>
<td>8–1; Justice Stevens dissented.</td>
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factor to be taken into account in assessing the reasonableness of a search. Two years later, in Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416 (1997), the Court reaffirmed this conclusion and held that there were no categorical exceptions to this requirement, saying “We recognized in Wilson that the knock-and-announce requirement could give way under circumstances presenting a threat of physical violence, or where police officers have reason to believe that evidence would be destroyed if advance notice were given.” This judgment would have to be made on a case-by-case basis in light of the facts. But any incentive for police to follow this requirement was effectively undercut by the Court’s subsequent holding in Hudson v. Michigan, 547 U.S. 686, 126 S.Ct. 2159 (2006), that violating the rule would not require suppression of the evidence. A five-Justice majority concluded that applying the exclusionary rule in these circumstances would be a sanction grossly disproportionate to the error police committed.

**Hot Pursuit**

A third exception extends to instances of “hot pursuit” such as those depicted in *Warden v. Hayden*. When police are chasing a suspect and he runs into a building, they are not compelled to risk losing him by having to go back to the courthouse to get a warrant. But the test in such instances is immediacy. The more remote in time the sequence of events becomes, the faster this exception fades.

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**WARDEN V. HAYDEN**

Supreme Court of the United States, 1967

387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782

**BACKGROUND & FACTS** The facts are set out in the Court’s opinion below.

Mr. Justice BRENNAN delivered the opinion of the Court.

* * *

About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of “Holdup,” followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5’8” tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed a robber had entered the house, and asked to search the house. She offered no objection.

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, “was searching the cellar for a man or the money” found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden’s bed, and ammunition for the shotgun was found in a bureau drawer in Hayden’s room. All
these items of evidence were introduced against respondent at his trial.

We agree with the [Maryland] Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid.

* * * The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

* * *

The judgment of the Court of Appeals is reversed.

[Mr. Justice DOUGLAS dissented.]

**Motor Vehicles**

The Court has long recognized searches of automobiles as a fourth exception to the requirement to get a warrant. First recognized in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925), and affirmed in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), the motor vehicle exception is aimed at preventing evidence from being whisked out of the police officer’s grasp and either destroyed or moved beyond the reach of the jurisdiction in which a warrant for search and seizure must be issued. Because of both the mobility of an automobile and the reduced expectation of privacy one has in it (compared to that which a person has within his home), the police officer may search a motor vehicle on the spot if he has probable cause. The parameters of this exception to the warrant requirement are sketched out in COOLIDGE v. NEW HAMPSHIRE. But these parameters have been expanding rapidly. As recent cases clearly show (p. 638), the scope of permissible police conduct in searching a car is now far greater than when a search incident to arrest is conducted at home. Of all the exceptions to the warrant requirement, the Court’s pursuit of crime control values has made this one the area of greatest growth over the past three decades.

**COOLIDGE v. NEW HAMPSHIRE**

Supreme Court of the United States, 1971

403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564

**BACKGROUND & FACTS** During their investigation of the brutal murder of a 14-year-old girl near Manchester, New Hampshire, the police obtained evidence that appeared to implicate Edward Coolidge in the crime. Two witnesses had told police that on the night the girl disappeared and at the site where her body was eventually found, they assisted a man in a parked 1951 Pontiac similar to the one owned by Coolidge. In addition, petitioner’s wife had voluntarily handed over to the police four weapons and some clothing that he owned. (A laboratory test of the guns revealed that one of them was used to kill the girl, although conflicting test results were later presented at the trial.) This and other evidence was brought before the state attorney general, who was in charge of the investigation and who subsequently helped prosecute the case. Acting in his capacity also as a justice of the peace, he issued an arrest warrant and four search warrants including one authorizing seizure of
Coolidge's 1951 Pontiac. (Under a New Hampshire law, all justices of the peace were empowered to issue search warrants.) The police then arrested Coolidge at his home and had the Pontiac, which was parked in the driveway at the time, towed to the police station. An inspection of the car yielded further evidence that was used at the trial to convict Coolidge. The New Hampshire Supreme Court affirmed, and the U.S. Supreme Court granted certiorari. Among several objections raised by petitioner was his contention that the warrant authorizing the seizure and search of his automobile was invalid because it had been issued by someone with a direct and substantial interest in the outcome of the proceedings instead of by a "neutral and detached magistrate" as required by the Fourth and Fourteenth Amendments.

Mr. Justice STEWART delivered the opinion of the Court.

***

The petitioner's first claim is that the warrant authorizing the seizure and subsequent search of his 1951 Pontiac automobile was invalid because not issued by a "neutral and detached magistrate." Since we agree with the petitioner that the warrant was invalid for this reason, we need not consider his further argument that the allegations under oath supporting the issuance of the warrant were so conclusory as to violate relevant constitutional standards. * * *

The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in Johnson v. United States, 333 U.S. 10, 13–14, 68 S.Ct. 367, 369 (1948):

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." * * *

In this case, the determination of probable cause was made by the chief "government enforcement agent" of the State—the Attorney General—who was actively in charge of the investigation and later was to be chief prosecutor at the trial. * * * [The whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the "competitive enterprise" that must rightly engage their single-minded attention. * * *

***

We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all. If the seizure and search are to be justified, they must, therefore, be justified on some other theory.

The State proposes three distinct theories to bring the facts of this case within one or another of the exceptions to the warrant requirement. * * *

[The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established]
and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative." [T]he burden is on those seeking the exemption to show the need for it." * * *

The State's first theory is that the seizure * * * and subsequent search of Coolidge's Pontiac were "incident" to a valid arrest. * * *

Even assuming, arguendo, that the police might have searched the Pontiac in the driveway when they arrested Coolidge in the house, Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964), makes plain that they could not legally seize the car, remove it, and search it at their leisure without a warrant. In circumstances virtually identical to those here, Mr. Justice Black's opinion for a unanimous Court held that "[o]nce an accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the arrest." * * * Search incident doctrine, in short, has no applicability to this case.

The second theory put forward by the State to justify a warrantless seizure and search of the Pontiac car is that under Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925), the police may make a warrantless search of an automobile whenever they have probable cause to do so, and, under our decision last Term in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), whenever the police may make a legal contemporaneous search under Carroll, they may also seize the car, take it to the police station, and search it there. But even granting that the police had probable cause to search the car, the application of the Carroll case to these facts would extend it far beyond its original rationale.

The rationale, set forth in Carroll and affirmed in Chambers, was that, as distinguished from the search of a house or other building, in stopping an automobile on the highway "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." The Court held that it was the prospect of flight of the evidence that produced the exception.]

* * *

Since Carroll would not have justified a warrantless search of the Pontiac at the time Coolidge was arrested, the later search at the station house was plainly illegal, at least so far as the automobile exception is concerned. * * *

The State's third theory in support of the warrantless seizure and search of the Pontiac car is that the car itself was an "instrumentality of the crime," and as such might be seized by the police on Coolidge's property because it was in plain view. * * *

* * *

A[n] object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. Chimel v. California, 395 U.S., at 762–763, 89 S.Ct., at 2039–2040. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. * * *

* * *

It is apparent that the "plain view" exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.

The seizure was therefore unconstitutional, and so was the subsequent search at the station house. Since evidence obtained in the course of the search was admitted at Coolidge's trial, the judgment must be reversed and the case remanded to the New Hampshire Supreme Court. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

* * *

Mr. Justice HARLAN, concurring.
From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man’s property to arrest him and seize a vehicle believed to have been used during the commission of a crime.

I would begin this process of re-evaluation by overruling Mapp v. Ohio* * * and Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963). The former of these cases made the federal “exclusionary rule” applicable to the States. The latter forced the States to follow all the ins and outs of this Court’s Fourth Amendment decisions, handed down in federal cases.

In combination Mapp and Ker have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. Basically these have had two aspects, as I believe an examination of our more recent opinions and certiorari docket will show. First, the States have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. * * *

Second, in order to leave some room for the States to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well. * * *

* * *

Mr. Chief Justice BURGER, dissenting in part and concurring in part.

This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves. See my dissent in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).

On the merits of the case I find not the slightest basis in the record to reverse this conviction. Here again the Court reaches out, strains, and distorts rules that were showing some signs of stabilizing, and directs a new trial which will be held more than seven years after the criminal acts charged.

* * *

Mr. Justice BLACK, concurring and dissenting.

* * *

* * * With respect to the rifle voluntarily given to the police by petitioner’s wife, the majority holds that it was properly received in evidence. I agree. But the Court reverses petitioner’s conviction on the ground that the sweepings taken from his car were seized during an illegal search and for this reason the admission of the sweepings into evidence violated the Fourth Amendment. I dissent.

* * * The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment [unlike the Fifth] did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

Justice BLACK went on to find the seizure in this case incident to a valid arrest. He also chided the majority for “reject[ing] the test of reasonableness provided in the Fourth Amendment and substitut[ing] a per se rule—if the police could have obtained a warrant and did not, the seizure, no matter how reasonable, is void. Continued Justice BLACK, “But the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only ‘unreasonable searches and seizures.’ The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.”*

* * *
Mr. Justice BLACKMUN joins Mr. Justice BLACK in * * * parts of this opinion. * * *

Mr. Justice WHITE, with whom THE CHIEF JUSTICE joins, concurring and dissenting.

I would affirm the judgment. In my view, Coolidge's Pontiac was lawfully seized as evidence of the crime in plain sight and thereafter was lawfully searched. * * *

[Justice WHITE examined at considerable length the consequences of the inadvertence rule imposed by the Court in searches conducted without a warrant, concluding that it "seems a punitive and extravagant application of the exclusionary rule." ]

### OTHER CASES ON AUTOMOBILE SEARCHES

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<td>Texas v. White, 423 U.S. 67, 96 S.Ct. 304</td>
<td>Where police had probable cause to search the defendant's car immediately after he had been arrested at the scene for attempting to pass fraudulent checks, probable cause was still held to exist and thus support a warrantless search of the defendant's auto at the station house.</td>
<td>7-2; Justices Brennan and Marshall dissented.</td>
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<td>South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)</td>
<td>Since cars afford much less expectation of privacy than homes, police can routinely search and inventory contents of impounded cars so as to adequately secure and guard them even if the car is already locked, but where some valuables sitting on the dashboard and rear seat are visible.</td>
<td>5-4; Justices Brennan, Stewart, White, and Marshall dissented.</td>
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<td>Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978)</td>
<td>A legitimate occupant of an automobile does not have standing to challenge a search of the vehicle unless he happens to own or have a property interest in it.</td>
<td>5-4; Justices Brennan, White, Marshall, and Stevens dissented.</td>
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<td>New York v. Belton, 453 U.S. 454, 101 S.Ct. 2066 (1981)</td>
<td>&quot;When the occupant of an automobile is subjected to a lawful custodial arrest, * * * the constitutionally permissible scope of a search incident to his arrest include[s] the passenger compartment of the vehicle in which he was riding * * *.&quot;</td>
<td>6-3; Justices Brennan, White, and Marshall dissented.</td>
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<td>California v. Camery, 471 U.S. 366, 105 S.Ct. 2066 (1985)</td>
<td>Law enforcement officers did not violate the Fourth Amendment when they conducted a warrantless search based on probable cause of a mobile motor home located in a public place. Such a warrantless search is justified both by the ready mobility of the vehicle (thus bringing it within the motor vehicle exception to the warrant requirement) and by the reduced expectation of privacy that attaches to such a vehicle that is found stationary in a place not regularly used for residential purposes.</td>
<td>6-3; Justices Brennan, Marshall, and Stevens dissented.</td>
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<td>Florida v. Jimeno, 500 U.S. 245, 111 S.Ct. 1801 (1991)</td>
<td>Where a suspect has given police consent to search his car and has not placed any explicit limitation on the scope of the search, such consent could legitimately be pressed to extend to a search of closed containers in the car.</td>
<td>7-2; Justices Marshall and Stevens dissented.</td>
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### Other Cases on Automobile Searches — Continued

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<td>California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982 (1991)</td>
<td>Police may search a container located in an automobile and need not hold the container pending the issuing of a warrant even though they lack probable cause to search the vehicle as a whole; probable cause that the container holds contraband or evidence is sufficient. The fact that police have probable cause to search the container, however, does not justify a search of the entire vehicle.</td>
<td>6–3; Justices White, Marshall, and Stevens dissented.</td>
</tr>
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<td>Knowles v. Iowa, 525 U.S. 120, 119 S.Ct. 484 (1998)</td>
<td>Where the driver has been issued only a citation for speeding and not been arrested, police may not conduct a full-blown search of the driver or the passenger compartment.</td>
<td>9–0.</td>
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<td>Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999)</td>
<td>Where a police officer during a routine traffic stop noticed a hypodermic syringe in the driver's dress shirt pocket, which he admitted he used to take drugs, the officer was entitled to search the entire passenger compartment and any of the driver's or passengers' belongings or containers capable of holding suspected contraband.</td>
<td>6–3; Justices Stevens, Souter, and Ginsburg disented.</td>
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<td>Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999)</td>
<td>The &quot;automobile exception&quot; to the warrant requirement has no separate emergency requirement. Where police have probable cause to believe that an automobile contains drugs, no warrant is necessary if the car is readily mobile. They need not show an actual immediate prospect that the vehicle will be moved in order to proceed without a warrant.</td>
<td>7–2; Justices Stevens, and Breyer dissented, but not on this issue.</td>
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<td>Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001)</td>
<td>The Fourth Amendment does not prohibit being handcuffed and taken into custody for a misdemeanor—such as failure to buckle your seatbelt—that is punishable only by a fine.</td>
<td>5–4; Justices Stevens, O'Connor, Ginsburg, and Breyer dissented.</td>
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<td>Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004)</td>
<td>When an officer has made a lawful custodial arrest of the occupant of a vehicle, a search of the passenger compartment is justified as incident to the arrest. It makes no difference whether the occupant was inside or outside the car when the officer initiated contact.</td>
<td>9–0.</td>
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<td>Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834 (2005)</td>
<td>Following a routine traffic stop, police may walk a sniffing dog around the vehicle without having any particularized suspicion that the car contains narcotics. Since the dog alerts only to contraband, the practice cannot &quot;compromise any legitimate interest in privacy.&quot;</td>
<td>6–2; Justices Souter and Ginsburg dissented. Chief Justice Rehnquist did not participate.</td>
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<td>Brendlin v. California, 551 U.S. —, 127 S.Ct. 2400 (2007)</td>
<td>When police make a traffic stop, a passenger in the car, just like the driver, may challenge the stop's constitutionality because no reasonable person in his position would have believed himself free to terminate the encounter with the police and leave.</td>
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Plain Sight

Material may also be seized without a warrant when it is in “plain sight.” This exception to the warrant requirement can be triggered in two different contexts. In one, illustrated by California v. Ciraolo below, the individual has exposed something to public view, and when that occurs, the owner’s expectation of privacy has been surrendered. There is no constitutional requirement that a police officer ignore what is there for all to see, but the issue that divided the Justices in Ciraolo was whether in fact Ciraolo had exposed the contents of his backyard to public view. The second “plain sight” context is illustrated by more recent cases (p. 647). In these instances, police in the course of conducting a valid search have turned up other evidence. Certainly police officers are not compelled to avert their eyes when they come across other criminal evidence in the course of making a valid search. Although coming across evidence in “plain sight” need not be inadvertent, it is a requirement that, when the police officer sees the material in question, he must have probable cause to believe it is linked to criminal activity. The Court has also recognized the existence of a “plain touch” exception (see p. 645).

**California v. Ciraolo**

Supreme Court of the United States, 1986

476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210

Background & Facts An anonymous caller phoned the Santa Clara police with a tip that Ciraolo was growing marijuana in his backyard. Unable to observe the yard from ground level because it was shielded by a 6-foot outer fence and a 10-foot inner fence, Officer Shutz, who was assigned to investigate, secured a private plane in which to fly over the area. On the fly-over, which was conducted at an altitude of about 1,000 feet, Officer Shutz was accompanied by Officer Rodriguez, who was also trained in marijuana identification. Looking down into the yard, the officers readily identified Ciraolo’s marijuana plants with the naked eye and took pictures of them. Shutz appended one of the photos to the warrant affidavit, and the search warrant was subsequently issued. After a trial court denied Ciraolo’s motion to suppress the evidence seized, he pleaded guilty to cultivation of marijuana. However, a state appellate court reversed the conviction on grounds that the evidence had been obtained only by violating a legitimate expectation of privacy that Ciraolo had in his backyard. The state then petitioned the U.S. Supreme Court for certiorari.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

The touchstone of Fourth Amendment analysis is whether a person has a “constitutionally protected reasonable expectation of privacy.” Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 516 (1967) (Harlan, J., concurring). Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?**

[R]espondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits.** It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent took normal precautions to maintain his

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus. Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. * * *

We turn, therefore, to the second inquiry under Katz, i.e., whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity, but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver v. United States, 466 U.S., at 181–183, 104 S.Ct., at 1742–1744.

Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the Fourth Amendment without a warrant. The history and genesis of the curtilage doctrine are instructive. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver, supra, 466 U.S., at 180, 104 S.Ct., at 1742 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532 (1886)). * * * The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. * * * Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible. * * * "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, supra, 389 U.S., at 351, 88 S.Ct., at 511.

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace * * * in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. * * * Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent’s expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

* * * In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

Reversed.

Justice POWELL, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

* * *
Respondent’s yard unquestionably was within the curtilage. Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant. * * *

The Court’s holding, * * * must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. * * * One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air. * * *

This line of reasoning is flawed. * * * [T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court’s suggestion, * * * people do not “‘knowingly expos[e]’ ” their residential yards “‘to the public’ “ merely by failing to build barriers that prevent aerial surveillance.

* * * [T]he Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.

* * *

* * * Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in Katz was designed to prevent silent and unseen invasions of Fourth Amendment privacy rights in a variety of settings, we have consistently afforded heightened protection to a person’s right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the longstanding presumption that warrantless intrusions into the home are unreasonable. * * *

But would simply moving the marijuana-growing operation inside effectively end the risk of surveillance? In Kyllo v. United States, which follows, the Court turned its attention to police detection of a marijuana-growing operation brought indoors, an agricultural enterprise whose success was made possible by the use of high-intensity lights. Much like the Olmstead case (p. 689), where the development of audio technology (the telephone) used by Prohibition law-breakers gave rise to constitutional questions surrounding the use of police counter-technology (wiretapping)—or the Ciraolo case, where flight technology made possible visual inspection of the defendant’s backyard—the growers’ in-the-home use of high-intensity lamps spawned constitutional questions about police reliance upon the technology of thermal imaging to detect the illicit activity. Unlike Ciraolo, however, the Court’s decision in Kyllo produced a most unusual voting alignment.
BACKGROUND & FACTS

Suspecting that Kyllo was growing marijuana in his home, police scanned his residence with a thermal imager, a device with the capacity to detect high degrees of heat. They believed that the unusual heat emanating from his residence was consistent with that given off by high-intensity lamps being used in an indoor marijuana-growing operation. The scan of Kyllo’s triplex revealed much more heat being given off from his garage roof and side wall than from neighboring units. Based in part on this thermal scan, police secured a warrant to search Kyllo’s home where they found he was indeed growing marijuana. Kyllo was subsequently convicted of violating federal drug laws. At trial and on appeal, the defendant argued that the warrantless thermal scan tainted the search warrant. A divided federal appeals court ultimately upheld the search on the grounds that Kyllo exhibited no subjective expectation of privacy—because he took no steps to conceal the heat emissions from his home—and, even if he had, he had no reasonable objective expectation of privacy, because the imager did not expose any intimate details of his life—only “hot spots” on the roof and wall. Upon Kyllo’s petition, the Supreme Court granted certiorari.

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

***

"At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 683 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable must be answered no.

***

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

*** While it may be difficult to refine [the test set out in] Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Government maintains that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." But
just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in Katz, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development. * * *

The Government also contends that the thermal imaging was constitutional because it did not “detect private activities occurring in private areas.” * * *

Limiting the prohibition of thermal imaging to “intimate details” would not only be wrong in principle; it would be impractical in application, failing to provide “a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment” * * *.

To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the “intimacy” of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are “intimate” and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up “intimate” details—and thus would be unable to know in advance whether it is constitutional. * * *

We have said that the Fourth Amendment draws “a firm line at the entrance to the house” * * *.

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant. * * *

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom THE CHIEF JUSTICE [REHNQUIST], Justice O’CONNOR, and Justice KENNEDY join, dissenting.

[It is * * * well settled that searches and seizures of property in plain view are presumptively reasonable. * * * Whether that property is residential or commercial, the basic principle is the same: ”What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”] California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 1813 (1986) (quoting Katz v. United States * * *). That is the principle implicated here.

[This case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner’s home. All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner’s home; all that those measurements showed were relative differences in emission
levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. * * * [N]o details regarding the interior of petitioner’s home were revealed. Unlike an x-ray scan, or other possible “through-the-wall” techniques, the detection of infrared radiation emanating from the home did not accomplish “an unauthorized physical penetration into the premises,” Silverman v. United States, 365 U.S. 505, 509, 81 S.Ct. 679, 681 (1961), nor did it “obtain information that it could not have obtained by observation from outside the curtilage of the house,” United States v. Karo, 468 U.S. 705, 715, 104 S.Ct. 3296, 3303 (1984).

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

***

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment’s protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner’s home, and while it did pick up “details of the home” that were exposed to the public, * * * it did not obtain “any information regarding the interior of the home,” * * * (emphasis added). In the Court’s own words, based on what the thermal imager “showed” regarding the outside of petitioner’s home, the officers “concluded” that petitioner was engaging in illegal activity inside the home. * * * [T]he only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, see California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625 (1988), or pen register data, see Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577 (1979), or, as in this case, subpoenaed utility records * * *. For the first time in its history, the Court assumes that an inference can amount to a Fourth Amendment violation. * * *

***

* * * Just as “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,” * * * so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with “sense-enhancing technology,” * * * and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

***

Is there a “plain touch” exception as well? Speaking for the Court in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), Justice White answered “yes.” Summing up the justification for such an exception, he wrote: “Under * * * [the ‘plain view’] doctrine, if police are lawfully in a position from which they view an object, if its
incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. * * * [T]his doctrine has an obvious analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. In this case, the defendant was observed leaving a notorious crack house and engaged in behavior to evade police when he spotted the marked squad car. Dickerson was stopped in a nearby alley and, in the course of a routine patdown to check for weapons, the officer “felt a lump, a small lump in the front [jacket] pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane.” The officer then pulled a small plastic bag containing a fifth of a gram of cocaine from the defendant’s pocket. The cocaine was held to be inadmissible because, as Justice White explained: “Although the officer was lawfully in a position to feel the lump in respondent’s pocket, because Terry entitled him to place his hands upon respondent’s jacket, * * * the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by Terry, or by any other exception to the warrant requirement. Because this further search of respondent’s pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional.” The “further search” consisted of “squeezing, sliding, and otherwise manipulating the contents of the defendant’s pocket—a pocket which the officer already knew contained no weapon.” Although the U.S. Supreme Court’s decision that there is a “plain touch” exception is binding as a matter of federal constitutional law, some state supreme courts have rejected it as a matter of state constitutional law. See People v. Diaz, 81 N.Y.2d 106, 595 N.Y.S.2d 940, 612 N.E.2d 298 (1993); State v. Broadnax, 98 Wash.2d 289, 654 P.2d 96 (1982).

In what Justice Breyer’s dissent lamented as an “emerging jurisprudence of squeezes,” the Court turned its attention seven years later, in Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462 (2000), to the question “whether a law enforcement officer’s physical manipulation of a bus passenger’s carry-on luggage violated the Fourth Amendment’s proscription against unreasonable searches.” In this case, a U.S. Border Patrol agent boarded a bus at a permanent checkpoint to check the immigration status of passengers. After he had completed this procedure, the Border Patrol agent squeezed the soft-sided luggage that passengers had placed in the overhead storage area above their seats. After squeezing a green opaque canvas bag belonging to Bond and feeling a brick-like object, the agent asked him if he could open the bag and look in it. Bond agreed. The agent subsequently discovered a “brick” of methamphetamine wrapped in duct tape and rolled in a pair of pants. The seven-Justice majority disagreed with the government’s contention that by exposing his soft luggage to public view, Bond has forfeited any legitimate expectation of privacy that his luggage would not be squeezed. Declaring that “[p]hysically invasive inspection is simply more intrusive than purely visual inspection[,]” Chief Justice Rehnquist spoke for the Court: “When a bus passenger places a bag in an overhead bin, he expects that other bus passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag be handled. He does not expect that other bus passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here.” In Justice Breyer’s view, however, the officer’s handling of Bond’s bag was not much different than what could be expected when soft luggage in overhead bins was moved about by other passengers. Apprehensive about the possibility of deciding future cases on a squeeze-by-squeeze basis, he said, “[T]he traveler who wants to place a bag in a shared overhead bin and yet safeguard its contents from public touch should plan to pack those contents in a suitcase with hard sides * * *.”
Just as police need not have written permission before they can chase a fleeing suspect into a building, so firefighters need not stop at the courthouse to get a warrant before they enter a burning building. Genuine emergencies excuse the warrant requirement. The problem, illustrated in Michigan v. Tyler, which follows, lies not so much in disputing whether an emergency occurred, but in deciding when it ended.

### Other Cases on the "Plain Sight" Exception

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<thead>
<tr>
<th>Case</th>
<th>Ruling</th>
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<td>Washington v. Chrisman, 455 U.S. 1, 102 S.Ct. 812 (1982)</td>
<td>Where a university police officer arrested a college student for underage drinking and where the student then asked to go to his room so that he could get some identification, it was not a violation of the Fourth Amendment for the officer to accompany the student and, once in the room, to seize contraband in plain sight. The officer saw seeds and a pipe that smelled of marijuana lying on a desk, read the student his Miranda rights, and asked if there were any other drugs in the room. After waiving his rights, the student handed the officer a box containing some plastic bags of marijuana and money, and a search of the room later turned up more drugs.</td>
<td>6–3; Justices Brennan, White, and Marshall dissented.</td>
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<td>Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987)</td>
<td>A gun was fired through the floor of the defendant's apartment, injuring a man in the apartment below. Police entered the defendant's apartment to find the individual who fired the gun and get the weapon. Where police found and seized several weapons, including a sawed-off shotgun; found a stocking mask; and, on a hunch that certain stereo components might be stolen, copied down the serial numbers of the equipment, subsequent seizure of the stereo equipment as evidence of the theft was unconstitutional. At the time police recorded the serial numbers, they did not have probable cause to believe the equipment was stolen; they were operating only on a hunch.</td>
<td>6–3; Chief Justice Rehnquist and Justices Powell and O'Connor dissented.</td>
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<td>Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529 (1988)</td>
<td>The Fourth Amendment does not require the exclusion of evidence first discovered during police officers' illegal entry of private premises if that evidence is still in plain sight during the course of a subsequent search pursuant to a valid warrant that is completely independent of, and therefore untainted by, the initial illegal entry.</td>
<td>4–3; Justices Marshall, Stevens, and O'Connor dissented. Justices Brennan and Kennedy did not participate.</td>
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<td>Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990)</td>
<td>&quot;Plain sight&quot; seizures need not be inadvertent. Where police had probable cause to search the defendant's home for the proceeds of an armed robbery and the weapons used, but the warrant authorized a search for only the stolen property, the police legitimately seized the weapons that were in plain sight. It made no difference that they had hoped to find them. Sufficient protection for privacy interests is afforded by the requirement that the warrant particularly describe what is to be seized.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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**Emergencies and Inspections**

Just as police need not have written permission before they can chase a fleeing suspect into a building, so firefighters need not stop at the courthouse to get a warrant before they enter a burning building. Genuine emergencies excuse the warrant requirement. The problem, illustrated in Michigan v. Tyler, which follows, lies not so much in disputing whether an emergency occurred, but in deciding when it ended.
The exception in Tyler excusing emergencies arises, however, only because of the general rule that the police are not the only public officials under an obligation to first procure a warrant before entering private property. Administrative searches as well as law enforcement ones are covered by the warrant requirement, as the Court held in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967), when it included visits by the city building inspector within the protection of the Fourth Amendment. A companion case, See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967), extended the requirement as well to inspections of commercial premises by the city fire marshal. Where refusal to permit an inspection, plus discovery of conditions that might violate local law, make a person liable to criminal charges, the Court has held that a warrant—but not necessarily one resting upon probable cause—is required. Thus, in Tyler, after the blaze had been extinguished, reentering to search for evidence of arson required an administrative warrant or notice to the owner. Some warrantless regulatory visits and inspections, however, have been held not to violate the Fourth Amendment. For example, in Wyman v. James, 400 U.S. 309, 91 S.Ct. 381 (1971), the Court held that home visitation with advance notice by caseworkers to ensure compliance with state regulations by individuals receiving public welfare payments did not constitute a search within the meaning of the Fourth Amendment. Camara's refusal to permit the inspection triggered a criminal prosecution; Ms. James' refusal to admit the caseworker, said the Court, resulted only in the loss of benefits. In Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978), the Court invalidated routine warrantless inspections to enforce federal standards imposed by the Occupational Safety and Health Act of 1970 (OSHA), but noted "[c]ertain industries have such a history of governmental oversight that no reasonable expectation of privacy * * * could exist for a proprietor over the stock of such an enterprise. Liquor * * * and firearms * * * are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to submit himself to a full arsenal of government regulation." This list of well-regulated entrepreneurs also now includes mine operators and junkyard dealers (see Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981); New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636 (1987)).

**MICHIGAN v. TYLER**

_Supreme Court of the United States, 1978_

436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486

**BACKGROUND & FACTS** Shortly before midnight on January 21, 1970, a fire broke out in Tyler and Tompkins' furniture store. Two hours later when the fire chief arrived at the scene as the smoldering embers were being hosed down, he learned that two plastic containers of flammable liquid had been found. He entered the building, examined the containers, and called a police detective to investigate the possibility of arson. The detective subsequently took pictures of the containers and the gutted building, but ceased his efforts due to the smoke and the steam. When the fire had been completely extinguished at approximately 4 A.M., the fire chief and the detective left and took the containers with them. Four hours later, the fire chief and one of his assistants returned for a brief examination of the building, and an hour after that the assistant and the detective showed up again for another inspection of the premises in the course of which additional pieces of evidence were removed. Nearly a month later, a state police arson investigator took still more photographs of the building; this visit was followed by several other inspections, which turned up further evidence and information. None of these inspections or searches was conducted with a warrant or with the defendants' consent. Evidence and testimony based upon these searches were admitted at trial to convict the defendants. The state supreme court
reversed the convictions, however, ruling that “[o]nce the blaze has been extinguished and the firefighters have left the premises, a warrant is required to reenter and search the premises, unless there is consent or the premises have been abandoned.”

Mr. Justice STEWART delivered the opinion of the Court.

***

As this Court stated in Camara v. Municipal Court, 387 U.S., at 528, 87 S.Ct., at 1730, the “basic purpose of this Amendment * * * is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967); Marshall v. Barlow’s, Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978). * * * These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

The petitioner argues, however, that an entry to investigate the cause of a recent fire is outside that protection because no individual privacy interests are threatened. If the occupant of the premises set the blaze, then, in the words of the petitioner’s brief, his “actions show that he has no expectation of privacy” because “he has abandoned those premises within the meaning of the Fourth Amendment.” And if the fire had other causes, “the occupants of the premises are treated as victims by police and fire officials.” In the petitioner’s view, “[t]he likelihood that they will be aggrieved by a possible intrusion into what remains of their privacy in badly burned premises is negligible.”

This argument is not persuasive. For even if the petitioner’s contention that arson establishes abandonment be accepted, its second proposition—that innocent fire victims inevitably have no protectible expectations of privacy in whatever remains of their property—is contrary to common experience. People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. The petitioner may be correct in the view that most innocent fire victims are treated courteously and welcome inspections of their property to ascertain the origin of the blaze, but “even if true, [this contention] is irrelevant to the question whether the * * * inspection is reasonable within the meaning of the Fourth Amendment.” Camara, 387 U.S., at 536, 87 S.Ct., at 1735. Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the petitioner’s argument unravels. For it is of course impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction.

Thus, there is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, “one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” Camara, supra, at 528–529, 87 S.Ct., at
1731. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists. * * *

* * * To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum. * * *

In addition, even if fire victims can be deemed aware of the factual justification for investigatory searches, it does not follow that they will also recognize the legal authority for such searches. As the Court stated in Camara, "when the inspector demands entry [without a warrant], the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U.S., at 532, 87 S.Ct., at 1732. Thus, a major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality. * * *

In short, the warrant requirement provides significant protection for fire victims in this context, just as it does for property owners faced with routine building inspections. As a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment. In the words of the Michigan Supreme Court: "Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution." But "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply." 399 Mich., at 584, 250 N.W.2d, at 477. Since all the entries in this case were "without proper consent" and were not "authorized by a valid search warrant," each one is illegal unless it falls within one of the "certain carefully defined classes of cases" for which warrants are not mandatory. Camara, supra, at 528–529, 87 S.Ct., at 1731.

* * *

A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. * * * Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor
by Chief See’s removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.

***

The entries occurring after January 22, however, were clearly detached from the initial exigency and warrantless entry. Since all of these searches were conducted without valid warrants and without consent, they were invalid under the Fourth and Fourteenth Amendments, and any evidence obtained as a result of those entries must, therefore, be excluded at the respondents’ retrial.

In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. *** Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. ***

These principles require that we affirm the judgment of the Michigan Supreme Court ordering a new trial.

Affirmed.

Mr. Justice BRENnan took no part in the consideration or decision of this case.

Mr. Justice STEVENS, concurring in part and concurring in the judgment.

***

In particular, I cannot agree with the Court’s suggestion that, if no showing of probable cause could be made, “the warrant procedures governing administrative searches,” *** would have complied with the Fourth Amendment. In my opinion, an “administrative search warrant” does not satisfy the requirements of the Warrant Clause. *** Nor does such a warrant make an otherwise unreasonable search reasonable.

A warrant provides authority for an unannounced, immediate entry and search. No notice is given when an application for a warrant is made and no notice precedes its execution; when issued, it authorizes entry by force. In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry, *** I believe the sovereign must provide fair notice of an inspection.

The Fourth Amendment interests involved in this case could have been protected in either of two ways—by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed. Since the entry on February 16 was not authorized by a warrant and not preceded by advance notice, I concur in the Court’s judgment and in [p]arts *** of its opinion.

Mr. Justice WHITE, with whom Mr. Justice MARSHALL joins, concurring in part and dissenting in part.

***

*** To hold that some subsequent re-entries are “continuations” of earlier ones will not aid firemen, but confuse them, for it will be difficult to predict in advance how a court might view a re-entry. In the end, valuable evidence may be excluded for failure to seek a warrant that might have easily been obtained.

Those investigating fires and their causes deserve a clear demarcation of the constitutional limits of their authority. Today’s opinion recognizes the need for speed and focuses attention on fighting an ongoing blaze. The fire truck need not stop at the courthouse in rushing to the flames. But once the fire has been extinguished and the firemen have left the premises, the emergency is over. Further intrusion on private property can and should be accompanied by a warrant indicating the authority under which the firemen presume to enter and search.
Mr. Justice REHNQUIST, dissenting.

I agree with my Brother STEVENS, for the reasons expressed in his dissenting opinion in Marshall v. Barlow’s, Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978) (STEVENS, J., dissenting), that the “Warrant Clause has no application to routine, regulatory inspections of commercial premises.” Since in my opinion the searches involved in this case fall within that category, I think the only appropriate inquiry is whether they were reasonable. The Court does not dispute that the entries which occurred at the time of the fire and the next morning were entirely justified, and I see nothing to indicate that the subsequent searches were not also eminently reasonable in light of all the circumstances.

***

Street Stops

Another exception to the warrant requirement is the “stop and frisk” incident. Created by the Court’s holding in Terry v. Ohio below, this exception justifies the act of a police officer in stopping and questioning someone whom he reasonably suspects is engaged in criminal activity. Under such circumstances, the probable cause requirement is also obviated. The officer, however, must be operating on the basis of an articulable suspicion, not merely a hunch. Terry itself seems to focus largely on the question whether officers can “pat down” suspects whom they have temporarily detained, but Justice Harlan correctly identifies the all-important first question—whether officers have the authority to stop suspects at all. Justice Douglas’s objection to departing from the probable cause standard in such street encounters has been overwhelmed by succeeding cases that have focused almost exclusively on trying to sketch the limits of “reasonable suspicion.” Considered together with Sibron and Peters (p. 656), two companion cases decided with Terry, the Court tried to provide examples of what would count for reasonable suspicion and what would not. Do these cases, taken together with subsequent decisions (p. 660), clearly mark the boundary lines of such encounters so that both the officer and the citizen will be able to recognize when a legitimate “stop” has occurred? It would be particularly appropriate here to review the earlier discussion of the constitutional bounds of a “patdown” following a legitimate street stop (see pp. 653–654).

TERRY V. OHIO

Supreme Court of the United States, 1968

392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

BACKGROUND & FACTS At approximately 2:30 one afternoon, Detective Martin McFadden was patrolling in downtown Cleveland. His attention was attracted by two men, petitioner Terry and his cohort. McFadden testified that he had never seen the men before, but that routine habits of observation, which he had developed in over 40 years with the police force, led him to conclude that they “didn’t look right.” He took up an observation post in a doorway several hundred yards away and continued to watch them. His suspicions were aroused further when he saw one of the men walk past some stores, pause, look in a store window, walk on a short distance, turn around, pause, look in the same window, and then rejoin his companion at the corner. In all, this ritual was repeated about a dozen times. At one point, the two men were joined by a third, and they conferred together at the corner. These observations led McFadden to surmise that the men were “casing” the store for
a prospective robbery. He decided to investigate. McFadden approached the three men he had seen at the corner, identified himself as a police officer, and asked for their names, an inquiry to which he received a mumbled response. Because he thought they might have a gun, McFadden "grabbed * * * Terry, spun him around * * * and patted down the outside of his clothing." He felt a pistol in Terry's left breast pocket, but could not remove the gun by reaching inside to the coat pocket, so he told the men to step into a store where he took off Terry's coat and confiscated the revolver. After "putting down" the other two men, McFadden found another gun. He then asked the proprietor of the store to call the police, and the men were taken to the police station, where Terry and his companions were booked for carrying concealed weapons. Both were convicted on the charge and sentenced to from one to three years' imprisonment. Defendants moved before the trial to suppress the evidence on grounds McFadden's actions constituted an unreasonable search and seizure under the Fourth and Fourteenth Amendments. A state appellate court later affirmed the convictions, the Ohio Supreme Court dismissed the appeal, and Terry petitioned the U.S. Supreme Court for certiorari.

Mr. Chief Justice WARREN delivered the opinion of the Court.

* * *

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. * * *

* * * The question is whether in all the circumstances of this on-the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure.

* * *

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." * * * It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrest" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seize" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. * * *

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. * * * We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police
conduct if the officers stop short of something called a "technical arrest" or a "full-blown search.

***

[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.

***

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.

Mr. Justice HARLAN, concurring.

***

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

***

The state courts held * * * that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right * * * to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have
constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner’s protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime. 

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet. * * * Officer McFadden’s right to interrupt Terry’s freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer’s right to take suitable measures for his own safety followed automatically. * * *

Mr. Justice WHITE, concurring. * * *

* * * There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will follow. If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. * * * Constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

Mr. Justice DOUGLAS, dissenting. I agree that petitioner was “seized” within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a “search.” But it is a mystery how that “search” and that “seizure” can be constitutional by Fourth Amendment standards, unless there was “probable cause” to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

The opinion of the Court disclaims the existence of “probable cause.” If loitering were in issue and that was the offense charged, there would be “probable cause” shown. But the crime here is carrying concealed weapons; and there is no basis for concluding that the officer had “probable cause” for believing that the crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of “probable cause.” We hold today that the police have greater authority to make a “seizure” and conduct a “search” than a judge has to authorize such action. We have said precisely the opposite over and over again. * * *
BACKGROUND & FACTS: These controversies were companion cases to Terry v. Ohio (p. 652) and involved the application of a New York statute, the provisions of which were nearly identical to the guidelines set down by the Supreme Court in Terry. Both Sibron and Peters were convicted in state courts on the basis of evidence taken from them by police under “stop and frisk” conditions and both challenged the constitutionality of police officers’ actions in obtaining the evidence. Sibron was convicted of heroin possession. He moved to suppress the evidence taken from him by Brooklyn Patrolman Anthony Martin. During the eight hours of his beat patrol, Martin testified that he saw Sibron in conversation with several known narcotics addicts, but he did not overhear any of the conversations or see anything pass between Sibron and the others. Near midnight, Martin entered a restaurant, saw Sibron speak with three more known addicts, but again overheard nothing and saw nothing pass between them. As Sibron was eating pie and coffee, Martin came over to him and told him to step outside. Once outside, Martin told Sibron, “You know what I am after.” Sibron mumbled something and reached into his pocket, whereupon Martin shoved his hand into the same pocket and discovered several glassine envelopes that turned out to contain heroin.

Peters was convicted of possessing burglary tools with the intent to use them in the commission of a crime. The tools were taken from him at the time he was arrested. The arrest occurred in the same building in which police officer Samuel Lasky lived. Lasky testified that he had just finished showering and was drying himself off when he heard a noise at his apartment door. When he looked through the peephole in the door, he saw two men tiptoeing away toward the stairway. Lasky called the police, threw on some civilian clothes, and took his service revolver. Another quick look out the peephole disclosed that the two men were continuing to tiptoe away. Lasky had lived in the building for 12 years and said he did not recognize either of the men. Believing the two to be burglars in the process of casing apartments in the building, Lasky opened his front door and slammed it behind him, whereupon the two men fled down the stairs. Lasky chased them and grabbed Peters by the collar two flights down. Lasky asked Peters what he was doing in the building and Peters offered an unconvincing explanation, so Lasky patted him down for weapons. Discovering a hard object in Peters’ pocket that he thought might be a knife, Lasky removed it and found an opaque plastic envelope containing burglar tools.

Mr. Chief Justice WARREN delivered the opinion of the Court.

* * * The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. * * *

Turning to the facts of Sibron’s case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman
Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might * * * “have been talking about the World Series.” The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual’s personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. * * *

If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. * * * In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. * * * Patrolman Martin’s testimony reveals no such facts. The suspect’s mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—“You know what I am after”—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron’s pocket.

Even assuming arguendo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron’s pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment. * * *

We think it is equally clear that the search in Peters’ case was wholly reasonable under the Constitution. * * * By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The officer heard strange noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea [criminal intent], and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. * * *

[Although] a search incident to a lawful arrest may not precede the arrest and serve
as part of its justification[,] it is clear that [Peters'] arrest had, for purposes of constitutional justification, already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. * * * At that point he had the authority to search Peters, and the incident search was obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." * * * Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

* * *

[Peters' conviction was affirmed; Sibron’s conviction was reversed.]

* * *

Mr. Justice BLACK, concurring and dissenting.

I concur in the affirmance of the judgment against Peters but dissent from the reversal of * * * Sibron v. New York, and would affirm that conviction. * * *

* * *

I think there was probable cause for the policeman to believe that when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him. * * *

In Peters, it wasn’t simply that the defendant ran from the scene but also his behavior before the officer slammed the door that created reasonable suspicion about criminal activity. But what if someone does nothing more than run when he sees a policeman? Is the act of running by itself enough to provide reasonable suspicion? In Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000), the Supreme Court rejected both the absolute rule that flight in itself is enough and its opposite, that flight alone is not sufficient. The fact that a suspect flees when he sees a police officer is one of many factors to be considered. Whether reasonable suspicion exists depends upon the totality of the circumstances—"the big picture"—to use Justice Ginsburg’s phrase.

**NOTE—WHEN MAY POLICE OFFICERS USE DEADLY FORCE?**

Tennessee law permitted police officers to use deadly force in order to capture suspects fleeing the scene of both violent and nonviolent felonies. Relying upon such authorization, a police officer killed an unarmed 15-year-old youth fleeing from the nighttime burglary of an unoccupied home. After the officer shined a light on the boy and shouted to him to stop, he fired at the upper part of the boy’s body as the youth tried to jump a backyard fence. Although the officer saw no weapon and thought, but was not certain, that the boy was unarmed, he fired because he believed that the youth would elude capture in the dark. The boy’s father subsequently brought a wrongful death suit against the officer, the city police department, and the City of Memphis under the federal civil rights statutes. A federal district court found for the defendants, but this judgment was reversed on appeal.

In its decision in this case, Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985), the Supreme Court, per Justice White, held that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others." Beginning from the premise that, "[w]henever an
officer restrains the freedom of a person to walk away, he has seized that person," Justice White reasoned that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Reaffirming the principle that the reasonableness of a seizure is to be determined "by balancing the extent of the intrusion against the need for it," Justice White declared that "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him." Although the governmental interests in effective law enforcement were weighty, Justice White observed that "[t]he intrusiveness of a seizure by means of deadly force is unmatched" and "[t]he use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." Moreover, Justice White questioned whether effectiveness in making arrests required resorting to deadly force, since "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects." He concluded:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower about does not always justify killing the suspect. A police officer may not seize an unarmed nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

In a dissent in which she also spoke for Chief Justice Burger and Justice Rehnquist, Justice O'Connor charged the majority with "creating a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape." She continued: "The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures." Pointing out that "burglary is a serious and dangerous felony" that poses real risk of serious harm to persons as well as to property, she added, "Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect." With respect to "the Court's silence on critical factors in the decision to use deadly force," she declared:

Police are given no guidance for determining which objects, among an array of potential lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide "probable cause" for believing that a suspect "poses a significant threat of death or serious physical injury," * * * when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime.

Unlike the burglar in Garner, a motorist fleeing police in a high-speed auto chase did endanger others. Thus, in Scott v. Harris, 550 U.S. —, 127 S.Ct. 1769 (2007), the Court held that a police officer's attempt to terminate a dangerous car chase that threatened the lives of innocent bystanders did not violate the Fourth Amendment, even when it placed the fleeing motorist at risk of serious injury or death. In Harris, the police rammed the speeding driver's car. An accident resulted that left the driver a quadriplegic. A nearly-unanimous Court ruled that the police decision to force the driver off the road was reasonable in light of
the need to protect pedestrians and other motorists from “a Hollywood-style car chase of the most frightening sort.” (The Court took the unusual step of posting on its website not only its opinion but also the 15-minute video of the chase which had been recorded by a camera mounted on the dashboard of the squad car.)

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<td>Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979)</td>
<td>The defendant was unconstitutionally convicted under a Texas statute for refusing to comply with a policeman’s demand that he identify himself when he was stopped on a hunch by the police officer. The police were without any articulable suspicion in stopping the defendant where, on patrol, they observed the defendant and another man walking away from each other in an alley in an area known to have a high volume of drug traffic and had no basis for suspecting the defendant of any criminal activity or of being armed other than because the circumstances “looked suspicious” and because the officers “had never seen that subject in that area before.” The Court expressly reserved the question “whether an individual may be punished for refusing to identify himself in the context of a lawful investigation stop which satisfies Fourth Amendment requirements.”</td>
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<td>Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979)</td>
<td>Where police, armed with a warrant to search a tavern and the bartender for drugs, simply frisked all of the patrons in a cursory search for weapons, they violated the Fourth Amendment, since none of the customers was implicated or even mentioned in the events leading to the issuance of the warrant. Nor did the conduct of the defendant (who was a customer in the bar at the time the search warrant was executed) give the police cause to frisk him, since (1) he was not known as a person with a criminal history who might try to attack the police, his hands were empty, and he “gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening”; and (2) the police did not have reason to believe he was engaged in criminal conduct, and “he made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers.”</td>
<td>6–3; Chief Justice Burger and Justices Blackmun and Rehnquist dissented.</td>
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<td>Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)</td>
<td>Police had reasonable suspicion to stop and to temporarily detain a nervous young man (together with his two heavy suitcases) who was paying cash for a one-way airline ticket under an assumed name and who fit the “drug courier profile” while they used the least intrusive means possible to establish his identity and check out their suspicions about his possible criminal activity. The police exceeded their authority, however, when they asked the defendant to accompany them to a small room off the airport concourse, retained his ticket and driver’s license, and gave no indication that he was free to leave. Drugs that turned up in a subsequent examination of his luggage constituted inadmissible evidence.</td>
<td>5–4; Chief Justice Burger and Justices Blackmun, Rehnquist, and O’Connor dissented.</td>
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### Other Cases Drawing Upon *Terry v. Ohio*—Continued

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<td><em>Kolendar v. Lawson</em>, 461 U.S. 352, 103 S.Ct. 1855 (1983)</td>
<td>A California statute required persons stopped by the police for listening or wandering on the streets to provide a &quot;credible and reliable&quot; identification and to account for their presence when required by a police officer. Such a statutory requirement is void for vagueness. It lacks the notice required by due process because it fails to clarify what constitutes &quot;credible and reliable&quot; identification.</td>
<td>7–2; Justices White and Rehnquist dissented.</td>
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<td><em>United States v. Place</em>, 462 U.S. 696, 103 S.Ct. 2637 (1983)</td>
<td>Law enforcement authorities may stop and temporarily detain an individual (and his baggage) about whom they have an articulable suspicion of criminal activity. During such temporary detention, the baggage may be subjected to sniffing by a well-trained narcotics detection dog, an investigative technique so unique in its nonintrusiveness that it does not constitute a &quot;search&quot; of the baggage. But where, as here, the baggage was detained for an hour and a half, its seizure was unreasonable. This Fourth Amendment violation was compounded by failure to give the individual notice as to how long he would be without his baggage, where it was being taken, or by what means it would be returned to him.</td>
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<td><em>Hayes v. Florida</em>, 470 U.S. 811, 105 S.Ct. 1643 (1985)</td>
<td>Where there existed no probable cause to arrest the defendant, no consent to the trip to the police station, and no prior judicial authorization for his detention, investigative detention at the station house for the purpose of fingerprinting him violated the Fourth Amendment. Such fingerprints were inadmissible because they were the fruits of an unlawful detention.</td>
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<td><em>United States v. Sokolow</em>, 490 U.S. 1, 109 S.Ct. 1581 (1989)</td>
<td>Correspondence between certain aspects of the defendant's behavior and the &quot;drug courier profile&quot; amounted to reasonable suspicion and constituted a legally sufficient basis to detain the defendant for further investigation.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td><em>Alabama v. White</em>, 496 U.S. 325, 110 S.Ct. 2412 (1990)</td>
<td>An anonymous tip, which informed police in considerable detail about the anticipated circumstances and movements of the defendant as she transported illegal drugs and which was corroborated by independent police work, had sufficient indications of reliability to provide reasonable suspicion to make an investigatory stop.</td>
<td>6–3; Justices Brennan, Marshall, and Stevens dissented.</td>
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<td><em>Florida v. J. L.</em>, 529 U.S. 266, 120 S.Ct. 1375 (2000)</td>
<td>Merely receiving a tip over the phone from an unidentified source is insufficient to justify stopping and frisking someone without evidence that the caller is reliable. That the tip may accurately describe an individual standing at the specified location and who was carrying a concealed weapon does not, in itself, constitute reasonable suspicion that the person described is engaged in criminal activity.</td>
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<td><em>Hiibel v. Sixth Judicial District Court of Nevada</em>, 542 U.S. 172, 124 S.Ct. 2451 (2004)</td>
<td>A state law punished refusal to disclose one's identity if detained by police under circumstances that indicate a crime has been, or is about to be, committed. The statute did not require the person to produce a driver's license or any other document. Disclosing one's name does not constitute testimonial evidence and thus does not fall within the protection of the Fifth Amendment guarantee against self-incrimination.</td>
<td>5–4; Justices Stevens, Souter, Ginsburg, and Breyer dissented.</td>
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Border Searches

A final exception is the border search. Searches at the border implicate weighty governmental interests, so their justification and scope are different from searches and seizures conducted in the nation's interior. As the Court explained in United States v. Montoya de Hernandez, 473 U.S. 531, 105 S.Ct. 3304 (1985):

Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. ** * This Court has long recognized Congress' power to police entrants at the border. * * * Consistent with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause. * * * Automotive travelers may be stopped at fixed check points near the border without individualized suspicion even if the stop is based largely on ethnicity, * * * and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. * * * These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics, * * * and in particular by the increasing utilization of alimentary canal smuggling. This desperate practice appears to be a relatively recent addition to the smuggler's repertoire of deceptive practices, and it also appears to be exceedingly difficult to detect. Congress had recognized these difficulties. Title 19 U.S.C. § 1582 provides that "all persons coming into the United States from foreign countries shall be liable to detention and search authorized * * * [by customs regulations]." Customs agents may "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise which is subject to duty." ** *

Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government * * * respondent was entitled to be free from unreasonable search and seizure. But not only is the expectation of privacy less at the border than in the interior, * * * but the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the Government at the border. * * *

In that case, U.S. customs agents suspected the defendant of carrying drugs in balloons that she swallowed. Their suspicions were fortified by the circumstances of her travel, the firmness of her abdomen to touch, the fact that pregnancy was not an explanation, the unusual amount of protective clothing she wore, and the result of a rectal examination, which yielded a balloon containing drugs. The Court held that no violation of the Fourth Amendment occurred where the agents detained her until the rest of the balloons were evacuated in the course of her natural bodily functions.

The Justices similarly upheld customs officials' actions in removing and disassembling the gas tank of a station wagon on the off-chance drugs might be concealed in it. Whether the inspectors' search was random, routine, or just based on a hunch, made no constitutional difference. Although an intrusive body search might occasion more vigorous constitutional scrutiny, the expectation of privacy in a vehicle—especially one halted at the border—was much less. If the search had been conducted in a manner resulting in destruction or serious damage to the property, that also might warrant closer attention. However, the removal and disassembly of the gas tank could be redressed simply by reassembling and reattaching it, with no depreciation of the owner's property interest. See United States v. Flores-Montano, 541 U.S. 149, 124 S.Ct. 1582 (2004).
Probable Cause and Reasonableness

The difference between the two models of criminal justice, outlined in the previous chapter, is well illustrated in the search and seizure context by the divergent views of the majority and the dissenters in Cupp v. Murphy below. Even though Murphy was not under arrest while he was detained at the station house, the majority invoked an expanded interpretation of the search-incident-to-arrest exception to justify the constitutionality of police taking scrapings from his fingernails without first getting a warrant. The majority thought a combination of factors justified this warrantless seizure: its conclusion—even on an uncertain record—that probable cause already existed, the slightness of the bodily intrusion, and the likelihood that important evidence would disappear if not obtained immediately.

In Cupp v. Murphy and many other search and seizure cases, the Burger and Rehnquist Courts have repeatedly emphasized that the test to be employed is not whether the police had adequate opportunity to procure a warrant, but whether the search itself was reasonable in light of “the totality of the circumstances.” The Warren Court and especially its most liberal holdovers, Justices Douglas, Brennan, and Marshall, took the position that a search without a warrant is presumptively unreasonable and can otherwise be regarded as reasonable within the meaning of the Fourth Amendment only if it falls within one of a few narrowly interpreted exceptions noted above. The Burger and Rehnquist Courts, on the other hand, took the view that the critical question is whether the search itself is reasonable. In arriving at this judgment, the needs of effective and efficient law enforcement and the first-hand knowledge possessed by the police officer were facts at least—if not more important—than whether there was an opportunity to first procure a warrant. In the search and seizure cases it has decided over the past 35 years, the Court has increasingly come to ask whether probable cause, not a warrant, was present. And recently the Court has been asking whether something less than probable cause is good enough.

CUPP V. MURPHY

Supreme Court of the United States, 1973
412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900

BACKGROUND & FACTS  Upon being informed of the murder of his wife, Daniel Murphy promptly telephoned the Portland police and voluntarily appeared at the Portland police station for questioning. Murphy’s wife had died of strangulation in her home in Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or a robbery. Soon after Murphy’s arrival

4. Although the Court in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952), reached its conclusion that manual attempts to extract capsules of drugs that the suspect had swallowed and the eventual stomach-pumping violated due process because such methods “shock the conscience,” subsequent decisions involving intrusions into a suspect’s body to retrieve evidence have more carefully identified a myriad of factors that must be weighed on a case-by-case basis: (1) the extent to which the effort would call for the use of novel or unusual medical procedures; (2) the threat to the suspect’s health or safety; (3) the degree of intrusion on the suspect’s dignity or bodily integrity; (4) the chances of successfully obtaining the evidence; (5) the reliability of the evidence in question; and (6) how important the evidence is to the state’s case and how difficult it would be to prove the criminal charge by other available means. Using this calculus, the Court, in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966), sustained drawing a sample of the defendant’s blood to determine whether he had been driving under the influence of alcohol. But in Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985), the Court rejected surgery to remove a bullet that had penetrated sufficiently into the body of a robbery suspect to require use of a general anesthetic.
at the police station, the police noticed a dark spot on his finger. The police, believing that the dark spot might be blood and knowing that evidence of strangulation is often found under the assailant’s fingernails, requested of Murphy that they be allowed to take a sample of scrapings from his fingernails. Murphy, who was not under arrest, refused the request, but the police, over his protest and without a warrant, proceeded to take the samples anyway. The samples turned out to contain traces of skin and blood cells and fabric from the victim’s nightgown, all of which were admitted into evidence at the trial. A month later Murphy was arrested and later convicted. He appealed his conviction, claiming that the samples taken by the police were the product of an unconstitutional search in violation of the Fourth and Fourteenth Amendments. The Oregon Court of Appeals affirmed the conviction, and the U.S. Supreme Court denied certiorari. Murphy then appealed to a U.S. district court for habeas corpus relief against Cupp, the superintendent of the Oregon State Penitentiary. The district court denied the petition for habeas corpus, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that in the absence of an arrest the search was unconstitutional even though probable cause to make an arrest may have existed. The Supreme Court granted the state’s petition for certiorari.

Mr. Justice STEWART delivered the opinion of the Court.

***

We believe this search was constitutionally permissible under the principles of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Chimel stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest. * * * The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession. * * * [A] warrantless search incident to arrest, the Court held in Chimel, must be limited to the area "into which an arrestee might reach." * * *

Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself. Accordingly, we do not hold that a full Chimel search would have been justified in this case without a formal arrest and without a warrant. But the respondent was not subjected to such a search.

At the time Murphy was being detained at the station house, he was obviously aware of the detectives’ suspicions. Though he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention. Testimony at trial indicated that after he refused to consent to the taking of fingernail samples, he put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a “metallic sound, such as keys or change rattling” was heard. The rationale of Chimel, in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails. * * *

On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the Court of Appeals is reversed.

Reversed.

***
Mr. Justice DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by Chimel, on which the Court relies, for in Chimel an arrest had been made.

As in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879 (1968), the Court rejected the view that the Fourth Amendment does not limit police conduct “if the officers stop short of something called a ‘technical arrest’ or a ‘full-blown search.’ ”

The reason why no arrest of Murphy was made on the day his fingernails were scraped creates a nagging doubt that they did not then have probable cause to make an arrest and did not reach that conclusion until a month later.

What the decision made today comes down to, I fear, is that “suspicion” is the basis for a search of the person without a warrant. Yet “probable cause” is the requirement of the Fourth Amendment which is applicable to the States by reason of the Fourteenth Amendment. * * * Suspicion has never been sufficient for a warrantless search, save for the narrow situation of searches incident to an arrest as was involved in Chimel. * * * [T]his is a case where a warrant might have been sought but was not. It is therefore governed by the rule that the rights of a person “against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.” Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183 (1920).

Mr. Justice BRENNAN, dissenting in part.

Without effecting an arrest, and without first seeking to obtain a search warrant from a magistrate, the police decided to scrape respondent’s fingernails for destructible evidence. In upholding this search, the Court engrafts another, albeit limited, exception on the warrant requirement. Before we take the serious step of legitimating even limited searches merely upon probable cause—without a warrant or as incident to an arrest—we ought first be certain that such probable cause in fact existed. * * * [S]ince the Court of Appeals did not consider that question, the proper course would be to remand to that court so that it might decide in the first instance whether there was probable cause to arrest or search. There is simply no need for this Court to decide, upon a disputed record and at this stage of the litigation, whether the instant search would be permissible if probable cause existed.

C. CURRENT CONTROVERSIES IN SEARCH AND SEIZURE LAW

The selection of Fourth Amendment cases presented in this section focuses on some current constitutional controversies. The four major cases deal with drug testing, school searches, sobriety checkpoints, and garbage searches. Although these are quite different search and seizure problems, all four Supreme Court decisions included here share a strong
commonality in the preference they display for crime control values, and three of the four further reflect the substitution of broadly focused interest balancing in place of determining probable cause. In those senses, they are surely not unrepresentative of recent Court decisions.

The recent decisions in National Treasury Employees Union v. Von Raab (below) and its companion case, Skinner v. Railway Labor Executives Association, constitute the Court’s verdict on the constitutionality of drug and alcohol testing conducted outside the criminal justice process. Precisely because these testing programs involved noncriminal searches, the Court found the probable cause standard inapplicable and concluded they were reasonable on the basis of balancing the competing social interests. The dissents mount two very different lines of attack. Justices Brennan and Marshall criticized the majority as being unfaithful to the Fourth Amendment by upholding drug and alcohol testing on any grounds other than individualized suspicion. Justice Scalia, on the other hand, saw a difference in the two programs. He did not object to the use of a balancing approach, but argued that the Customs Service program was completely unjustified. Given public anxiety over the AIDS epidemic and the enormous importance a Court decision on testing could have for doctors, health workers, and private citizens in all sorts of circumstances, what do the Court’s decisions in these two cases portend? Does the Court’s approval of drug and alcohol testing by government seem limited to the specifics of these two programs, or does the Court’s approach appear to signal broad approval of testing by government even where public safety and security are not at risk?

**NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB**

*Supreme Court of the United States, 1989*

489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685

**BACKGROUND & FACTS** A union representing federal employees brought suit against the Commissioner of the U.S. Customs Service, challenging the constitutionality of the agency’s mandatory drug-screening program for employees seeking transfer to three kinds of jobs: “positions that either directly involve the interdiction of illicit drugs, require the carrying of a firearm, or involve access to classified information.” The agency sought to justify its drug-testing program not on the basis of suspicion that a given employee was using drugs, but on the broader ground that it has a “special responsibility to insure [a drug-free] workforce,” since the Customs Service is charged with “stemming the tide of illicit drugs entering [the United States].” A federal district court granted the plaintiff union declaratory and injunctive relief against the drug-testing program, but this judgment was vacated by the U.S. Court of Appeals for the Fifth Circuit. In response to the union’s petition, the Supreme Court granted certiorari.

This case was argued and decided together with Skinner v. Railway Labor Executives Association, 489 U.S. 602, 109 S.Ct. 1402 (1989), which presented the Court with a challenge to regulations promulgated by the Federal Railroad Administration (FRA). Those regulations required drug and alcohol testing of certain railroad employees who were involved in major train accidents or incidents and authorized breath or urine tests or both for employees who violated certain safety rules. A federal district court upheld the constitutionality of the regulations, but that judgment was reversed by the U.S. Court of Appeals for the Ninth Circuit, whereupon Skinner, the U.S. Secretary of Transportation, sought certiorari from the Supreme Court.

The Supreme Court upheld the constitutionality of the regulations in both cases, but by different margins. In the National Treasury Employees case, the vote was 5–4
with Justices Brennan, Marshall, Stevens, and Scalia dissenting. In Railway Labor Executives, the vote was 7–2 with only Justices Brennan and Marshall dissenting. In his dissenting opinion, Justice Scalia, joined by Justice Stevens, distinguished the two cases. Because Justice Marshall, joined by Justice Brennan, dissented from the decision in National Treasury Employees only in a brief statement that cited as reasons those given in his dissent in Railway Labor Executives, the Marshall dissent reproduced here is the dissenting opinion he penned in the Railway Labor Executives case.

Justice KENNEDY delivered the opinion of the Court.

We granted certiorari to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.

***

In Skinner v. Railway Labor Executives Assn., 489 U.S. 602, 616–618, 109 S.Ct. 1402, 1412–1413, decided today, we hold that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer, * * * and, in view of our holding in Railway Labor Executives that urine tests are searches, it follows that the Customs Service’s drug testing program must meet the reasonableness requirement of the Fourth Amendment.

While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, * * * our decision in Railway Labor Executives reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. * * * As we note in Railway Labor Executives, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. * * *

It is clear that the Customs Service’s drug testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee’s consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government’s concern for safe rail transportation at issue in Railway Labor Executives, present a special need that may justify departure from the ordinary warrant and probable cause requirements.

*** Even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant than most other Government workers, requiring a warrant in this context would serve only to divert valuable agency resources from the Service’s primary mission. * * *

Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer * * * Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must
follow in administering the test. * * * Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." South Dakota v. Opperman, 428 U.S. 364, 383, 96 S.Ct. 3092, 3104 (1976) (Powell, J., concurring).

Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause. * * * Our cases teach, however, that the probable-cause standard "is peculiarly related to criminal investigations." Colorado v. Bertine, 479 U.S. 367, 371, 107 S.Ct. 738, 741 (1987) * * *. In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, * * * especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. * * * Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. * * * We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." United States v. Montoya de Hernandez, 473 U.S. 531, 538, 105 S.Ct. 3304, 3309 (1985). * * * Our cases also reflect the traffickers' seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics. * * * The record in this case confirms that, through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. * * * The record also indicates, and it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension. * * *

Many of the Service's employees are often exposed to this criminal element and to the controlled substances they seek to smuggle into the country. * * * The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service. * * * * * *

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion * * *. This national interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. * * *

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. * * * We agree with the Government that the public should
not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force. * * *

Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. * * * We have recognized, however, that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. * * * [C]ertain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. * * *

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. * * * While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

* * *

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967), and of motorists who are stopped at the checkpoints we approved in United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074 (1976). * * *

We think petitioners' second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—oversstates the case. * * * Addicts may be unable to abstain even for a limited period of time, or may be unaware of the "fade-away effect" of certain drugs. * * * More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. * * *

We are persuaded that the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions. * * *

* * * Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions which require the incumbent to carry a firearm, is reasonable. * * *

The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.
It is so ordered.

** Justice SCALIA, with whom Justice STEVENS joins, dissenting.

The issue in this case is not whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to detect such drug use. The Government asserts it can demand that employees perform “an excretory function traditionally shielded by great privacy,” Skinner v. Railway Labor Executives’ Assn., 489 U.S., at 626, 109 S.Ct., at 1418, while “a monitor of the same sex * * * remains close at hand to listen for the normal sounds,” * * * and that the excretion thus produced be turned over to the Government for chemical analysis. The Court agrees that this constitutes a search for purposes of the Fourth Amendment — and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment. * * * Today, in Skinner, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court’s opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court’s opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

**

*** It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler—unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less “sympathetic” to their drug-interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less sympathetic to their mission of enforcing the traffic laws. * * * Nor, finally, is it apparent to me that urine tests will be even marginally more effective in preventing gun-carrying agents from risking “impaired perception and judgment” than is their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers—unless, again, their addiction is so severe that no urine test is needed for detection.

What is absent in the Government’s justifications * * * is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. * * * Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. * * *

**

Today’s decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logi-
cally, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. * * * Since drug use is not a particular problem in the Customs Service, employees throughout the government are no less likely to violate the public trust by taking bribes to feed their drug habit, or by yielding to blackmail. Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information would also be constitutional.

* * * I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: “Implementation of the drug screening program would set an important example in our country’s struggle with this most serious threat to our national health and security.”

* * * What better way to show that the Government is serious about its “war on drugs” than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? * * * I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolically, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

* * *

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

* * *

Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions in the warrant requirement. * * *

In widening the “special needs” exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process begun in T.L.O. [see p. 673] of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons “beyond the normal need for law enforcement.” * * * In its place, the majority substitutes a manipulable balancing inquiry under which, upon the mere assertion of a “special need,” even the deepest dignitary and privacy interests become vulnerable to governmental incursion. * * * By its terms, however, the Fourth Amendment—unlike the Fifth and Sixth—does not confine its protections to either criminal or civil actions. Instead, it protects generally “[t]he right of the people to be secure.”

The fact is that the malleable “special needs” balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority’s concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. * * * I reject the majority’s “special needs” rationale as unprincipled and dangerous.

The proper way to evaluate the FRA’s [Federal Railroad Administration] testing regime is to use the same analytic framework which we have traditionally used to appraise Fourth Amendment claims involving full-scale searches, at least until the recent “special needs” cases. Under that framework, we inquire, serially, whether a search has taken place, * * * whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement, * * * whether the
search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive, * * * and, finally, whether the search was conducted in a reasonable manner * * *

* * * Who among us is not prepared to consider reasonable a person’s expectation of privacy with respect to the extraction of his blood, the collection of his urine, or the chemical testing of these fluids? * * *

Finally, the chemical analysis the FRA performs upon the blood and urine samples implicates strong privacy interests apart from those intruded upon by the collection of bodily fluids. Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression. * * * As the Court of Appeals for the District of Columbia has observed: “such tests may provide Government officials with a periscope through which they can peer into an individual’s behavior in her private life, even in her own home.” * * * The FRA’s requirement that workers disclose the medications they have taken during the 30 days prior to chemical testing further impinges upon the confidentiality customarily attending personal health secrets.

By any reading of our precedents, the intrusiveness of these three searches demands that they—like other full-scale searches—be justified by probable cause. * * *

### Other Cases Where “Special Needs” Have Been Asserted to Override the Requirement of Individualized Suspicion

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<th>Case</th>
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<td>Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 646 (1995)</td>
<td>Random drug testing for students participating in athletic programs is like monitoring a “closely regulated industry” since students have a much-diminished expectation of privacy (they must take an annual physical exam, maintain a minimum GPA, acquire insurance coverage, abide by dress, hours, and conduct regulations, and suit-up and shower without much privacy). Given the unobtrusiveness of providing the urine sample, the fact that students are not adults and are constantly supervised by the school, the results of the test are not used for law enforcement or disciplinary purposes, and the importance of drug deterrence to maintaining order, protecting the health of athletes who are under physical stress, and the fact that they are role-models, individualized suspicion is not required.</td>
<td>6–3; Justices Stevens, O’Connor, and Souter dissented.</td>
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<tr>
<td>Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295 (1997)</td>
<td>Despite Georgia’s assertions that drug use by state officers draws into question an official’s judgment and integrity, undermines the discharge of public functions (such as law enforcement), and saps public confidence in elected officials, the state’s program of drug testing all statewide candidates for elective office is unconstitutional. Unlike the situation in Vernonia, there was no evidence here of a thriving “drug culture” or an epidemic of drug use. There was no showing that drug users were likely to be candidates for public office. Given the ease with which effectiveness of the drug test here could be diluted, the susceptibility of candidates’ behavior to relentless media and public scrutiny, and any demonstration that ordinary law enforcement was insufficient to deal with the problem, no special need had been demonstrated.</td>
<td>8–1; Chief Justice Rehnquist dissented.</td>
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Continued
The Court’s decision in New Jersey v. T.L.O. similarly reflects a jettisoning of probable cause as a precondition to search and seizure. Yet, nearly four decades ago in the context of a First Amendment challenge raised by a junior high school student, the Court loudly proclaimed that “state-operated schools may not be enclaves of totalitarianism and students do not ‘shed their constitutional rights *** at the schoolhouse gate.” Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 511, 89 S.Ct. 733, 736, 739 (1969). What is it that the Court’s decision in T.L.O. illustrates—just the weighing of the very limited nature of individual rights in this particular circumstance and the overriding importance of maintaining order? The conclusion that reasonable suspicion is not necessary if a search occurs outside the criminal justice process, even though evidence is seized that triggers punishment in the juvenile justice process? An end to the broad principle announced in Tinker?

**NEW JERSEY v. T.L.O.**

Supreme Court of the United States, 1985
469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720

**BACKGROUND & FACTS** T.L.O., a high school freshman, was taken to the principal’s office by a teacher after she and another girl had been discovered smoking in a lavatory, which was a violation of a school rule. The other girl admitted the violation. When T.L.O. denied such activity, Mr. Choplick, the assistant principal, insisted on seeing her purse. When he opened T.L.O.’s purse, he found a pack of cigarettes. He also noticed a package of rolling papers commonly used in the making of marijuana cigarettes. Mr. Choplick continued searching through the purse and found some marijuana, a pipe, plastic bags, a substantial amount of money, a list of students who owed T.L.O. money, and two letters implicating her in sales of marijuana.
In delinquency proceedings brought against her in juvenile court, T.L.O. moved to suppress the evidence from her purse seized by Mr. Choplick. The juvenile court judge denied the motion to suppress; ruled that while the Fourth Amendment applied to searches conducted by school officials, the search in this case was a reasonable one; and found T.L.O. to be a delinquent. An intermediate state appellate court affirmed the finding that the search was reasonable, but vacated the judgment on other grounds. On appeal, the New Jersey Supreme Court reversed and ordered the evidence suppressed because, it concluded, the search of T.L.O.’s purse was unreasonable.

Justice WHITE delivered the opinion of the Court.

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In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

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* * * *Today’s public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. * * * * In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard or reasonableness governing any specific class of searches requires “balancing the need to search against the invasion which the search entails.” Camara v. Municipal Court, 387 U.S., at 536–537, 87 S.Ct., at 1735. * * *

* * * * A search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise “illegitimate.” * * * * To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is “prepared to recognize as legitimate.” * * * * The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property “unnecessarily” carried into a school. * * * *

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. * * *

Nor does the State’s suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and

5. We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials. * * * * [Footnote by the Court.]
grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child’s interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. * * * Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. * * * Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. * * *

* * * It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. * * *

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marijuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marijuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marijuana had the first search not taken place. * * *

* * * A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this
report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick’s suspicion that there were cigarettes in the purse was not an “inchoate and unparticularized suspicion or ‘hunch,’” rather, it was the sort of “common-sense conclusion[] about human behavior” upon which “practical people”—including government officials—are entitled to rely. Of course, even if the teacher’s report were true, T.L.O. might not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: “sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.” The hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick’s belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.’s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of “people who owe me money” as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court’s decision to exclude that evidence from T.L.O.’s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

I agree that schoolteachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students’ belongings without first obtaining a warrant. Special government needs sufficient to override the warrant requirement flow from “exigency”—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. A teacher or principal could neither carry out essential teaching functions nor adequately protect students’ safety if required to wait for a warrant before conducting a necessary search. [But] I emphatically disagree with the Court’s decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search.

Our holdings that probable cause is a prerequisite to a full-scale search are based on the relationship between the two clauses of
the Fourth Amendment. The first clause ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *") states the purpose of the amendment and its coverage. The second clause (* * * and no Warrants shall issue but upon probable cause * * *) gives content to the word "unreasonable" in the first clause. * * * ["Seizures are 'reasonable' only if supported by probable cause." Dunaway v. New York, 442 U.S., at 214, 99 S.Ct., at 2257.]

The provisions of the warrant clause—a warrant and probable cause—provide the yardstick against which official searches and seizures are to be measured. * * * If the search in question is more than a minimally intrusive Terry-stop, the constitutional probable-cause standard determines its validity.

* * *

Applying the constitutional probable-cause standard to the facts of this case, I would find that Mr. Choplick's search violated T.L.O.'s Fourth Amendment rights. After escorting T.L.O. into his private office, Mr. Choplick demanded to see her purse. He then opened the purse to find evidence whether she had been smoking in the bathroom. When he opened the purse, he discovered the pack of cigarettes. At this point, his search for evidence of the smoking violation was complete.

* * * Mr. Choplick * * * did not have probable cause to continue to rummage through T.L.O.'s purse. Mr. Choplick's suspicion of marijuana possession at this time was based solely on the presence of the package of cigarette papers. The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T.L.O. had violated the law by possessing marijuana and that evidence of that violation would be found in her purse. Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T.L.O. based on the mere presence of a package of cigarette papers. Therefore, the fruits of this illegal search must be excluded and the judgment of the New Jersey Supreme Court affirmed.

* * *

On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. * * *

Justice STEVENS, with whom Justice MARSHALL joins, and with whom Justice BRENNAN joins as to [p]art[;] * * * concurring in part and dissenting in part.

* * *

* * * Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship. When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.

[W]arrantless searches of students by school administrators are reasonable when undertaken for those purposes. But the majority's statement of the standard for evaluating the reasonableness of such searches is not suitably adapted to that end. The majority holds that "a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." * * * This standard will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precautionary guideline for student behavior. The Court's standard for deciding whether a search is justified "at its inception" treats all
violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

When minor violations are involved, there is every indication that the informal school disciplinary process, with only minimum requirements of due process, can function effectively without the power to search for enough evidence to prove a criminal case. **

The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument. **

** There is no mystery ** in the state court’s finding that the search in this case was unconstitutional; the decision below was ** based ** on the trivial character of the activity that prompted the official search. The New Jersey Supreme Court wrote:

“We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence.

“In determining whether the school official has reasonable grounds, courts should consider ‘the child’s age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.’”

The emphasized language in the state court’s opinion focuses on the character of the rule infraction that is to be the object of the search.

In the view of the state court, there is a quite obvious, and material difference between a search for evidence relating to violent or disruptive activity, and a search for evidence of a smoking rule violation. This distinction does not imply that a no smoking rule is a matter of minor importance. Rather, like a rule that prohibits a student from being tardy, its occasional violation in a context that poses no threat of disrupting school order and discipline offers no reason to believe that an immediate search is necessary to avoid unlawful conduct, violence, or a serious impairment of the educational process.

** Like the New Jersey Supreme Court, I would view this case differently if the Assistant Principal had reason to believe T.L.O.’s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any such assumption—not even a “hunch.”

In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen’s and sophomores’ building. It is, of course, true that he actually found evidence of serious wrongdoing by T.L.O., but no one claims that the prior search may be justified by his unexpected discovery. As far as the smoking infraction is concerned, the search for cigarettes merely tended to corroborate a teacher’s eyewitness account of T.L.O.’s violation of a minor regulation designed to channel student smoking behavior into designated locations. Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T.L.O.’s purse was entirely unjustified at its inception.

** The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context. Although I agree that school administrators must have broad latitude to maintain order and discipline in our classrooms, that authority is not unlimited.

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen
and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the Government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court’s decision today is a curious moral for the Nation’s youth. * * *

Although there was disagreement among the Justices about whether the level of suspicion was sufficient, at least in T.L.O. it was individualized and, while the search turned up evidence of delinquent conduct, it entailed only a search of the student’s purse. But what about the constitutionality of a strip-search conducted without any individualized suspicion by a teacher and a police officer on a class of 13 fifth-graders? Applying the principles articulated by the Court in T.L.O. and the Vernonia case (p. 672), a federal appeals court, in Thomas ex rel. Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003), ultimately held that it constituted a flat violation of the Fourth Amendment. In Thomas, the teacher thought someone in the class had stolen an envelope from her desk containing $26 in proceeds from a candy sale held to help fund a school trip.

A third area of current search and seizure controversy is the use of roadblocks to intercept drunk drivers. In Michigan Department of State Police v. Sitz below, the Court upheld the constitutionality of that state’s sobriety checkpoint program. In his opinion for the Court upholding the use of fixed checkpoints to stop motorists, Chief Justice Rehnquist distinguished this case from Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979), in which the Court invalidated random stops by police to check the validity of driver’s licenses and auto registrations. In light of the attack mounted by Justice Stevens in dissent, how persuasively do you think Chief Justice Rehnquist distinguished Sitz from Prouse? Note the extent to which the avenues of attack on the Court’s opinion by Stevens in Sitz parallel the objections registered by Justice Scalia in National Treasury Union Employees and the extent to which the content of the Brennan-Marshall dissent had become a familiar refrain.

**MICHIGAN DEPARTMENT OF STATE POLICE v. SITZ**
Supreme Court of the United States, 1990
496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412

**BACKGROUND & FACTS** The Michigan State Police operate a sobriety checkpoint program. After a checkpoint has been established at a selected site along a state road, all vehicles passing through the checkpoint are stopped and their drivers briefly examined for signs of intoxication. When the officer conducting the stop detects signs of intoxication, the driver is asked to pull over out of the flow of traffic where his driver’s license and vehicle registration are checked and, if appropriate, further sobriety tests are conducted. Drivers found to be intoxicated are then arrested. A state circuit court held the sobriety checkpoint program to be a violation of the Fourth Amendment, and the Michigan Court of Appeals affirmed, whereupon the state sought certiorari from the U.S. Supreme Court.

Chief Justice REHNQUIST delivered the opinion of the Court.

This case poses the question whether a State’s use of highway sobriety check points violates the Fourth and Fourteenth Amendments to the United States Constitution. * * *

[A] Fourth Amendment “seizure” occurs when a vehicle is stopped at a checkpoint. * * * The question thus becomes whether such seizures are “reasonable” under the Fourth Amendment.
It is important to recognize what our inquiry is not about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint. * * * [T]he instant action challenges only the use of sobriety checkpoints generally. We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard. * * *

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. * * *

Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight. We reached a similar conclusion as to the intrusion on motorists subjected to a brief stop at a highway checkpoint for detecting illegal aliens. See [United States v.] Martinez-Fuerte, [428 U.S.,] at 558, 96 S.Ct., at 3083. We see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask. * * *

*** [T]he Court of Appeals *** agreed with the trial court's conclusion that the checkpoints have the potential to generate fear and surprise in motorists. This was so because the record failed to demonstrate that approaching motorists would be aware of their option to make U-turns or turnoffs to avoid the checkpoints. On that basis, the court deemed the subjective intrusion from the checkpoints unreasonable. * * *

We believe the Michigan courts misread our cases concerning the degree of "subjective intrusion" and the potential for generating fear and surprise. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop. * * *

Checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we uphold in Martinez-Fuerte. * * *

*** Based on extensive testimony in the trial record, the court concluded that the checkpoint program failed the "effectiveness" part of the test, and that this failure materially discounted petitioners' strong interest in implementing the program. We think the Court of Appeals was wrong on this point as well.

The actual language from Brown v. Texas, upon which the Michigan courts based their evaluation of "effectiveness," describes the balancing factor as "the degree to which the seizure advances the public interest." 443 U.S., at 51, 99 S.Ct., at 2640. This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers. * * *

In Delaware v. Prouse we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said
that “it seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed.” * * * We observed that the random stops involved the “kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.” * * * We went on to state that our holding did not “cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.” * * *

Unlike Prouse, this case involves neither a complete absence of empirical data nor a challenge to random highway stops. During the operation of the Saginaw County checkpoint, the detention of each of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.5 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. * * * By way of comparison, the record from one of the consolidated cases in Martinez-Fuerte, showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. * * * We see no justification for a different conclusion here.

In sum, the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.

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

Reversed.

* * *

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

* * *

The majority opinion creates the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures, or at least those “dealing with police stops of motorists on public highways.” * * * This is not the case. In most cases, the police must possess probable cause for a seizure to be judged reasonable. * * * Only when a seizure is “substantially less intrusive,” * * * than a typical arrest is the general rule replaced by a balancing test. * * * [Even then] [s]ome level of individualized suspicion is [still] a core component of the protection the Fourth Amendment provides against arbitrary government action. * * * By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. * * * That stopping every car might make it easier to prevent drunken driving, * * * is an insufficient justification for abandoning the requirement of individualized suspicion. * * *

* * *

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join as to [p]arts * * *, dissenting.

* * *

* * * The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen’s interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is “virtually no difference” between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint. I believe this case is controlled by our several
precedents condemning suspicionless random stops of motorists for investigatory purposes. * * *

There is a critical difference between a seizure that is preceded by fair notice and one that is effected by surprise. * * * That is one reason why a border search, or indeed any search at a permanent and fixed checkpoint, is much less intrusive than a random stop. A motorist with advance notice of the location of a permanent checkpoint has an opportunity to avoid the search entirely, or at least to prepare for, and limit, the intrusion on her privacy.

No such opportunity is available in the case of a random stop or a temporary checkpoint, which both depend for their effectiveness on the element of surprise. A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply “business as usual,” and may likewise infer, again correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point.

There is also a significant difference between the kind of discretion that the officer exercises after the stop is made. A check for a driver’s license, or for identification papers at an immigration checkpoint, is far more easily standardized than is a search for evidence of intoxication. A Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion. A ruddy complexion, an unbuttoned shirt, bloodshot eyes or a speech impediment may suffice to prolong the detention. Any driver who had just consumed a glass of beer, or even a sip of wine, would almost certainly have the burden of demonstrating to the officer that her driving ability was not impaired.

Finally, it is significant that many of the stops at permanent checkpoints occur during daylight hours, whereas the sobriety checkpoints are almost invariably operated at night. A seizure followed by interrogation and even a cursory search at night is surely more offensive than a daytime stop that is almost as routine as going through a toll gate. * * *

These fears are not, as the Court would have it, solely the lot of the guilty. * * * To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomforting simply because one’s secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe.

The Court’s analysis * * * resembles a business decision that measures profits by counting gross receipts and ignoring expenses. The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. Thus, although the gross number of arrests is more than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any net advance in the public interest in arresting intoxicated drivers.

My objections to random seizures or temporary checkpoints do not apply to a host of other investigatory procedures that do not depend upon surprise and are unquestionably permissible. * * * It is, for example, common practice to require every prospective airline passenger, or every visitor to a public building, to pass through a metal detector that will reveal the presence
of a firearm or an explosive. * * * Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test. That requirement might well keep all drunken drivers off the highways that serve the fastest and most dangerous traffic. This procedure would not be subject to the constitutional objections that control this case: the checkpoints would be permanently fixed, the stopping procedure would apply to all users of the toll road in precisely the same way; and police officers would not be free to make arbitrary choices about which neighborhoods should be targeted or about which individuals should be more thoroughly searched. * * * Sobriety checkpoints are elaborate, and disquieting, publicity stunts. The possibility that anybody, no matter how innocent, may be stopped for police inspection is nothing if not attention-getting. * * * This is a case that is driven by nothing more than symbolic state action * * *

A police officer, of course, is constitutionally entitled to stop a vehicle if he spots any traffic infraction. Applying the principles relevant to a “stop” recognized by the Court in *Terry v. Ohio*, it is doubtless true that the officer is entitled to require the driver to exit the vehicle if he is concerned about his safety. In *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Crt. 330 (1977), the Supreme Court went further and held that the officer could order the driver to leave the vehicle in the course of a legitimate traffic stop whether or not the driver’s behavior raised suspicion. But what about passengers in the vehicle? Can they be ordered out on the officer’s simple say-so, regardless of whether they appear to pose a risk? In a recent “auto stop” case, *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882 (1997), the Court answered “yes.” The Court held that stopping a vehicle with several people in it was likely to increase the risk and hence all of the occupants could legitimately be ordered out of the vehicle, even if their behavior did not arouse the officer’s suspicion.

Police officers who have developed a hunch about someone’s criminal behavior may stop them or pull them over for one reason but really have something else in mind. The matter of such pretextual stops was addressed by the Supreme Court in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). In that case, plainclothes policemen, patrolling a “high crime area” of Washington, D.C. in an unmarked car, observed a truck wait at an intersection stop sign for an unusually long time, turn suddenly without signalling, and then drive off at an “unreasonable” rate of speed. The officers stopped the vehicle, ostensibly to warn the driver about traffic violations, and as they approached the truck saw the defendant holding plastic bags of crack cocaine. The defendant argued that, since police might be tempted to use traffic stops as a pretext to uncover other violations of crime, the test for pulling a motorist over ought to be whether a reasonable officer would have stopped the vehicle for the purpose of enforcing the traffic law. In *Whren*, the Court held that, so long as probable cause existed to believe a traffic violation occurred, detention of the motorist was reasonable. Any ulterior motive the officer might have had for the stop did not invalidate police conduct based on probable cause.

To summarize, pulling a vehicle over depends upon the officer having an articulable reason for believing an offense has been committed, whether a motor vehicle infraction or some other criminal violation. Stopping vehicles at fixed checkpoints does not demand individualized suspicion, unless the interaction between the officer and an occupant of the vehicle gives rise to it, in which case the vehicle is pulled out of the line. But what if police used fixed checkpoints to stop vehicles for the purpose of detecting criminal activity? In *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000), the Court emphasized that it “ha[s] never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” Said the Court, “[E]ach of the checkpoint
programs that we have approved was designed primarily to serve purposes closely related to
the problems of policing the border or the necessity of ensuring roadway safety.” In Edmond,
city police had established a highway checkpoint for the purpose of detecting drugs. At the
stop in Edmond, a drug-sniffing dog walked around each car. The use of drug-sniffing dogs
was upheld in United States v. Place (p. 661) too. But the Court underscored the difference
between the two cases: In Place, an articulable suspicion justified the detention of the
individual whose bag was being sniffed; in Edmond, there was no individualized suspicion—
all the cars at the checkpoint were sniffed. The Court did concede, however, that a
criminal detection checkpoint likely would pass constitutional muster in the most exigent
circumstances—“an appropriately tailored roadblock set up to thwart an imminent terrorist
attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”

The Court’s decision in Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004), four
years later, was consistent with these principles. In that case, police had stopped cars only to
gather information about a fatal hit-and-run accident that occurred a week earlier, handed
out flyers, and asked motorists if they had been in the area and seen anything at the time of
the crash. As a result of the stop, Lidster was arrested for drunk driving. The six-Justice
majority observed that the informational stop “significantly” advanced “important
investigatory needs” and was “appropriately tailored,” occurring as it did a week after the
hit-and-run accident, on the same highway, near the accident site, and at about the same
time of night. The Court concluded that the stop “only minimally interfered” with Fourth
Amendment rights, since it entailed a short wait in line, a brief request for information, and
provided little cause for anxiety to the general public.

The fourth area of controversy has to do with whether we have a legitimate expectation in
the privacy of our garbage after we have put it out to be picked up. At first glance, this may
seem a trivial issue, but Justice Brennan is surely correct when he observes that rummaging
through someone’s trash can disclose an enormous amount of information about that person.
Nor can revealing elements of a person’s lifestyle be kept hidden forever. Sooner or later we
have to throw things away, and most localities now closely regulate the manner in which that
can be done. In California v. Greenwood below, the Court held that we have no constitutional
expectation of privacy in our trash once it has been placed on the curb.

Relying on much the same reasoning in United States v. Scott, 975 F.2d 927 (1st Cir.
1992), cert. denied, 507 U.S. 1042, 113 S.Ct. 1877 (1993), a federal appellate court later
held that shredding your trash does not provide any greater expectation of privacy.
Someone who abandons trash runs the risk that, through sophisticated technology and
sheer ingenuity, police may be able to piece together incriminating evidence.

With whom would you agree, in Greenwood, the Court or Justice Brennan? And if you
agree with Justice Brennan, at what point would the expectation of privacy lapse? Also worth
noting about the Greenwood case is the injection of a state constitutional issue. Although the
California Supreme Court had already ruled that, as a matter of state constitutional law, trash
owners have a legitimate expectation of privacy in their trash, the California electorate
repealed the state’s exclusionary rule in a referendum. As Justice White pointed out, the
federal exclusionary rule may not, in the absence of a Fourth Amendment violation, be used
to vindicate rights that exist only as a matter of state constitutional law.

**California v. Greenwood**

Supreme Court of the United States, 1988

486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30

**Background & Facts** Relying both on a tip that Billy Greenwood
and Dyanne Van Houten were engaged in illicit drug trade and on surveillance of
Greenwood's home, which disclosed that many vehicles were making brief late-night and early-morning stops, police asked the neighborhood's trash collector to pick up the plastic garbage bags that Greenwood left on the curb in front of his house and to turn the bags over to them without mixing the contents with trash from other houses. After inspection of Greenwood's trash bags turned up material suggestive of drug use, police secured a warrant to search his house and seized some drugs. Greenwood was charged with possessing and trafficking in narcotics. This procedure was repeated, and Greenwood was charged a second time. Relying on People v. Krivda, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), in which the California Supreme Court held that warrantless trash searches violated both the Fourth Amendment and the California Constiution, a state superior court excluded the evidence and dismissed the charges. A state appellate court, bound by the state supreme court's previous decision on the Fourth Amendment issue, affirmed this judgment. The California Supreme Court denied review, and the state petitioned the U.S. Supreme Court for certiorari.

Justice WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. * * *

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the police. The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. * * * Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents’ trash or permitted others, such as the police, to do so. Accordingly, respondents * * * had no reasonable expectation of privacy in the inculpatory items that they discarded.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Katz v. United States, 389 U.S. at 351, 88 S.Ct., at 511. * * *

With the federal constitutional question thus settled, the Court turned its attention
to Greenwood's argument that the federal exclusionary rule should operate to enforce the state constitutional prohibition on warrantless trash searches. Normally, of course, suppression of evidence seized in violation of a state constitutional provision would be dictated by a state exclusionary rule. However, by referendum in 1982, California voters amended the state constitution to abolish the state exclusionary rule. Consequently, if the California Supreme Court determined that a particular police practice violated the state constitution, nothing required the exclusion of any evidence so obtained.

Greenwood finally urges * * * that the California constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law violates the Due Process Clause of the Fourteenth Amendment. In his view, having recognized a state-law right to be free from warrantless searches of garbage, California may not under the Due Process Clause deprive its citizens of what he describes as "the only effective deterrent to violations of this right.

We see no merit in Greenwood's position. California could amend its constitution to negate the holding in Krivda that state law forbids warrantless searches of trash. * * *

[O]ur decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. * * *

The States are not foreclosed by the Due Process Clause from using a similar balancing approach to delineate the scope of their own exclusionary rules. Hence, the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. * * * Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

Our precedent, therefore, leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags— identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion.

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.

A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore inevitably associated with the expectation of privacy." [Arkansas v.] Sanders, 442 U.S., at 762, 99 S.Ct., at 2592. * * * A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status,
political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,' " which the Fourth Amendment is designed to protect. * * * * * * 

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood's, we would have a different case. But all that Greenwood "exposed * * * to the public," * * * were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view every bit as much as did * * * [the] double-locked footlocker [in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 (1977)] and * * * [the] green, plastic wrapping [in Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841 (1981)]. Faithful application of the warrant requirement does not require police to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Rather, it only requires them to adhere to norms of privacy that members of the public plainly acknowledge.

The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home * * * or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person * * * seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz, 389 U.S., at 351–352, 88 S.Ct., at 511. * * *

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, * * * who might himself have sorted through respondents' trash or permitted others, such as police, to do so." * * * In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so, * * * and prohibited him from disposing of it in any other way * * * More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; [they] are just as likely as trash collectors (and certainly have greater incentive) to "sort[] through" the personal effects entrusted to them, "or permit[] others, such as police to do so." * * *

D. Wiretapping and Eavesdropping

Few eras in our national experience have more forcefully raised the question about how far government should be allowed to go in combating crime than Prohibition. A combination of frustration with other methods of law enforcement and technological development led to the creation of a new means of obtaining evidence, the wiretap. In Olmstead v. United States (p. 689), the Supreme Court confronted the constitutionality of this crime detection device for the first time. Compare the majority's ruling that the protection of the Fourth
Amendment applies only when government agents have committed a physical trespass on private property and where tangible things have been seized with Justice Brandeis’s view that the amendment was meant to protect the human right of privacy—“the right to be let alone”—not just property interests.6 Critics of “judicial legislation”—such as Justice Black dissenting in both the Berger and Katz cases that follow—reject Brandeis’s view on the grounds that it is not the function of the Court to keep the Constitution “up with the times.” Who do you think is more faithful to the purpose and principle of the Fourth Amendment: Chief Justice Taft and the majority or Justice Brandeis?

Justice Butler—in an interesting variation on the protection of property rights—argues against wiretapping as a violation of the contract between the phone company and the customer. This raises an interesting question: Can privacy be effectively protected just by

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6. The argument made by Justice Brandeis in his Olmstead dissent was an extension of a view about the human dimension to privacy first articulated in Samuel Warren and Louis D. Brandeis, “The Right of Privacy,” 4 Harvard Law Review 193 (1890). That article argued for the recognition of a new tort, the invasion of privacy, which sought to address injuries that could not be redressed as a matter of infringements to property rights. For a general discussion, see P. Allan Dionisopoulos and Craig R. Ducat, The Right to Privacy: Essays and Cases (1976), pp. 19–29.
defending property rights so that it is not necessary to recognize (critics, such as Justice Black, would say “create”) a right of privacy specifically rooted in human dignity? Suppose, for example, that there was probable cause to believe criminal activity was going on in a public washroom and police installed video surveillance equipment that allowed them to peer into all areas of the washroom including the toilet stalls. Since there would appear to be little reason why the principles applied to audio surveillance should not apply to video surveillance as well, would Justice Butler resolve the search and seizure issue on the basis of whether they were pay-toilets (that is, where someone wishing to use the toilet first had to insert a dime in order to enter the stall, as was common practice many years ago)? Would there be no protection at all, since it was a public washroom? The Court in later cases came to address such questions in terms of whether the individual involved had a legitimate expectation of privacy. Although this would seem to be a useful way of thinking about the problem, the words of the Constitution do not state such a concept.

Olmstead v. United States
Supreme Court of the United States, 1928
277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944

BACKGROUND & FACTS
Roy Olmstead and several accomplices were convicted in federal district court of importing and selling liquor in violation of the National Prohibition Act. Incriminating evidence, obtained by federal officers who wiretapped telephone lines at points between the defendants’ homes and their offices, was presented by the government at the trial. A U.S. court of appeals affirmed the convictions over objections that this evidence was inadmissible under the Fourth Amendment guarantee against unreasonable searches and seizures and the Fifth Amendment protection from being compelled to testify against one’s self. The Supreme Court granted certiorari.

Mr. Chief Justice TAFT delivered the opinion of the Court.

There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man’s house, his person, his papers, and his effects, and to prevent their seizure against his will. * * *

The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized.

* * *

* * *

* * *

* * *

7. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981, 86 S.Ct. 555 (1966), was just such a case. The kinds of questions posed were addressed by all three federal appeals judges who participated. The court found the surveillance constitutional, but there was a vigorous dissent.
The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

[We cannot] subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the commonlaw doctrine generally supported by authority. * * * Evidence secured by such means has always been received.

The judgments of the Circuit Court of Appeals are affirmed. * * *

Mr. Justice BRANDEIS (dissenting).

* * *

The government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that, if wire tapping can be deemed a search and seizure within the Fourth Amendment, such wire tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 521 (1886). But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring
unexpressed beliefs, thoughts and emotions. * * * Can it be that the Constitution affords no protection against such invasions of individual security?

* * *

Time and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. * * *

* * *

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants’ objections to the evidence obtained by wire tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants’ premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

* * *

* * * Here the evidence obtained by crime was obtained at the government’s expense, by its officers, while acting on its behalf * * *. There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants * * * the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

* * *

* * * When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers’ crimes. * * * And if this court should permit the government, by means of its officers’ crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker.

Will this court, by sustaining the judgment below, sanction such conduct on the part of the executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. * * * Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

* * *

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 imperiled if it fails 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—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

[Justices HOLMES and STONE also dissented, agreeing with Justice BRANDEIS.]

Mr. Justice BUTLER (dissenting). I sincerely regret that I cannot support the opinion and judgments of the court in these cases.

* * *

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

* * *

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. * * *

Several measures were introduced in Congress to modify the policy embodied in the Olmstead decision, but these efforts were unavailing until the enactment of section 605 of the Federal Communications Act of 1934. That provision declared that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance *** of such intercepted communication to any person."

In Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275 (1937), the Court held section 605 to apply against the national government as well as private individuals. Wiretap evidence thus became inadmissible in federal court, as did the fruits of any such surveillance in the second Nardone case, 308 U.S. 338, 60 S.Ct. 266 (1939), two years later. Wiretapping by federal agents, however, did not stop, since U.S. Attorneys General subsequently interpreted these rulings to apply only to surveillance that intercepted communications, the contents of which were afterward divulged, and not to wiretapping that remained secret. In Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942), this same policy was extended to cover eavesdropping carried out, like wiretapping, without physical intrusion into constitutionally protected premises such as one's home or rented hotel room. Electronic surveillance came to be used by federal agents chiefly against organized crime and suspected subversives until 1965, when President Johnson ordered a sharp curtailment in surveillance activities, limiting their use to selected instances approved by the President or the Attorney General involving possible threats to the national security.

The post-Olmstead limitations on electronic surveillance, however, had no binding effect at the state level. In the absence of legislation by a particular state that would proscribe such activities, the Court held in Schwart v. Texas, 344 U.S. 199, 73 S.Ct. 232 (1952), that section 605's prohibition on the interception and divulgence of communications did not preclude admissibility of such evidence in state court proceedings. State authorities, therefore, continued to wiretap and eavesdrop and were entitled to make direct use of what they heard.
The limited scope of judicial rulings in this area as well had the effect of encouraging the
ominous kind of “cooperative federalism” between national and state law enforcement
agents noted earlier. Federal authorities escaped application of the exclusionary rule in
federal courts by merely accepting evidence willingly procured for them by state authorities
unconstrained by section 605. This cross-ruffing between federal and state agents
continued until the Supreme Court’s ruling in Benanti v. United States, 355 U.S. 96, 78
S.Ct. 155 (1957), that evidence obtained via wiretapping by state law enforcement
authorities was inadmissible in federal court. The Court then plugged the remaining
loophole in Lee v. Florida, 392 U.S. 378, 88 S.Ct. 2096 (1968), by holding section 605
applicable also against state-undertaken surveillance netting evidence that was then used
in state proceedings.

In 1967, the Court finally vindicated the views expressed by Justice Brandeis by
overruling Olmstead and Goldman. As Berger v. New York below and Katz v. United States
(p. 696) make abundantly clear, both wiretapping and eavesdropping are to be considered
searches, and intercepted communications are to be regarded as seized materials under the
terms of the Fourth and Fourteenth Amendments. In line with this holding, legislation
authorizing such searches must be able to withstand the kind of scrutiny demanded by the
Fourth Amendment and, above all, comply with constitutional commands for close
continual judicial supervision of all such activities. In sum, the Court required that
electronic searches and seizures be brought back into line with the constitutional standards
governing more usual kinds of searches and seizures typified in the Chimel case.

**BERGER v. NEW YORK**

Supreme Court of the United States, 1967
388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040

**BACKGROUND & FACTS**

New York judges were authorized by the
 provision of a state statute to permit wiretaps and buggings “upon oath or affirmation
 * * * that there is reasonable ground to believe that evidence of crime” may be
obtained by such means. Officers applying for warrants were also required to
“particularly [describe] the person or persons whose communications, conversations,
or discussions are to be overheard or recorded and the purpose” of the eavesdrop.
Ralph Berger was convicted of conspiring to bribe the chairman of the state’s liquor
authority on evidence obtained by a recording device installed for 60 days under a
court order. Berger contended that the statute was unconstitutional because, among
other things, it failed to require a particular description of the conversations to be
seized and a showing of probable cause. Two state courts affirmed the conviction
before the U.S. Supreme Court granted certiorari.

Mr. Justice CLARK delivered the opin-
ion of the Court.

[The Court began by observing that the
holding in Olmstead had been largely washed
out by legislation and judicial rulings since
then and that interception of conversations
by use of electronic devices also had been
brought within the scope of Fourth and
Fourteenth Amendment protections.]

* * *

While New York’s statute satisfies the
Fourth Amendment’s requirement, that a
neutral and detached authority be inter-
posed between the police and the public,
* * * the broad sweep of the statute is
immediately observable, * * *

* * *

* * *

* * * New York’s statute * * * merely says
that a warrant may issue on reasonable
ground to believe that evidence of crime
may be obtained by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor “the place to be searched,” or “the persons or things to be seized” as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. *** Moreover, the statute permits *** extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is “in the public interest.” Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. [Furthermore] the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute’s procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. *** Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute’s blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.

***

[T]his Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices *** where the “commission of a specific offense” was charged, its use was “under the most precise and discriminate circumstances” and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the “precincts of the home or the office *** sanctuaries where the law can never reach,” *** but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed.

Mr. Justice DOUGLAS, concurring.

I join the opinion of the Court because at long last it overrules sub silentio Olmstead v. United States *** and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment. I also join the opinion because it condemns electronic surveillance for its similarity to the general warrants out of which our Revolution sprang ***.

***

A discreet selective wiretap or electronic “bugging” is of course not rummaging around, collecting everything in the particular time and space zone. But even though it is limited in time, it is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer’s office—everywhere and anywhere a “bug” can be placed.

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the home-
owner is completely unaware of the invasion of privacy. * * *

[Justice STEWART concurred in the result, but rejected the majority’s conclusion that the statute was per se unconstitutional. While he agreed with the dissenters that it was compatible with the Fourth Amendment on its face, he found that there were no “reasonable grounds” for authorizing the bugging in this particular instance.]

Mr. Justice BLACK, dissenting. * * *

While the electronic eavesdropping here bears some analogy to the problems with which the Fourth Amendment is concerned, I am by no means satisfied that the Amendment controls the constitutionality of such eavesdropping. As pointed out, the Amendment only bans searches and seizures of “persons, houses, papers, and effects.” This literal language imports tangible things, and it would require an expansion of the language used by the framers, in the interest of “privacy” or some equally vague judge-made goal, to hold that it applies to the spoken word. It simply requires an imaginative transformation of the English language to say that conversations can be searched and words seized. * * *

[Justice BLACK then went on to discuss what he saw as the correctness and the continuing viability of the Court’s ruling in Olmstead.]

* * *

As I see it, the differences between the Court and me in this case rest on different basic beliefs as to our duty in interpreting the Constitution. This basic charter of our Government was written in few words to define governmental powers generally on the one hand and to define governmental limitations on the other. I believe it is the Court’s duty to interpret these grants and limitations so as to carry out as nearly as possible the original intent of the Framers. But I do not believe that it is our duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution “up to date.” Of course, where the Constitution has stated a broad purpose to be accomplished under any circumstances, we must consider that modern science has made it necessary to use new means in accomplishing the Framers’ goal. * * *

There are * * * some constitutional commands that leave no room for doubt—certain procedures must be followed by courts regardless of how much more difficult they make it to convict and punish for crime. These commands we should enforce firmly and to the letter. But my objection to what the Court does today is the picking out of a broad general provision against unreasonable searches and seizures and the erecting out of it a constitutional obstacle against electronic eavesdropping that makes it impossible for lawmakers to overcome. Honest men may rightly differ on the potential dangers or benefits inherent in electronic eavesdropping and wiretapping. * * * But that is the very reason that legislatures, like New York’s, should be left free to pass laws about the subject. * * *

Mr. Justice HARLAN, dissenting.

The Court in recent years has more and more taken to itself sole responsibility for setting the pattern of criminal law enforcement throughout the country. Time-honored distinctions between the constitutional protections afforded against federal authority by the Bill of Rights and those provided against state action by the Fourteenth Amendment have been obliterated, thus increasingly subjecting state criminal law enforcement policies to oversight by this Court. * * * Newly contrived constitutional rights have been established without any apparent concern for the empirical process that goes with legislative reform. * * *

Today’s decision is in this mold. Despite the fact that the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country, the
Court has chosen, quite unnecessarily, to decide this case in a manner which will seriously restrict, if not entirely thwart, such efforts, and will freeze further progress in this field, except as the Court may itself act or a constitutional amendment may set things right.

[Justice WHITE also dissented.]

The Court’s ruling in Berger that wiretapping and eavesdropping amounted to a search within the meaning of the Fourth Amendment and therefore that the procedures mandated by the Warrant Clause controlled government’s use of electronic surveillance did not demolish all of the heritage left by Olmstead and Goldman. Implicit in both decisions was the proposition that Fourth Amendment protection was not triggered unless there had been physical trespass into a constitutionally protected area. Speaking for the Court in Katz v. United States, Justice Stewart rejected this formulation, refocused the question at issue, and thus eliminated what was left of the Olmstead-Goldman legacy.

**KATZ v. UNITED STATES**
Supreme Court of the United States, 1967
389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576

**BACKGROUND & FACTS** Charles Katz was convicted in a U.S. district court for telephoning information on bets and wagers from a telephone booth in Los Angeles to Boston and Miami in violation of a federal statute. A recording of his phone conversations made by FBI agents using an electronic listening device attached to the outside of the booth was presented as evidence by the government at the trial. A U.S. court of appeals affirmed the conviction over Katz’s contention that the evidence was obtained at the expense of his Fourth Amendment right to be secure against unreasonable searches and seizures, and he appealed to the Supreme Court.

Mr. Justice STEWART delivered the opinion of the Court.

* * * We granted certiorari in order to consider the constitutional questions thus presented.

The petitioner has phrased those questions as follows:

“A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

“B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.”

We decline to adopt this formulation of the issues. * * * [T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase “constitutionally protected area.” * * *

* * * For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought
to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. ** ** **

We conclude that the underpinnings of Olmstead and Goldman [v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942)] have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government’s position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner’s activities had established a strong probability that he was using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

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protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.” My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.” Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. 

Mr. Justice BLACK, dissenting.

* * *

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

* * *

In response to the Court's decisions in Katz and Berger, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to protect the privacy of wire and oral communications and standardize rules for their interception by the government. As Berger makes clear, basically the same procedures and exactly the same standard (probable cause) must be met to procure a warrant to wiretap or eavesdrop as to search for and seize physical evidence. Congress afforded additional security to wire and oral communications by outlawing private interception, authorizing lawsuits to remedy such occurrences, and imposing a statutory exclusionary rule to bar the admission of evidence obtained in violation of the law. The reach of the statutory exclusionary rule went further than a constitutional ban because it barred the use of illegally obtained information by the government, even in circumstances that could survive examination under the Fourth Amendment’s reasonable-expectation-of-privacy test. The statute also made it clear that wiretapping and eavesdropping were not preferred investigative tools. Law enforcement officers were expected to employ “normal investigative techniques” first and, only if those were unlikely to succeed, should they seek authorization to wiretap and eavesdrop. 18 U.S.C.A. § 2518(1)(c). The following note discusses the constitutionality of using pen registers, which have been recognized as one of the “normal investigative techniques” (see United States v. Castillo-Garcia, 117 F.3d 1179 (10th Cir. 1997)). The pen register is a good example of technology that evaded Fourth Amendment constraints previously announced by the Court because it yielded information about telephone calls without disclosing the content of conversations. The development of cordless telephones also significantly undercut the user’s “reasonable expectation of privacy” because radio waves, like the clicks or pulses created in phone dialing, could be picked up by anyone possessing non-invasive technology.
NOTE—USE OF A PEN REGISTER DOES NOT CONSTITUTE A "SEARCH"

In Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577 (1979), the Supreme Court, in an opinion by Justice Blackmun, held that installation and use of a pen register did not amount to a "search" within the meaning of the Fourth and Fourteenth Amendments. When hooked up to the appropriate phone line at the central office of the telephone company, a pen register records the numbers dialed, but not the content of outgoing calls made by a telephone subscriber. After he had robbed her, Smith placed a series of threatening and obscene calls to the victim. At the time of the robbery, the victim gave police a description of both the robber and an automobile she had observed nearby. When, during one of his calls, the caller asked her to step out on her front porch, she saw the same car she had observed at the crime scene. Police later spotted that car in the neighborhood, took down the license plate number, and were thus able to discover Smith's identity and his address. They then had a pen register installed to monitor calls dialed from his phone. After confirming that calls to the victim were coming from Smith's phone, police acquired a warrant to search his residence and turned up incriminating evidence. At trial, the defendant moved to suppress the fruits of the residential search on the grounds that police had not obtained a warrant prior to the installation of the pen register.

Justice Blackmun reasoned that telephone users have no subjective expectation of privacy because pen registers and similar devices are routinely employed by the phone company for billing, investigative, and repair purposes. Phone subscribers are given notice of this in the phone book, and even if they were not aware of this, they could conclude that the phone company regularly obtains information about outgoing calls just by looking at their phone bills. Nor does the phone user have an objective expectation of privacy in the numbers he calls because he has voluntarily exposed this information to a third party, the phone company, and necessarily assumes the risk that the phone company may turn this information over to the police. The Court concluded that, when the numbers of outgoing calls are recorded by a pen register, the phone subscriber waives any privacy interest in those numbers just as surely as he would if the calls had been placed through an operator.

Justices Brennan, Stewart, and Marshall dissented. Justice Stewart objected to the characterization of the numbers of outgoing calls as "without content." Such numbers, he pointed out, "easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life." Justice Marshall thought the majority's risk-assumption analysis was fundamentally flawed. He wrote, "In my view, whether privacy expectations are legitimate depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." Telephonic communication, he continued, plays a "vital role * * * in our personal and professional relationships." Use of a pen register, other than for the phone company's business purposes, ought to require a search warrant. Justice Marshall explained:

Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. * * *

Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity, I am unwilling to insulate use of pen registers from independent judicial review.
Although developing technology in the past made it easier to gain information about communications, it more recently has made monitoring by government more difficult. As a recent federal appeals court opinion succinctly summed it up: “Before the dawn of the digital era, there were few technological obstacles to the government’s wiretapping capabilities: Eavesdropping on a phone call was as easy as finding the copper wires that ran into every caller’s home. With the advent of the digital age, however, the architecture of the world’s communications networks changed drastically. In the place of physical copper wires that connected individual end-users, new communications technologies (such as digital subscriber line (“DSL”), cable modems, and VoIP [Voice over Internet Protocol]) substituted ethereal and encrypted digital signals that were much harder to intercept and decode using old-fashioned call-interception techniques.” (American Council on Education v. Federal Communications Commission, 451 F.3d 226, 228–229 (D.C.Cir. 2006). The following note surveys constitutional and statutory protection of privacy for these non-traditional forms of communications.

**NOTE—WHAT PROTECTION IS THERE FOR CORDLESS PHONES, CELL PHONES, AND E-MAIL?**

Title III of the Omnibus Crime Control and Safe Streets Act explicitly denied privacy protection to radio transmissions. Individuals using radio waves to communicate had to take their chances that other people using scanners would not listen in on conversations and disclose them or—worse yet—record them and make them available, possibly for use in criminal prosecutions. Using a cordless phone therefore was risky business. It was 1994 before Congress amended the law to explicitly include cordless phones within the meaning of “wire communications” to cover transmissions between “the cordless telephone handset and the base unit.” The reason it took so long was Congress’s belief that private interception was so easy.

Congress likewise had extended the statute’s protection to cellular phone transmissions in 1988. Before 1986, Title III did not cover “electronic communications.” But “[b]y the mid 1980s, the computer had become a pervasive tool in the world of communications. An increasing number of telephone calls were being digitalized, and personal computer sales were skyrocketing. It was unclear whether the Fourth Amendment covered some, or even any, of the new technologies.” Without Title III protection, and with Fourth Amendment protection in doubt, the government conceivably could have intercepted an e-mail message without obtaining a warrant. Certainly, no legal prohibition prevented private individuals, who are not affected by the Fourth Amendment, from eavesdropping.

Congress’s response was to enact the Electronic Communications Privacy Act (ECPA) of 1986, 100 Stat. 1848, which extended most—but not all—of the law’s protection to “electronic” communications (including data transmission) and to “messages held in electronic communications storage, which previously were unprotected” (for example, personal checks held by

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a bank). 18 U.S.C.A. § 2510(1). Notably, while the ECPA prohibits private interception of e-mail and other electronic communications, it affords the government greater leeway in securing a warrant, gives stored electronic communications less protection than stored wire communications (such as voice mail), and, most important of all, does not extend to them the protection of the statutory exclusionary rule. “Thus, when electronic communication is involved and no constitutional violation occurs, the defendant may seek only civil and criminal sanctions against offending government officials, whereas a defendant fighting an interception of wire and oral communication can make use of the statutory exclusionary rule as well.” Among the unintended results of the law's discriminatory treatment of electronic communications may be a reluctance of users to take full advantage of the developing technology and a disincentive for federal law enforcement to rigorously adhere to procedural requirements in procuring and conducting authorized interceptions.

Virtually all of the Al Qaeda operatives apprehended following the September 11, 2001 attacks were tracked down by tracing e-mail messages, faxes, and cellphone transmissions. For a discussion of searches and electronic surveillance where the target individuals can be plausibly linked to a foreign power or terrorist organization, see pp. 706–711.

In response to yet another kind of attack—electronic attack by computer hackers—Congress enacted, as part of the Homeland Security Act of 2002, 116 Stat. 2135, several provisions (many of them in Title II of the Act) that substantially enlarged the government’s authority. The law increases to life in prison the maximum sentence that could be imposed on a hacker who knowingly causes, or attempts to cause, death from his electronic attack. And it hikes the penalty for causing serious injury to a possible 20 years. The statute immunizes from suit internet service providers who disclose to the government the contents of e-mails, financial transactions, and other information which they “reasonably believe” is related to an immediate danger of causing death or serious injury. Whereas the government previously had to get a warrant to obtain such information, the legislation permits federal agents to conduct emergency surveillance of a computer without first securing judicial approval. The law defines an emergency with remarkable—and to libertarian critics, alarming—breadth as “an immediate threat to a national security interest” or an attack on a computer used in interstate commerce. Congressional Quarterly Weekly Report, Nov. 23, 2002, p. 3073.

Moreover, a divided federal appeals court, in American Council on Education v. Federal Communications Commission, 451 F.3d 226 (D.D.C. 2006), recently upheld a ruling by the Federal Communications Commission that providers of broadband Internet services and Voice over Internet Protocol services are “telecommunications carriers” within the meaning of the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C.A. §§ 1001–1010, and must, therefore, ensure that law enforcement officers are able to intercept communications transmitted over the providers’ networks. When ease of access is coupled with a lack of judicial supervision over the interception—as when communications are tapped pursuant to an administrative subpoena or national security letter, instead of a warrant that requires a showing of probable cause—the importance of this ruling is clear.

On a closely-related front, a privacy battle is shaping up between the Department of Justice and federal magistrates on the use of cell phones for tracking purposes. In this controversy, law enforcement officials seek orders to compel mobile phone companies to turn over electronic data about the location of cell phone subscribers who are suspected of having committed crimes. Cell phone location information can be used to provide a detailed map of an individual’s comings and goings as well as current location and, as such, it can reveal whom you associate with, what meetings you attend, and with whom you do business. In order to compel a mobile phone company to turn over the data, the Department of Justice has argued that the showing it is required to make is the same as that needed to get approval for the installation of a pen register (a simple court order), rather than the more demanding standard of probable cause it must meet if it wants to hear the contents of conversations. Federal magistrates, on the other hand, have insisted on meeting the

10. Ibid., p. 408.
higher standard because, although cell phones were not conceived of as a tracking device, monitoring cell site data converts it to that purpose.

The lower standard was established in the Electronic Communications Privacy Act of 1986 (ECPA). Eight years after its enactment of the ECPA, Congress passed the CALEA; but that statute (which, as noted above, requires phone companies to build monitoring capabilities into their networks) does not require a showing of probable cause for cell phone location data. While the Supreme Court has held that law enforcement officers do not need a search warrant to track someone in a public place, they do when the suspect enjoys a reasonable expectation of privacy. Congress may have first say on resolving this controversy by amending the statutes, but the Supreme Court is likely to have the last word. See Joelle Tessler, "Privacy Battle Shaping Up Over Cell Phone Tracking," Congressional Quarterly Weekly Report, June 26, 2006, pp. 1762–1763.

Although the Warren Court's decisions in Katz and Berger made it clear that the basic principles of search and seizure law were to govern wiretapping and eavesdropping in cases of suspected criminal activity, a substantial question remained about the applicability of these procedures when it came to monitoring done in the name of national security. Presidents had long argued that surveillance in this especially sensitive area was wholly a matter to be determined by the executive branch. When Congress codified the procedures outlined in Katz and Berger in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, it set the stage for a clash between judicial supervision and executive prerogative. The need to address this tension was hastened by challenges to surveillance conducted by the Nixon Administration in response to the allegedly subversive activities of anti-Vietnam War activists. Does the Court's interpretation of Title III in United States v. U.S. District Court, which follows, furnish a clue about how far the standards of Katz will be applied to monitoring done by the government when the nation's security is at risk? Do the provisions of Title III or the Court's interpretation suggest any loopholes through which agents of the executive branch might escape judicial oversight of surveillance activities?

UNITED STATES v. UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF MICHIGAN
Supreme Court of the United States, 1972
407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752

BACKGROUND & FACTS The United States filed charges against three defendants in federal district court for the destruction of government property. One of the defendants was indicted for the bombing of a Central Intelligence Agency office in Ann Arbor, Michigan. At pretrial proceedings, the defense moved to compel disclosure of certain wiretap information that the government had accumulated. The purpose of requesting disclosure was to allow a determination as to whether the electronic surveillance had tainted the evidence upon which the indictment was based or which the government would offer at the trial. The government produced a sealed exhibit containing the wiretap logs and offered them
for inspection by the judge in camera, but refused to permit disclosure to the defense on grounds that secrecy was essential to national security. The government also submitted an affidavit by the Attorney General, certifying that the wiretapping had been carried out lawfully under his authorization, though without prior judicial approval and pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The district court ruled that the surveillance violated the Fourth Amendment and ordered full disclosure, whereupon the government sought a writ of mandamus from the U.S. Sixth Circuit Court of Appeals directing the district court to vacate its order. The appellate court denied the government's petition, and the government appealed.

Mr. Justice POWELL delivered the opinion of the Court.

The issue before us * * * involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. * * *

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.A. §§ 2510–2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C.A. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873 (1967), and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967).

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U.S.C.A. § 2511(3):

“Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C.A. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.” (Emphasis supplied.)

The Government relies on § 2511(3). It argues that “in excepting national security surveillances from the Act’s warrant requirement Congress recognized the President’s authority to conduct such surveillances without prior judicial approval.” * * * The section thus is viewed as a recognition or affirmation of a constitutional authority in the President to conduct
warrantless domestic security surveillance such as that involved in this case.\footnote{In footnote 8 of the Court’s opinion, Justice POWELL added: Section 2511(3) refers to “the constitutional power of the President” in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a “foreign power”; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as “national security” threats, the term “national security” is used only in the first sentence of section 2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of section 2511(3), with the threat emanating—according to the Attorney General’s affidavit—from “domestic organizations.” Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.}

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpretation.\footnote{In footnote 8 of the Court’s opinion, Justice POWELL added: Section 2511(3) refers to “the constitutional power of the President” in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a “foreign power”; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as “national security” threats, the term “national security” is used only in the first sentence of section 2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of section 2511(3), with the threat emanating—according to the Attorney General’s affidavit—from “domestic organizations.” Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.}

Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them. The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. \footnote{In footnote 8 of the Court’s opinion, Justice POWELL added: Section 2511(3) refers to “the constitutional power of the President” in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a “foreign power”; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as “national security” threats, the term “national security” is used only in the first sentence of section 2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of section 2511(3), with the threat emanating—according to the Attorney General’s affidavit—from “domestic organizations.” Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.}

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of “ordinary” crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.\footnote{In footnote 8 of the Court’s opinion, Justice POWELL added: Section 2511(3) refers to “the constitutional power of the President” in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a “foreign power”; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as “national security” threats, the term “national security” is used only in the first sentence of section 2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of section 2511(3), with the threat emanating—according to the Attorney General’s affidavit—from “domestic organizations.” Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.}

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.” Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.\footnote{In footnote 8 of the Court’s opinion, Justice POWELL added: Section 2511(3) refers to “the constitutional power of the President” in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a “foreign power”; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as “national security” threats, the term “national security” is used only in the first sentence of section 2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of section 2511(3), with the threat emanating—according to the Attorney General’s affidavit—from “domestic organizations.” Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.}

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.
As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

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* * * Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute. * * *

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* * * We recognize * * * the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or incomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. * * *

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* * * We emphasize [that] our decision * * * involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents. * * *

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* * * Given those potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. * * *

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Affirmed.

THE CHIEF JUSTICE [BURGER] concurs in the result.

Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the
Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that “exigencies of the situation [make its] course imperative.”

Here federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines simply to seize those few utterances which may add to their sense of the pulse of a domestic underground. We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations. Senator Edward Kennedy found recently that “warrantless devices accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average for those devices installed under court order.” He concluded that the Government’s revelations posed “the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time.” Even the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government’s data bank. See Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318 (1972).

Following U.S. District Court, federal appeals courts generally recognized foreign intelligence surveillance as an exception to the warrant requirement, relying on the “good faith” of the Executive and sanctions for illegal surveillance incident to post-search criminal or civil litigation.” United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974), cert. denied sub nom. Ivanov v. United States, 419 U.S. 881, 95 S.Ct. 147 (1975). Probable cause, however, was still required (see United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987), cert. denied 486 U.S. 1010, 108 S.Ct. 1741 (1988)). Congress addressed the matter directly when it passed the Foreign Intelligence Surveillance Act (FISA) six years later.

Note—The Foreign Intelligence Surveillance Act

In 1978 Congress passed the Foreign Intelligence Surveillance Act, 92 Stat. 1783, in an effort to control electronic surveillance conducted in the United States for purposes of national security. The statute reaffirms the principle that no bugging or wiretapping without prior judicial approval is to be initiated by federal intelligence or law enforcement agents against an American citizen, a lawfully resident alien, or any of various incorporated and unincorporated domestic organizations. The law requires that agents seeking a warrant for any electronic surveillance of the above parties first produce evidence of criminal activity. The law also imposes stiff criminal penalties for violations and provides for the recovery of compensatory and punitive damages and legal and investigative fees by an aggrieved party. As distinguished from its stringent regulation of surveillance of “U.S. persons” believed to be engaged in intelligence operations on behalf of a foreign power, the legislation provides more relaxed oversight of bugging and wiretapping activities by federal agents directed at a “foreign power” or an “agent of a foreign power.” In such instances, although a warrant is required—except in a specially recognized, but secret, category of NSA (National Security Agency) probes—court authorization does not hinge upon the government’s showing of criminal activity, but only upon a demonstration that there is “probable cause” to believe that the target of surveillance is a “foreign power” or the “agent of a foreign power.” The
statute also does not allow foreign powers or their agents to recover damages or fees for any violation of the Act. Other provisions of the law (1) provide for special courts to authorize warrants and hear government appeals from their denial in matters of such national-security-related electronic surveillance; (2) specify procedures governing the issuance, execution, and extension of such warrants; (3) minimize, closely regulate the disclosure of, and potentially mandate the suppression of intercepted communications involving innocent American individuals; and (4) require regular reports to Congress from the Attorney General concerning all electronic surveillance conducted pursuant to the statute. Although the Act purposely eschews any mention or recognition of any inherent constitutional power of the President to conduct warrantless electronic surveillance in the name of national security, it does—in addition to the NSA exception noted earlier—empower the President to authorize electronic surveillance without a court order for up to 15 days following a declaration of war by Congress.

In addition to those acting in behalf of traditional nation-states, federal courts held that agents of “foreign powers” within the meaning of the FISA also included agents of terrorist organizations, for example, the leader of U.S. operations for the Provisional Irish Republican Army (see United States v. Duggan, 743 F.2d 59 (2nd Cir. 1984)) and members of Al Qaeda (see United States v. Bin Laden, 126 F.Supp.2d 264 (S.D.N.Y. 2000)). Treating nonresident aliens differently from citizens and resident aliens under the FISA has also been upheld against the contention that it violates the Equal Protection Clause, although warrantless electronic surveillance of American citizens residing abroad has been upheld for the purpose of foreign intelligence gathering.

In the wake of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, Congress adopted the USA PATRIOT Act of 2001, 115 Stat. 272, Title II of which substantially broadened the federal government’s powers of electronic surveillance. Key provisions of the new law (1) add terrorism and “computer fraud and abuse” as crimes that can constitute the basis for securing wiretaps; (2) allow secret searches—so-called “black-bag” or “sneak and peek” operations—in which investigators can delay notifying a suspect if they believe that giving notice will tip off other suspects (usually the suspect is given the warrant just before the search is undertaken); (3) enable investigators to track Internet communications as they do telephone communications (although the government is required to use technology that minimizes capturing the content of Internet communications—technology, in other words, roughly analogous to the use of pen registers in tracking telephonic communications); (4) permit “roving wiretaps” so the tap follows the suspect regardless of the fact that different phones are used; (5) authorize “one-stop taps” or court orders for nationwide investigations of terrorist activities (as opposed to requiring that the government secure a warrant in each jurisdiction where such activities are investigated); and (6) permit voice mail to be seized by use of a warrant while customer information and credit card numbers could be obtained by subpoena. The statute also permits government officials access to secret grand jury testimony and information obtained by investigators’ wiretaps if it is necessary to counterintelligence or foreign intelligence operations. Government officials are also liable through civil suits for the unauthorized release or leaks of information.

The PATRIOT Act expired in December 2005. In March 2006, after two temporary extensions, during which critics of the law extracted some modifications, Congress renewed all but two of the provisions permanently. See 120 Stat. 292. The two most contentious provisions, which expire in four years, were the power of the FBI to get “roving wiretaps” (surveillance that follows the person rather than monitoring a fixed
location) and its authority to seize business records upon the approval of a Foreign Intelligence Surveillance Court (FISC) judge or by means of a "national security letter." A national security letter is an administrative subpoena issued by the FBI without court approval or oversight in cases where terrorism or espionage is already suspected. However, official reviews of the bureau’s use of national security letters revealed that the bureau significantly underreported to Congress the numbers of letters issued, it requested customer information when there was no pending investigation, and it issued letters over the signatures of officials not authorized to approve them. In short, there was large-scale abuse of the investigative tools the FBI was given under § 215 of the original PATRIOT Act.

Congress’s enactment of the Foreign Intelligence Surveillance Act, and its creation of the courts to implement it, was thought to have been the final word on harmonizing the dictates of the Berger and Katz decisions with the surveillance of foreign intelligence activities that had domestic wiretapping ramifications. But in the wake of the 9/11 attacks, President George W. Bush acted unilaterally to authorize warrantless surveillance on his own say-so, that is without any judicial oversight. The President argued that Congress provided statutory authorization when it passed the Authorization for Use of Military Force (p. 709). Alternatively, he contended that his Article II power as Commander-in-Chief provided constitutional justification. The result, discussed in the following note, was the largest spying operation in American history.

12. One provision of the original PATRIOT Act has been struck down—that imposing a gag order on businesses receiving a national security letter which compelled them not to discuss the fact that they had received such a demand for their customer records. See Doe v. Gonzales, 386 F.Supp.2d 66 (D.Conn. 2005), appeal dismissed as m.o.o.t, 449 F.3d 415 (2d Cir. 2006). The district judge held that the government failed to carry its heavy burden of proving that speculative national security interests justified interference with free speech. The court said that "the statute has the practical effect of silencing those who have the most intimate knowledge of the statute’s effect and a strong interest in advocating against the federal government’s broad investigative powers." Moreover, the provision creates a situation where "the very people who might have information regarding investigative abuses and overreaching are peremptorily prevented from sharing that information with the public." New York Times, Sept. 10, 2005, p. B15. After initially appealing the ruling, the government changed its mind and abandoned attempts to prosecute libraries and businesses for discussing their receipt of national security letters. The appeals court then dismissed the case. Legislation in 2006 renewing this part of the PATRIOT Act (until 2009) no longer bars anyone from divulging the fact that the federal government has requested business and library records under this section.

13. In 2005, the FBI told Congress that its agents had delivered only 9,254 national security letters during 2003 and 2004. It was estimated, however, that the number for 2003 was 39,000 and the number for 2004 was 56,000. For the entire three-year period 2003–2005, it was estimated that the FBI issued more than 143,000 such letters. See http://seattletimes.nwsource.com/html/politics/2003609818_webbts.09.html. See Office of the Inspector General, U.S. Department of Justice, "A Review of the Federal Bureau of Investigation’s Use of Section 215 Orders for Business Records" (March 2007). For discussion, see New York Times, pp. A1, A10; Congressional Quarterly Weekly Report, Apr. 2, 2007, p. 970. Reuters reported that a subsequent preliminary FBI audit, based on a 10% sample of the searches conducted since 2002, revealed more than a thousand possible violations of the law or agency rules. See http://www.reuters.com/article/domesticNews/idUSN1421339820070614.

14. For a detailed description of judicial oversight of foreign intelligence monitoring, see Elizabeth Bazan, "The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview," Congressional Research Service (Jan. 2007). In brief, the Chief Justice selects the federal judges who comprise the Foreign Intelligence Surveillance Court (FISC). These judges sit individually to approve applications by federal agents to conduct surveillance on individuals or groups identified as foreign agents linked to terrorist activities, espionage, or sabotage. They function in far greater secrecy than is normal for federal courts because the materials they deal with are classified. Appeal from an adverse decision may be taken to the three-judge Foreign Intelligence Surveillance Court of Review (FISCR), whose members are also selected by the Chief Justice.
NOTE—THE LARGEST SURVEILLANCE OPERATION IN
AMERICAN HISTORY

Two related secret surveillance programs operated by the National Security Agency (NSA) were
launched in the wake of the 9/11 attacks. Reputed to be the largest spying operation in American
history, the NSA activities were ordered by President George W. Bush and conducted without
judicial approval or oversight. The program about which news leaked first was a domestic
eavesdropping operation in which the NSA listened in on phone calls and read e-mails to and from
American residents and individuals the agency believed were linked to Al Qaeda. In the beginning
the NSA focused only on the foreign end of those conversations, procuring a warrant only if the
agency decided the party in the United States was of intelligence interest. But the foreign-only
limitation on the eavesdropping was not always observed. The NSA intercepted numerous phone
calls and e-mails originating or ending on American soil because of confusion over what constituted
an "international" call. The technical difficulty of distinguishing between domestic and international
messages was attributed to such things as roving cell phones and internationally-routed e-mails. The
NSA now obtains warrants from the Foreign Intelligence Surveillance Court only if both parties in
the conversation were within the United States.

The second program obtained and mined long-distance phone-call data from the largest
communications companies in the United States for both foreign and domestic calls. The data for
each call included the phone numbers of the connected parties, the duration of the communication,
and its date and time. Unlike the domestic eavesdropping program, no attempt was made to monitor
the content of the conversation. Presumably, the aim of building and analyzing such a massive
database, acquired sometimes with the reluctance of the leading American telephone-service
providers, had been ferreting out calling patterns. Although monitoring the content of domestic calls
without a warrant would certainly violate both federal statutory and constitutional law, the Bush
Administration defended its acquisition of the data on the grounds that recording the numbers called
did not amount to a "search." In support of its position, the administration cited the Supreme Court's
1979 ruling in Smith v. Maryland (p. 699), which upheld the warrantless use of pen registers on the
ground that phone subscribers had no legitimate expectation of privacy in the identity of the
numbers they called. Regardless of its legality, some critics have questioned the accuracy and
usefulness of analyzing communications links inferred simply from the patterns of calls, arguing that
it amounts to inference piled on inference. They argue it isn't as if callers are simply dialing 1-800-
2006, p. A27. For an in-depth examination of the NSA program, see "Spying on the Home Front," a
documentary in the Frontline series, originally broadcast May 15, 2007 on PBS.

In addition to immediately attacking those who leaked word of the secret spying to the New York
Times, the administration defended the surveillance operation on both statutory and constitutional
grounds and said it would continue. Although the Federal Intelligence Surveillance Act (FISA) itself
does not permit warrantless surveillance, the statute excepts surveillance "otherwise authorized by
Congress." The Bush administration contended that the Congress's post-9/11 Authorization for the Use
of Military Force (AUMF) made such operations legal: The AUMF empowered the President "to use all
necessary and appropriate force against those nations, organizations, or persons he determines planned,
authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored
such organizations or persons, in order to prevent any future acts of international terrorism against the
United States" and electronic surveillance was "necessary and appropriate." Critics of this defense replied
that the AUMF authorized a military response and did not empower the President to engage in domestic
spying. Moreover, it had been reported that the NSA requested AT&T's cooperation in turning over its
records on calls as early as February 2001 (seven months before the 9/11 attacks took place)—well in
advance of any authorization from Congress. If so, the Bush Administration was clearly acting on an
assertion of inherent presidential power, not some delegation of authority from Congress.
Federal courts have generally recognized the President's inherent power to conduct covert foreign intelligence surveillance (see, for example, United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); In re Sealed Case..., 2002 WL 31546991 (F.I.S.Ct. 2002), but this is very far from conceding that presidential say-so alone is sufficient when domestic surveillance is implicated. See Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. en banc, 1975). President Bush defended the warrantless domestic surveillance as within his Article II powers, saying, "As president and commander-in-chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it." The problem with this argument is that, according to the Youngstown case (p. 198), the President's powers as Commander-in-Chief do not extend beyond the military context. Moreover, critics argued, if the President had inherent executive power under Article II to conduct warrantless domestic spying, why would Congress have established the FISC at all? (Within a week after the existence of the warrantless spying program was revealed, one of the FISC judges resigned in protest to make the point.) If inherent executive power authorized the President to violate this law, what law could he not violate in the name of fighting terrorism? The administration argued that applications to the FISC for emergency warrants were too time-consuming when what was needed was an immediate response. In response, critics pointed out that FISA allowed the government to go ahead and intercept communications which would be held legal as long as application for a warrant was then made within 72 hours. Moreover, the critics argued, the FISC could hardly be characterized as obstructionist since, of the 10,617 warrant applications made from 1995 to 2004, the FISC had turned down only 4. The administration contended, however, that the statute was written in an age of spy-to-spy communications when a few days' delay didn't matter much, but quick identification and interdiction of current terrorists with more capability of inflicting harm was necessary if attacks were to be prevented, a time-frame more likely measured in minutes and seconds.

Lawsuits challenging the NSA surveillance program were launched by the American Civil Liberties Union and the Center for Constitutional Rights. Those suits sought to answer the question whether the program had been used only to go after phone calls and e-mails of people linked to Al Qaeda or whether such surveillance had been used in ways that resemble the political spying abuses of the 1960s and 1970s that led to Congress's enactment of the FISA.

In American Civil Liberties Union v. National Security Agency, 438 F.Supp.2d 754 (E.D.Mich. 2006), order vacated, 493 F.3d 644 (6th Cir. 2007), a federal district court held the secret warrantless surveillance program to be unconstitutional. The plaintiffs in the suit were journalists, lawyers, and scholars who argued that monitoring of international telephone and internet communications was unauthorized and also invaded their First Amendment rights to communicate with persons outside the United States. The government had argued that the data in its possession amounted to "state secrets" absolutely protected from disclosure by federal law and that, without such evidence, plaintiffs could not demonstrate that they had standing, let alone the right to summary judgment in their behalf. But the court held that, while the information was absolutely protected, the government had nonetheless publicly admitted to conducting the program, so the plaintiffs did not need the information to argue their claims. The court went on to hold that the warrantless monitoring of communications (1) chilled the plaintiffs' First Amendment rights to carry out their professional responsibilities and communicate with sources, clients, witnesses, and scholars abroad; (2) flatly violated the Foreign Intelligence Surveillance Act; (3) was unauthorized by the military force resolution adopted by Congress in 2001; and (4) went substantially beyond any powers the President could claim, inherent or otherwise, under Article II of the Constitution. A divided federal appellate court subsequently dismissed the suit on grounds the plaintiffs lacked standing to sue because they did not show the injury alleged was sufficiently direct or concrete. But even if the district court's judgment had been affirmed on appeal, another federal court has ruled that the details would still remain classified because they are not covered by the Freedom of Information Act. See People for the
American Way Foundation v. National Security Agency, 462 F.Supp.2d 21 (D.D.C. 2006). (The government won other suits in which telephone subscribers either challenged the companies' cooperation with NSA requests or tried to force disclosure of what records the companies had turned over, see p. 261.)

In January 2007, President Bush agreed that further operation of the NSA program would cease and further monitoring would proceed only with FISA approval, although the administration backed legislation that would have made a court order unnecessary following a terrorist attack or when there was an “imminent threat of attack likely to cause death, serious injury, or substantial economic damage to the United States.” When Congress was slow to act on this legislative proposal, because the administration had not been more forthcoming with additional information about the operation of the NSA program, Michael McConnell, the Director of National Intelligence, seemed to suggest that the pledge to seek warrants from the FISC would not necessarily continue: “The President’s authority under Article II is in the Constitution. So if the President chose to exercise Article II authority, that would be the President’s call.” See New York Times, May 2, 2007, p. A16.

Nor were the secret NSA programs the only kind of covert surveillance undertaken by the Bush Administration solely on the basis of executive say-so. The following note details the secret program to track international financial transactions and thereby detect movements of money arguably used to fund terrorist and other illicit activities. Monitoring these SWIFT transactions, like the extensive NSA data-mining already discussed, permitted access to huge information bases and was not limited to information about specifically-identified individuals. In that important respect, the “national security letters” authorizing them more nearly resemble the general warrants or the writs of assistance so despised by the colonists, than search warrants which, under the Fourth Amendment, must “particularly describ[e] the place to be searched, and the persons or things to be seized.”

NOTE—FOLLOW THE MONEY: THE BUSH ADMINISTRATION MONITORS SWIFT TRANSACTIONS IN THE WAR ON TERROR

As disclosed by the New York Times, the Los Angeles Times, and the Wall Street Journal, since the 9/11 attacks the Bush Administration covertly tracked financial transactions of individuals suspected of having ties to Al Qaeda by reviewing records handed over by the Society for Worldwide Interbank Financial Telecommunication (SWIFT). SWIFT is a Belgian cooperative that routed approximately $6 trillion daily between banks, brokerages, stock exchanges, and other financial institutions. The focus of interest was wire transfers and other means of moving money overseas and into and out of the United States. Routine financial transactions within the United States are generally not in the database of information collected by the government. What began as a temporary monitoring operation to follow the money used to finance international terrorism became, over a five-year period, an ongoing surveillance program run out of the CIA and overseen by the U.S. Treasury Department.

As contrasted with grand jury subpoenas and judicial warrants directed at domestic financial institutions compelling them to turn over information about suspect transactions, the government (as with the NSA program of communications surveillance) resorted to administrative subpoenas, or so-called national security letters, requiring the production of data on tens of thousands of transactions. The government's program of financial monitoring focused on SWIFT because it was an important gatekeeper in financial transactions: it provided crucial electronic instructions in the transfer of money among some 7,800 financial institutions. The cooperative itself is owned by 2,200 organizations; and virtually all commercial banks, stock exchanges, fund managers, and brokerage houses use its services. New York Times, June 23, 2006, pp. A1, A10; June 27, 2006, pp. A1, A10.
The Bush Administration defended this financial monitoring program largely as a matter of the President’s emergency economic powers under the International Economic Emergency Powers Act (IEEPA) passed in 1977 (see p. 232) and claimed it has imposed multiple safeguards to protect against unwarranted searches of American financial records. The IEEPA gives the President enormous authority over financial transactions and was originally aimed at targeting drug cartels, money launderers, criminal organizations, and tax dodgers. The data accumulated, it was reported, do not allow the government to track routine financial activity, such as ATM withdrawals, or to see bank balances.

In light of the IEEPA, treaties, and other international agreements, the expectation of privacy in data surrounding international financial transactions is substantially less than protections afforded domestic transactions under American constitutional law. Indeed, even challenges to record-keeping by banks imposed by the Bank Secrecy Act of 1970 with many of these same aims in mind have not fared well, specifically insofar as banks sought to vindicate the privacy interests of clients or as clients have sought to protect their own privacy interests. See, for example, California Bankers Association v. Shultz, 416 U.S. 21, 94 S.Ct. 1494 (1974); United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976). This combination of the IEEPA, treaties, and other sorts of international agreements makes any Fourth Amendment claim even weaker in a global context. The Bush Administration’s financial surveillance program, therefore, was worlds away, legally speaking, from the NSA communications surveillance operation and would appear to rest on far more secure legal footing.

Belgian officials and a panel of the European Union, however, concluded that SWIFT’s disclosure of the data—as much as 2.5 billion records in 2005 alone—violated European Union law. “Under European Union law, companies are forbidden from transferring confidential personal data to another country unless that country offers adequate protections. The European Union does not consider the United States to be a country that offers sufficient legal protection of individual data.” With respect to the “broad administrative subpoenas issued to Swift by the United States Treasury,” a European commission said, “Swift should have realized that exceptional measures based on American rules do not legitimize hidden, systematic violations of fundamental European principles related to data protection over a long period of time.” The financial consortium responded that it was “obligated to answer subpoenas from American authorities because it conducted substantial business in the United States.” New York Times, Sept. 29, 2006, p. A8; Nov. 23, 2006, p. A14.
As the cases on electronic surveillance in the previous chapter show, the constitutional protection of privacy originally turned largely on expectations about its existence in particular places. For many years, the validity of such claims hinged on the possession of property rights, the most protected place being one's home. Increasingly, however, privacy came to be seen as a right that inheres in the person, not in a location.

Reproductive Rights and Family Values Before Griswold

The legal concept of “the right of privacy” originated not in constitutional law, but in personal injury law, and it surfaced not in a court decision, but in a law review article. What provoked Louis Brandeis (then a highly successful trial lawyer) and his law partner, Samuel Warren, to fashion their proposed new tort—the invasion of privacy—were recurring lurid press accounts of the social activities of the Warrens, one of Boston’s most prominent families. In promoting awareness of this heretofore unrecognized form of personal injury, Warren and Brandeis distinguished it from such things as injury to reputation by emphasizing that the nature of the damage lay in the lowering of the affected individual’s estimation of himself. The invasion of privacy was a personal right, not a property right, whose infringement impaired people’s sense of their own uniqueness, trammeled their independence, impaired their integrity, and assaulted their dignity. In short, Warren and Brandeis sought to establish privacy as a personal right—the right to an “inviolate personality.” Nearly four decades later, Justice Brandeis worked this idea into his dissent in the Olmstead case (p. 689) and declared as a matter of constitutional law as well that the individual possessed “as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

The right to an inviolate personality made its way into a Supreme Court opinion the following year when the Court spoke of the “inviability of the person.” It did so in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000 (1891), which posed the

question whether a woman who had sustained a concussion and other injuries in a train accident could be compelled to submit to surgical examination by medical experts for the defendant railroad in order to assess the extent of the damage. Acknowledging that refusal to permit examination of her injuries was something the jury would be entitled to take into account at trial, the Court concluded it had no legal right or power to enforce such a form of discovery. Speaking for the Court, Justice Gray wrote, “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.”

Although autonomy over one’s body as an indispensable aspect of individual integrity was vindicated by the decision in Botsford, the next round was won by government. In Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584 (1927), the Court upheld Virginia’s policy of sterilizing mental defectives. Noting that Carrie Buck was “the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child,” Justice Holmes, writing for the Court declared:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. * * * Three generations of imbeciles are enough.2

Having upheld the constitutionality of compulsory sterilization in principle, two decades later the Court addressed the issue of its use in preventing the reproduction of “habitual criminals.” Oklahoma law provided that anyone convicted of two or more felonies that were crimes of “moral turpitude” could be sterilized because of habitual criminality, although the state statute excluded convictions for prohibition or revenue act violations, embezzlement, or political offenses. Skinner, adjudged an habitual offender under the statute, had been convicted once of stealing chickens and twice of armed robbery. Writing for the Court in Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942), Justice Douglas declared:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the

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2. Holmes’s characterization of Carrie Buck and her daughter, Vivian—and, most probably, Carrie’s mother as well—was quite wrong. Although lacking in social graces and sophistication, they were individuals of normal intelligence. Stephen Jay Gould writes: “Carrie Buck was one of several illegitimate children borne by her mother, Emma. She grew up with foster parents * * *. She was raped by a relative of her foster parents, then blamed for the resulting pregnancy. Almost surely, she was (as they used to say) committed to hide her shame (and her rapist’s identity), not because enlightened science had just discovered her true mental status. In short, she was sent away to have her baby. Her case never was about mental deficiency; Carrie Buck was prosecuted for supposed sexual immorality and social deviance. The annals of her trial and hearing reek with the contempt of the well-off and well-bred for poor people of ‘loose morals.’ Who really cared whether Vivian was a baby of normal intelligence; she was the illegitimate child of an illegitimate woman. Two generations of bastards are enough.” The Flamingo’s Smile (1985), p. 314.
States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The statute in this case was a violation of equal protection of the laws because, as the Court pointed out, a three-time chicken thief could be sterilized, but a three-time embezzler could not. Justice Douglas continued, “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” This was, then, “clear, pointed, unmistakable discrimination.” In a concurring opinion, Justice Jackson added, “There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.”

At the same time as it rebuffed arguments by the mentally retarded for individual autonomy in the control of one’s body in Buck v. Bell, the Court did recognize unenumerated constitutional rights of considerable sweep related to domestic life. Said Justice McReynolds, writing for the Court in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923):

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

In Meyer, the Court struck down a state statute that banned the teaching of any language other than English until students were in high school. The same year, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925), the Court declared unconstitutional an Oregon law requiring children between the ages of 8 and 16 to attend school and only public schools. The Court ruled that such a policy “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”

Finally, in Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967), the Court turned its attention to a state law that prohibited interracial marriages involving whites. Reasoning from the premise that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and was thus a “fundamental freedom,” the Court concluded, “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.” Three years earlier, in McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283 (1964), the Court had struck down a state statute that specially punished interracial fornication. The Court held that the law violated equal protection by employing a racial classification because it treated an interracial couple of one white person and one black person differently from any other couple.

Recognizing a Constitutional Right of Privacy

Many, if not all, of these cases are cited by the Justices as antecedents of the right of privacy, which the Court announced for the first time in Griswold v. Connecticut (p.716). Their legacy was the assertion that a right of personal autonomy existed with respect to certain
domains of human activity, such as sexual relations and matters of the home. In the view of constitutional strict constructionists, their common weakness was that the various rights they declared did not specifically appear anywhere in the text of the Constitution. On the contrary, the freedoms they recognized invariably appealed to some set of transcendent values, which were asserted to lay at the core of American life.

**Griswold v. Connecticut**

Supreme Court of the United States, 1965
381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510

**BACKGROUND & FACTS** A Connecticut statute outlawed the use of birth control devices and also made it a criminal offense for anyone to give information or instruction on their use. Estelle Griswold, executive director of a planned parenthood league, and Dr. Buxton, its medical director, were convicted for dispensing such information to married persons in violation of the law and fined $100. A state appellate court and the Connecticut Supreme Court of Errors affirmed the convictions, whereupon defendants appealed to the U.S. Supreme Court.

Mr. Justice DOUGLAS delivered the opinion of the Court.

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We are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. * * * 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.

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[Previous] 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. * * * 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, 116 U.S. 616, 630, 6 S.Ct. 524, 532 (1886), as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692 (1961), to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”

***

The present case * * * 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, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314 (1964). 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.

Mr. Justice GOLDBERG, whom THE CHIEF JUSTICE [WARREN] and Mr. Justice BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment includes all of the first eight Amendments * * * I do agree that the concept of liberty * * * embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. * * *

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934). * * *

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

* * * To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments to the Constitution is to construe the Ninth Amendment to be of no effect.

[The Ninth Amendment shows a belief of the Constitution's authors that]
fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. * * * This Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. * * *

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State’s infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. * * *

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] * * * as to be ranked as fundamental.” Snyder v. Com. of Massachusetts [supra]. The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” * * * Powell v. State of Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63 (1932). * * *

* * *

The rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

* * * The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

* * *

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning * * * a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

* * *

It is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. * * *

Finally, it should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in Poe v. Ullman, 367 U.S. at 553, 81 S.Ct. at 1782 (1961):
"Adultery, homosexuality and the like are sexual intimacies which the State forbids, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States.

Mr. Justice HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937). I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

While I could not more heartily agree that judicial "self-restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times."

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

Mr. Justice WHITE concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court.

Mr. Justice BLACK, with whom Mr. Justice STEWART joins, dissenting.

*I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional."

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty...
of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an “arbitrary and capricious” or “shocking to the conscience” formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v. State of New York, 198 U.S. 45, 25 S.Ct. 539 (1905). That formula, based on subjective considerations of “natural justice,” is no less dangerous when used to enforce this Court’s views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578 (1937). * * *

Mr. Justice STEWART, whom Mr. Justice BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. * * * But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

* * *

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG’s concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held “states but a truism that all is retained which has not been surrendered,” United States v. Darby, 312 U.S. 100, 124, 61 S.Ct. 451, 462 (1941), was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy “created by several fundamental constitutional guarantees.” With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

* * *
The manner in which the Court announced its recognition of a constitutional right of privacy in Griswold v. Connecticut raised some major questions. One of these was just where in the Constitution such a right was to be found. The fact that the document did not guarantee the right of privacy in so many words made it even more important that the Court identify a specific provision anchoring the right. In his opinion for the Court, Justice Douglas discussed privacy as it is reflected in the penumbras of half a dozen constitutional amendments, but provided no secure beachhead for the right. If one of the criticisms of the Court’s performance in Griswold is that the right of privacy is unfounded, is that because no right of privacy can be inferred from the document or because the Douglas opinion reflects poor organization and insufficient reasoning? Justice Goldberg’s concurring opinion seems more focused as he makes a case for grounding the right of privacy in the Ninth Amendment. In doing so, Goldberg’s concurring opinion promised to transform what heretofore had been regarded as a vestigial constitutional organ into a functioning appendage.

Another problem with Griswold’s enunciation and justification of the right of privacy is that it appears to be confined to the marital relationship. This limitation characterizes both Justice Douglas’s and Justice Goldberg’s opinions. Their depictions of the right stressed its foundation in a particular kind of association rather than in the person. The right of privacy for them seems to inhere in family values rather than individual autonomy. But should it? As Justice Holmes wrote in Lochner when another form of substantive due process was flying high, “[The Constitution] *** is made for people of fundamentally differing views.”

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<tr>
<th>Case</th>
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<td>Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972)</td>
<td>A Massachusetts law making it a felony to give anyone other than a married person contraceptive devices or medicines violates the guarantee of equal protection to single persons because the prohibition bears no reasonable relation to either deterring premarital sex or regulating the distribution of potentially harmful articles. “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”</td>
<td>6–1; Chief Justice Burger dissented. Justices Powell and Rehnquist did not participate.</td>
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<tr>
<td>Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010 (1977)</td>
<td>A New York statute making it a crime for anyone to sell or distribute contraceptives to a minor under 16 or for anyone but a licensed pharmacist to distribute contraceptives to anyone over 16 is unconstitutional because the right to privacy in connection with decisions affecting procreation extends to minors as well as adults. Restricting sales of non-prescription contraceptives to those by pharmacists unreasonably burdens the right of individuals to use contraceptives if they choose to do so.</td>
<td>7–2; Chief Justice Burger and Justice Rehnquist dissented.</td>
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Abortion

As the Court moved from striking down Connecticut’s limitation on the availability of contraceptives in Griswold to its decision in Roe v. Wade eight years later, recognizing the qualified constitutional right of a woman to terminate her pregnancy, the Court’s definition of the right of privacy in associational terms gave way to a person-based conception. Roe, after all, was an unmarried woman, and vindicating her right to choose put a good deal of stress on the associational justification offered in the Griswold opinions. At stake in Roe was the constitutionality of the Texas therapeutic abortion statute, that is, a law restricting the performance of abortions to those instances in which the life of the mother would be endangered by carrying the fetus to term. Although the Court declared that Roe’s right of privacy cannot be absolute, it did declare the right to be fundamental, thus triggering strict scrutiny of any governmental regulation. Much of the Court’s opinion is spent discussing which interests asserted by the state qualify as compelling and harmonizing these compelling interests with the fundamental character of Roe’s right using the trimester framework. Justice Blackmun, speaking for the Court, is clear about which interests justify how much regulation at which point in the pregnancy, and he is equally direct in asserting that the state may not predicate its regulation of abortion on the simple assertion that life begins at conception (thus permitting the state to declare all fetuses persons, so that the performance of other than therapeutic abortions is a form of homicide). The Court’s position in Roe that the state may not constitutionally rest its public policy simply on moral declaration is one of the most controversial aspects of its ruling.

**ROE V. WADE**

Supreme Court of the United States, 1973
410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

**BACKGROUND & FACTS**  Texas abortion law, typical of that in effect in most states for more than a century, made it a felony for anyone to destroy a fetus except on “medical advice for the purpose of saving the life of the mother.” Three plaintiffs brought suit against Wade, the district attorney of Dallas County, for declaratory and injunctive relief: an unmarried pregnant woman, a licensed physician, and a childless married couple fearing future pregnancy because of the wife’s deteriorated health. (At the outset of its opinion, the U.S. Supreme Court subsequently determined that only Jane Roe (a pseudonym for the unmarried pregnant woman) had the requisite standing to sue.) The statute was challenged on grounds it denied equal protection (by forcing women who did not have the money for an abortion to have a baby when those who had money could go elsewhere and procure a safe, legal abortion), due process (because the statute was vague as to what preserving the life of the mother actually meant), and the mother’s right of privacy guaranteed under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. A three-judge federal district court found the statute unconstitutional, and the Supreme Court granted review as a matter of right.

Mr. Justice BLACKMUN delivered the opinion of the Court.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values,
and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547 (1905):

"It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. * * *

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. * * * Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of
course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

***

It is with these interests, and the weight to be attached to them, that this case is concerned.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891], 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, * * * in the Fourth and Fifth Amendments, * * * in the penumbras of the Bill of Rights, * * * in the Ninth Amendment, * * * or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment * * *. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” * * * are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, * * * procreation, * * * contraception, * * * family relationships, * * * and child rearing and education * * *.

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.

On the basis of elements such as these, appellants and some amici argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants’ arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman’s sole determination, is unpersuasive. The Court’s decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. * * * The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584 (1927) (sterilization).

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.

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Where certain “fundamental rights” are involved, the Court has held that regulation limiting these rights may be justified only by a “compelling state interest,” and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

***

* * * Appellant 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. * * * [W]e do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a “person” within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

[The use of the word “person” in the provisions of the Constitution only in a postnatal sense,] together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn. * * *

This conclusion, however, does not of itself fully answer the contentions raised by Texas * * *

B. 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, Griswold, Stanley, Loving, Skinner, 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.

***

In view of * * * 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 * * * that until the end of the first trimester mortality in abortion is 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 single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

***

To summarize and to repeat:

* * * A state criminal abortion statute of the current Texas type, that excepts from criminality only a life saving 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 abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

* * *

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example 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 intra-professional, are available. * * *

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. * * *

Mr. Justice DOUGLAS, concurring. * * *

The enactment [here] is overbroad. It is not closely correlated to the aim of preserving pre-natal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth. * * *

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting. * * *

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. * * *

Mr. Justice REHNQUIST, dissenting. * * *

If the Court means by the term “privacy” no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of “liberty” protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. * * *

But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. * * *

The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective * * *. But the Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one. * * *

While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 74, 25 S.Ct. 539, 551 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest
standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.” The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

***

Decisions following Roe v. Wade, many of which are summarized in the following chart, fine tuned the limits of the constitutional right and the competing state regulatory interests. In the beginning, constitutional evaluation of state laws using Roe’s trimester framework substantially restricted the power of the states, but as the appointments to the Court by the Reagan and Bush administrations increased, the cases appeared to reflect more lenient evaluation of abortion regulation. Although the Court turned aside repeated invitations by the Justice Department to overrule Roe v. Wade, the margin of the vote became less and less. Some members of the Court, like Chief Justice Rehnquist and Justice Scalia, rejected all of the reasoning in Roe. Justice O’Connor, on the other hand, focused specifically on the hazards of relying on the trimester framework and the current state of medical technology to assess whether state regulation at a given point in the pregnancy advanced either of the permissible interests recognized in Roe: protection of the mother’s health or the preservation of potential life. Medical technology, after all, is always changing, and if current medical practice was the measure of when the protection of either interest became compelling, then the point in the pregnancy at which the state could begin regulating would keep shifting, too. Worse yet, Justice O’Connor argued, medical technology had set the protection of the two interests on a collision course.

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<td>Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 756 (1973)</td>
<td>A Georgia statute confining performance of abortions to certain specially accredited hospitals, interposing examination of abortion requests by a hospital abortion committee, or requiring approval of abortion decisions by two other doctors placed an unjustified burden on the patient’s rights and the right of the doctor to practice medicine.</td>
<td>7–2; Justices White and Rehnquist dissented.</td>
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<td>Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976)</td>
<td>Portions of a Missouri statute (A) providing a flexible definition of viability, requiring informed, voluntary, and written consent of the woman, and mandating that certain records be kept are constitutional; (B) requiring the woman to obtain spousal consent if married, prohibiting the use of saline amniocentesis as an abortion technique, and imposing criminal liability on the doctor for failure to exercise due care and skill to preserve the life and health of the fetus if its survival is possible; and (C) requiring parental consent if the woman is an unmarried minor are unconstitutional.</td>
<td>(A) 9–2; (B) 6–3; Chief Justice Burger and Justices White and Rehnquist dissented. (C) 5–4; Justice Stevens also dissented.</td>
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Continued
BACKGROUND & FACTS

In this case, the Supreme Court declared unconstitutional five municipal ordinances regulating the performance of abortions. The city required that all abortions after the first trimester be performed in a hospital. Although this might have been a reasonable regulation at the time Roe v. Wade was announced, medical technology had developed substantially since then, so that...
abortions in the second trimester now could be performed safely on an out-patient basis, which significantly decreased the financial burden on the patient. The regulation requiring all unmarried female minors under 15 to have parental permission to obtain an abortion was held to be overbroad because it precluded decisions by minors who were mature enough to make that judgment themselves. The requirement that the physician explain the physiology of the fetus and state that “the unborn child is a human life from the moment of conception” in order to ensure the patient’s informed consent was invalidated because the Court ruled it was designed instead to get her to withhold consent and intruded on the doctor-patient relationship. The mandatory 24-hour waiting period between the giving of consent and the performance of the abortion was held to be unjustified by any legitimate governmental interest. The last requirement that the fetal remains were to be “disposed of in a humane and sanitary way” was found to be impermissibly vague, since it did not give fair notice to the physician about what manner of conduct was forbidden.

As the Court indicates today, the State’s compelling interest in maternal health changes as medical technology changes, and any health regulation must not “depart from accepted medical practice.” ** In applying this standard, the Court holds that “the safety of second-trimester abortions has increased dramatically” since 1973, when Roe was decided. ** Although a regulation such as one requiring that all second-trimester abortions be performed in hospitals “had strong support” in 1973 “as a reasonable health regulation,” ** this regulation can no longer stand because, according to the Court’s diligent research into medical and scientific literature, the dilation and evacuation (D & E) procedure, used in 1973 only for first-trimester abortions, “is now widely and successfully used for second-trimester abortions.” ** Further, the medical literature relied on by the Court indicates that the D & E procedure may be performed in an appropriate nonhospital setting for “at least *** the early weeks of the second trimester ***.” *** The Court then chooses the period of 16 weeks of gestation as that point at which D & E procedures may be performed safely in a nonhospital setting, and thereby invalidates the Akron hospitalization regulation.

It is not difficult to see that despite the Court’s purported adherence to the trimester approach adopted in Roe, the lines drawn in that decision have now been “blurred” because of what the Court accepts as technological advancement in the safety of abortion procedure. The State may no longer rely on a “bright line” that separates permissible from impermissible regulation, and it is no longer free to consider the second trimester as a unit and weigh the risks posed by all abortion procedures throughout that trimester. Rather, the State must continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to “depart from accepted medical practice” insofar as particular procedures and particular periods within the trimester are concerned. Assuming that legislative bodies are able to engage in this exacting task, it is difficult to believe that our Constitution requires that they do it as a prelude to protecting the health of their citizens. It is even more difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area. **
Just as improvements in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.

* * *

The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. * * * The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. * * *

* * *

Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in Roe and employed by the Court today. * * *

* * *

Just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has no interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.

The state interest in potential human life is likewise extant throughout pregnancy. In Roe, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. Although the Court refused to “resolve the difficult question of when life begins,” * * * the Court chose the point of viability—when the fetus is capable of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State’s interest in protecting potential human life exists throughout the pregnancy.

* * *

By 1992, with only Justice Blackmun remaining of the original majority that announced Roe v. Wade two decades earlier, the Court—now counting six appointments by Presidents Reagan and Bush—stood poised for overruling. Once again, the Court reaffirmed Roe. A center-right bloc comprised of Justices O’Connor, Kennedy, and Souter, combined with Justices Blackmun and Stevens, reaffirmed that a constitutional right of privacy includes a woman’s qualified right to terminate her pregnancy. The first part of the plurality opinion in Planned Parenthood of Southeast Pennsylvania v. Casey considered whether Roe should be overruled and concluded that the precedent should continue to stand. However, the remainder of the plurality opinion, which follows, rejected continued application of the trimester framework, substituted in its place an “undue burden” test, and sustained most—but not all—of Pennsylvania’s abortion control law.
BACKGROUND & FACTS

As amended in 1988 and 1989, the Pennsylvania Abortion Control Act of 1982 requires that a woman seeking an abortion give her informed consent and specifies that she receive information about alternatives to abortion at least 24 hours before the procedure is performed. In the case of a minor seeking an abortion, the statute requires the informed consent of one of her parents, but provides a judicial bypass option in the event a mature minor does not wish to or cannot obtain parental consent. The law also requires that, absent certain exceptions, a married woman seeking an abortion must acknowledge in writing that she has informed her husband of her intent to have the procedure performed. The statute exempts compliance with the foregoing requirements in the case of a “medical emergency,” which is defined in the law. Finally, the legislation imposes certain reporting requirements on facilities that perform abortions.

Several abortion clinics and an individual physician challenged the Pennsylvania law as unconstitutional on its face. A federal district court entered a preliminary injunction against enforcement of the law and, following a three-day trial, awarded injunctive and declaratory relief to the plaintiffs. A federal appeals court affirmed as to the unconstitutionality of the husband notification requirement, but otherwise reversed, holding the remainder of the statute constitutional, whereupon both the plaintiffs and the state officials petitioned the Supreme Court for certiorari.
most basic decisions about family and parenthood. * * *

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. * * *

Our precedents “have respected the private realm of family life which the state cannot enter.” Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman’s interest in terminating her pregnancy but cannot end it. * * *

Abortion is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International, afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in Roe relating to the woman’s liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.

III

When this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed as to be seen so differently, as to have robbed the old rule of significant application or justification.
Time has overtaken some of Roe's factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of Roe's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of Roe, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since Roe was decided; which is to say that no change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

Roe's underpinnings [have not been] weakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left Roe's central holding a doctrinal remnant; Roe portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal stare decisis analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming Roe's central holding.

IV

That brings us to the point where much criticism has been directed at Roe.

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. Most of our cases since Roe have involved the application of rules derived from the trimester framework.

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers. Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow
adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

* * * It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. * * *

* * * Measures aimed at ensuring that a woman’s choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in Roe, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in Roe itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. * * *

* * * The Court’s experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. * * * Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in Roe’s terms, in practice it undervalues the State’s interest in the potential life within the woman.

* * * The trimester framework * * * does not fulfill Roe’s own promise that the State has an interest in protecting fetal life or potential life. Roe began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. * * * [but] there is a substantial state interest in potential life throughout pregnancy. * * *

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.

* * *

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends. * * *

* * * Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose. * * * Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

* * *

* * * 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.

* * * 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.

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.* * *

A

Under the statute, a medical emergency is

"[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."* * *

While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include [preeclampsia, inevitable abortion, and premature ruptured membrane].* * *

We conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

B

We next consider the informed consent requirement.* * * Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

To the extent Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with Roe's acknowledgment of an important interest in potential life, and are overruled.* * * Those decisions, along with Danforth, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.* * * It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.* * * We
conclude * * * that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. * * *

[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure. * * *

* * * Thus, we uphold the provision as a reasonable means to insure that the woman's consent is informed.

* * *

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." * * * As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome." * * *

* * *

We cannot say that the waiting period imposes a real health risk.

* * * A particular burden is not of necessity a substantial obstacle. * * * And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

* * *

C Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

* * *

* * * The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence. * * *

* * * In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse,
but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from [the statute's] notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from [the statute's] notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, * * * because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins. * * * If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by [the statute].

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle * * * [and is therefore invalid].

* * *

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. * * *

Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

* * *

D

* * * Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.3

* * * Our [previous] cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the

3. In a subsequent case, Lambert v. Wicklund, 520 U.S. 292, 117 S.Ct. 1169 (1997), the Court unanimously held that a Montana law did not impose an undue burden where it required the physician to notify at least one of the minor’s parents or her guardian 48 hours before performing an abortion, unless there was clear and convincing evidence that: (1) the young woman was “sufficiently mature to decide whether to have an abortion”; or (2) there was “evidence of a pattern of physical, sexual, or emotional abuse” by the parent or guardian; or (3) “the notification of a parent or a guardian would not be in the best interests of the [minor].” Half a dozen states and the District of Columbia do not have parental notification requirements. In the months just before the 2006 House and Senate elections, the Republican-controlled Congress sought to pass legislation that would have made it a federal crime to transport a pregnant girl across state lines for the purpose of obtaining an abortion without the parents’ knowledge. Violation of the law would have been punishable by a fine and up to a year in jail. The version passed by the House would have established a national parental notification law that would have required a physician who knowingly performs or induces an abortion on a minor who is a resident of another state to provide at least 24-hours notice to her parents. Enough senators balked at the House bill that a cloture motion (to end debate) failed in the Senate and, consequently, neither version of the legislation was enacted. Congressional Quarterly Weekly Report, Dec. 18, 2006, p. 3336.
consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.

* * * Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

**E**

Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public.

For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman’s age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. * * * In all events, the identity of each woman who has had an abortion remains confidential.

[A]ll the provisions at issue here except that relating to spousal notice are constitutional. Although they do not relate to the State’s interest in informing the woman’s choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman’s choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

**VI**

* * * The judgment * * * is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion * * *

It is so ordered.

[The concurring and dissenting opinion of Justice STEVENS is omitted.]

Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

I join parts I, II, III, V–A, V–C, and VI of the joint opinion of Justices O’CONNOR, KENNEDY, and SOUTER * * *.

Five Members of this Court today recognize that “the Constitution protects a woman’s right to terminate her pregnancy in its early stages.” * * *

* * *

[Five Members of this Court today recognize that “the Constitution protects a woman’s right to terminate her pregnancy in its early stages.” * * *

* * *

Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. * * *

Furthermore, by] restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing
women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause. ***

While a State has “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child,” *** legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. ***

*** Roe’s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman’s fundamental right. Lastly, no other approach properly accommodates the woman’s constitutional right with the State’s legitimate interests.

Application of the strict scrutiny standard results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, stare decisis requires that we again strike them down.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

The joint opinion *** retains the outer shell of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973), but beats a wholesale retreat from the substance of that case. We believe that Roe was wrongly decided, and that it can and should be overruled ***.

*** Unlike marriage, procreation and contraception, abortion “involves the purposeful termination of potential life.” ***

The abortion decision must therefore “be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy,” Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S., at 792, 106 S.Ct., at 2195 (WHITE, J., dissenting).

One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. ***

Nor do the historical traditions of the American people support the view that the right to terminate one’s pregnancy is “fundamental.” The common law which we inherited from England made abortion after “quickening” an offense. At the time of the adoption of the Fourteenth Amendment *** in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. *** By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. *** But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when Roe was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. ***

On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as “fundamental” under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in Roe when it classified a woman’s decision to terminate her pregnancy as a “fundamental right” that could be abridged only in a manner which withstood “strict scrutiny.” ***

*** The “undue burden” standard *** is created largely out of whole cloth by the
authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result in the sort of “simple limitation,” easily applied, which the joint opinion anticipates. * * * In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a “substantial obstacle” in the path of a woman seeking an abortion. * * * [T]his standard is based even more on a judge’s subjective determinations than was the trimester framework * * *. Because the undue burden standard is plucked from nowhere, the question of what is a “substantial obstacle” to abortion will undoubtedly engender a variety of conflicting views. * * *

* * * A woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. * * * With this rule in mind, we examine [and uphold] each of the challenged provisions. * * *

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

* * * The States may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, “where reasonable people disagree the government can adopt one position or the other.” * * * A State’s choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a “liberty” in the absolute sense. Laws against bigamy, for example—which entire societies of reasonable people disagree with—intrude upon men and women’s liberty to marry and live with one another. But bigamy happens not to be a liberty specially “protected” by the Constitution.

That is, quite simply, the issue in this case: not whether the power of a woman to abort her unborn child is a “liberty” in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the “concept of existence, of meaning, of the universe, and of the mystery of human life.” * * * Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. * * *

* * *

The requirement that laws regulating abortions must contain a “health exception” was reaffirmed by the Supreme Court yet again in Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S.Ct. 961 (2006). States may not restrict the performance of abortions to only those instances where the life of the mother is in jeopardy but must permit it as well when there is immediate risk to her health. New Hampshire’s Parental Notification Prior to Abortion Act required waiting until 48 hours after written notice of an abortion had been delivered to an unmarried female minor’s parent or guardian. However, the law did not explicitly recognize an exception in the case of a medical emergency that presented immediate risk to the health—as distinguished from the life—of
the young mother. Because the law did not authorize judicial by-pass of the parental notification requirement in such a circumstance, federal courts struck down the law in its entirety. Although the Supreme Court reaffirmed the principle, it vacated the lower court judgment. The Court remanded the case and directed the lower court to fashion a much less blunt remedy: Instead of invalidating the entire parental notification requirement, the court should only have enjoined the state from applying the law in a health-exception emergency, an event that rarely occurs. (After a change in party control of the New Hampshire legislature following the 2006 election, Democratic majorities in both houses voted to repeal the law.)

The latest round of litigation has focused on the constitutionality of proscribing a medical procedure commonly referred to as “partial birth” abortion, a method of terminating pregnancy usually in the second trimester. Less than 2 percent of all abortions fall in this category. Partial-birth abortions are frequently performed on fatally-deformed fetuses. The following note discusses two divergent Supreme Court decisions, one striking down a Nebraska law and a second upholding the federal ban on partial-birth abortions. By the time the Nebraska case was decided by the Court, some 30 states had passed laws banning the medical procedure.

**NOTE—BANNING “PARTIAL-BIRTH” ABORTIONS**

Approximately 85–90% of the 1.3 million abortions performed annually in the United States take place during the first trimester. Sometimes the termination of pregnancy is achieved by the use of medication, but the more common method is for the physician to vacuum out the embryonic tissue. So-called “partial-birth” abortions take place during the second trimester. As defined by a Nebraska law banning the practice, a partial-birth abortion is one in which the doctor “partially delivers vaginally a living unborn child before killing the child.” This entails “intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, before performing a procedure [the doctor] knows will kill * * * and does kill the * * * child.” In Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597 (2000), the Supreme Court, by a 5–4 vote, declared Nebraska’s partial-birth abortion ban unconstitutional because (1) the statute contained no health exception (that is, it did not permit performance of a partial-birth abortion when the health of the mother was at risk, as distinguished from when her life was at stake), and (2) the vague language of the law swept overbroadly, potentially precluding several safer abortion procedures, thus forcing the doctor to use riskier methods in the second trimester.

With intact dilation and extraction (D & E), the doctor delivers the fetus until its head lodges in the cervix, usually past the point appropriate to a breech presentation and then deliberately pierces or crushes the skull of the fetus. In the case of regular D & E (also called standard D & E), the doctor does not partially-deliver the fetus first, but reaches further in and extracts it such that “the friction [of the process] causes the fetus to tear apart”; he then extracts the pieces.

In the wake of the Stenberg decision, anti-abortion forces in Congress successfully marshaled support to pass the federal Partial-Birth Abortion Ban Act of 2003, 117 Stat. 2101. The federal law more precisely defined the procedure as one in which the doctor “deliberately and intentionally vaginally delivers a living fetus until, in the case of head-first presentation, the entire fetal head is outside of the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus * * *.” In Gonzales v. Carhart, 550 U.S. —, 127 S.Ct. 1610 (2007), the Court upheld the federal statute. Speaking for the Court, Justice Kennedy cited important distinctions between the two laws and did not overrule Stenberg. Many observers, however, were quick to attribute the different result to a change in the composition of the Court:
Justice O'Connor, who had cast the crucial fifth vote to strike down Nebraska's partial-birth abortion ban, had been replaced by Justice Alito, who voted to uphold the federal ban.

It was the fact that intact D & E entailed partial delivery of the fetus before life was extinguished that led legislators to characterize it as infanticide. Segmented removal of the fetal parts, characteristic of regular D & E and permissible under the statute, however, entails the risk that not all fetal remnants will be removed, thereby posing later health problems for the woman. Other second-trimester abortion options, such as medical induction (the use of medication), hysterotomy (the abortion version of cesarian section), or hysterectomy, are legally-available options but, in contrast to the two varieties of D & E, invariably involve hospitalization that may be costly (an important consideration if the mother is poor).

In contrast to the Nebraska statute struck down in Stenberg, the majority in Gonzales found the precision of the federal statute sufficient to ban only intact D & E without subjecting the physician to criminal punishment for performing any of the other options. The ban on intact D & E, Justice Kennedy concluded, was constitutionally justified because the Court's previous decision in Casey had acknowledged "that the government has a legitimate and substantial interest in preserving and promoting fetal life," and willful destruction of a fetus after a substantial portion of it has been delivered demonstrated lack of respect for fetal life. Justice Kennedy found justification for this conclusion in several graphic accounts that vividly described the performance of the intact D & E procedure. The federal ban on partial-birth abortions did not impose an "undue burden" on the woman's right under Casey, he said, because other much-less-gruesome options were available to terminate a second-trimester pregnancy.

Although the Court's ruling in Stenberg had faulted the Nebraska statute for its failure to contain a health exception, the Court in Gonzales concluded that failure to categorically exempt intact D & E from the ban when it was necessary to protect the health of the mother did not render the federal law unconstitutional. Because Dr. Carhart and the other plaintiffs did "not demonstrate that the Act would be unconstitutional in a large fraction of the relevant cases," the Court, as in the Ayotte (p. 741) case, held that the statute could be challenged only on a case-by-case basis, that is as the health consideration arose in individual instances.

In a pointed dissent, Justice Ginsburg (speaking also for Justices Stevens, Souter, and Breyer) vigorously objected to what she saw as a retreat from the ruling in Casey, especially in its refusal to recognize a categorical exception to protect the mother's health. Criticizing the Court for failing to accurately appraise the medical evidence in the record, particularly insofar as intact D & E operated to reduce the risk to women's health in the performance of many second-trimester abortions, she characterized the decision as one that "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court * * *". By focusing its attention "on where a fetus is anatomically when a particular medical procedure is performed and thereby approving Congress's distinction between infanticide and abortion, the Court, she argued, had blurred the line between post-viability and pre-viability, the long-recognized divide that separated the sphere of government regulation from that of private choice. The categorical protection of fetal life, she continued, allowed the "moral concerns" of legislators to trump a woman's fundamental right and, thus, squarely contradicted the position taken by Justice Kennedy when he spoke for the Court in Lawrence v. Texas (p. 753). In an opinion concurring in the Court's decision, Justices Scalia and Thomas reiterated their view that Roe and Casey should be overruled.

Justice O'Connor's replacement by Justice Samuel Alito potentially clouds the future of Roe and Casey. Indeed, anticipating that another personnel change may come sooner rather than later or that Justice Kennedy might perhaps change his position from that which he took in Casey, pro-life advocates have renewed their efforts to put anti-abortion initiatives on the ballot. Some states have either passed or are considering the enactment of so-called
overturning decisions. Recent polls show that between 60% and two-thirds of the public is opposed to polls question about one quarter, one half, and one quarter, respectively. In response to a February 2007 whether abortions should always be legal, sometimes legal, or always illegal, the results were first category, small increases in the second and third, and no change in the fourth. See over the preceding decade of polling on the question revealed an eight-point drop in the 39%, 31%, and 12% respectively (2% were unsure). The most substantial development have long shown a striking congruence between public opinion and the Supreme Court America about the extent to which the law permits or limits abortions, public opinion polls Dakotacent reported that a random sample of the American public showed 34% in favor of South Dakota’s ban and 58% opposed. This was virtually identical to several other major polls.

Indeed, despite claims of pro-life partitions that unelected judges are out of step with America about the extent to which the law permits or limits abortions, public opinion polls have long shown a striking congruence between public opinion and the Supreme Court’s decisions. Recent polls show that between 60% and two-thirds of the public is opposed to overturning Roe v. Wade (with less than 30% in favor). When the public was asked whether abortions should always be legal, sometimes legal, or always illegal, the results were about one quarter, one half, and one quarter, respectively. In response to a February 2007 poll question “Should abortion be legal in all cases, legal in most cases, in most cases, or illegal in all cases?” the Washington Post reported that the American public divided 16%, 39%, 31%, and 12% respectively (2% were unsure). The most substantial development over the preceding decade of polling on the question revealed an eight-point drop in the first category, small increases in the second and third, and no change in the fourth. See www.pollingreport.com/abortion.htm. In other words, while there has been some decline over the past decade in the proportion of Americans who back abortion-on-demand, there has been no increase in the number who favor a total ban; movement has been to the gray area of increasing limitations on abortion (including the ban on partial-birth abortions) but not doing so severely—in Casey’s words, without imposing “an undue burden.”

As it became more and less apparent that the basic right recognized in Roe v. Wade was here to stay, the ferocity of confrontations outside abortion clinics increased. The increasing militancy of expression heightened the sense in which the pregnant woman’s right to choose locked horns with the antiabortion protesters’ right of free speech, especially as protesters blocked clinics and threatened violence. In Madsen v. Women’s Health

4. The strategy of abortion opponents had been predominantly to discourage women from choosing abortion by inhibiting the exercise of the right. For example, a South Dakota law required doctors to tell women seeking an abortion that the procedure would “terminate the life of a whole, separate, unique, living human being.” A federal appeals court struck it down on First Amendment grounds—that, as distinguished from a matter of medical fact, the requirement amounted to government-compelled expression of an opinion with which the physician may well disagree. See Planned Parenthood Minnesota v. Rounds, 467 F.3d 716 (8th Cir. 2006). A bill introduced in the South Carolina legislature in 2007 would require that any woman seeking an abortion be shown an ultrasound image of the fetus. (Some states provide for the availability of ultrasound images but no state has yet mandated that it be viewed.)

A strategy employed by some government officials is to subpoena the relevant medical records. In one high-profile demand for such records, the Kansas attorney general asserted the material was being subpoenaed to prosecute criminal cases (such as statutory rape and incest). New York Times, Feb. 25, 2005, pp. A1, A17. Attempts by the U.S. Department of Justice to procure such files have been blocked by the federal courts. In Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923 (7th Cir. 2004), a federal appeals court held that the subpoena imposed an undue burden on the hospital when the probative value of the records was weighed against patients’ fears of identification and the consequent harm to the hospital. In Alpha Medical Clinic v. Anderson, 280 Kan. 903, 128 P.3d 364 (2006), the Supreme Court of Kansas required that material revealing the identity of minors who had abortions be deleted. The court, however, did not hold the state attorney general in contempt for making some of the identifying material public.
Center, Inc. (p. 827), discussed later in the chapter on freedom of speech, the Court sustained several portions of a state court order imposing restrictions on protestors demonstrating outside abortion clinics. Congressional defenders of abortion rights passed a notable piece of legislation aimed at maintaining unobstructed access to the clinics when, overturning an exercise in statutory construction by the Court, they succeeded in making it a federal crime to intimidate women seeking abortions and clinic staff members. The federal antiracketeering statute became an additional tool in combating violence promoted by such militant antiabortion groups as Operation Rescue with the Supreme Court’s decision in NOW v. Scheidler below.

**NOTE—THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993**

Because the effect of the Supreme Court’s ruling in Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 113 S.Ct. 753 (1993) (see Chapter 14, section B) was to leave the maintenance of access to abortion clinics solely in the hands of state and local officials who might either be sympathetic to the views of Operation Rescue or lack the law enforcement capability to deal with a very large number of militant, lawbreaking antiabortion demonstrators, Congress enacted the Freedom of Access to Clinic Entrances Act of 1993, 108 Stat. 694. The law makes it a federal crime to intimidate women seeking abortions or clinic staff attempting to provide them by force or the threat of force and is Congress’s response to the wave of shootings, firebombings, and massive blockades at abortion clinics. The same protections apply to pregnancy counseling centers operated by antiabortion groups and to harassing behavior at places of religious worship. As authority for its enactment, the legislation cites both Congress’s enumerated powers in Article I of the Constitution and its enforcement power in section 5 of the Fourteenth Amendment. The statute distinguishes between nonviolent intimidating conduct and violent intimidating conduct in its schedule of fines and imprisonment for first-time and repeat offenses. A first-time nonviolent physical obstruction of a clinic could be punished by a fine of not more than $10,000 or six months’ imprisonment, or both, but a repeat conviction for violent physical obstruction could result in a maximum fine of $25,000 or a prison term of three years, or both. Where physical injury results, the length of confinement escalates to a maximum of 10 years, and if death results, the incarceration could range from any number of years to life. The statute also authorizes suits for compensatory and punitive damages and for injunctive relief to be brought by private citizens or by the U.S. or a state attorney general. The statute takes care in the section setting forth rules of construction to emphasize that nothing in the law shall be construed “to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment * * *.”

The federal appeals courts that have addressed the constitutionality of the Act have uniformly sustained it against challenges that: (1) it was beyond the reach of Congress legislating pursuant to the Commerce Clause; (2) it violated the freedom of speech; (3) it was unconstitutionally vague; and (4) it infringed the free exercise of religious belief. See, for example, American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995), cert. denied, 516 U.S. 809, 116 S.Ct. 55 (1995), and United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), cert. denied, 519 U.S. 806, 117 S.Ct. 47 (1996).

**NOTE—ANTI-ABORTION PROTESTS AND THE FEDERAL RACKETEERING LAW**

As a matter of statutory interpretation, a unanimous Supreme Court in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 114 S.Ct. 798 (1994), held that militant anti-abortion groups, such as Operation Rescue, which interfere with patients’ access to medical services, could be sued under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized
Crime Control Act of 1970, 18 U.S.C.A. §§1961–1968. RICO authorizes bringing both criminal and civil actions. It permits plaintiffs to collect triple damages in civil suits if they can demonstrate they were injured by "a pattern of racketeering activity," which can be established by proof of at least two actions that violate state or federal law.

The National Organization for Women and two abortion clinics sued Operation Rescue and individual defendants for violating the federal Hobbs Act, 18 U.S.C.A. §1951 (a), which punishes anyone who "in any way or degree obstructs, delays, or affects commerce or movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do so ***." Plaintiffs alleged over 20 violations each of the Hobbs Act, of state extortion law and of attempting or conspiring to violate either or both. They argued that the defendants were members of a nationwide conspiracy to shut down abortion clinics through a pattern of intimidating activity that amounted to extortion.

In Scheidler v. National Organization for Women, 537 U.S. 393, 123 S.Ct. 1057 (2003) (Scheidler II), the Supreme Court held that the protestors did not commit extortion because, regardless of their intimidating tactics, they did not "obtain" property from the plaintiffs. Although it was undisputed that Operation Rescue and the individual defendants disrupted and shut down the clinics, those acts did not violate the Hobbs Act because extortion requires that the perpetrators acquire property, not merely deprive the owners of its use, and the defendants did not acquire "something of value" from the plaintiffs. The Court refused to construe the statute expansively because adequate notice of what it is the law punishes—implicit in due process—requires that criminal statutes be interpreted strictly.

On remand following the 2003 decision, NOW lost the third and final round of the litigation in Scheidler v. National Organization for Women, 547 U.S. 9, 126 S.Ct. 1264 (2006). In Scheidler III, the Court unanimously held that the Hobbs Act cannot be read to punish free-standing acts or threats of violence against persons or property that affect interstate commerce. In other words, to run afoul of the Hobbs Act, the acts or threats of violence must be connected to either robbery or extortion.

Restricting the Use of Public Funds and Facilities in Performing Abortions

Roe v. Wade and later cases dealt with the constitutionality of restrictions imposed by government on the performance of abortions. But what about the constitutionality of placing restrictions on the funding of abortions out of public revenues or excluding public facilities and employees from the performance of abortions except when the life of the mother is endangered? In 1977, the Supreme Court heard argument in a trio of cases that presented this issue for the first time. In Beal v. Doe, 432 U.S. 438, 97 S.Ct. 2366 (1977), as a matter of statutory interpretation the Court ruled that the Social Security Act does not require a state to fund nontherapeutic abortions as a condition of participating in the Medicaid program. In Maher v. Roe, which follows, the Court turned to the constitutional question: Does a state's funding of only therapeutic abortions discriminate against poor women as a class and thus deny a constitutional right on the basis of indigency? Beal and Maher were argued together with Poelker v. Doe, 432 U.S. 519, 97 S.Ct. 2391 (1977), in which the Court sustained a policy of the St. Louis city administration refusing to make public hospitals available for the performance of nontherapeutic abortions, but making those facilities available for the performance of therapeutic abortions and childbirth. Relying on the reasoning of Maher, the Court in subsequent decisions upheld the constitutionality of the Hyde Amendment, imposing similar restrictions on the federal
funding of abortions (p. 750), and the "gag rule" (p. 751), imposed under the Reagan and Bush administrations, which prohibited abortion counseling and referrals in any federally funded program of medical services.

**MAHER V. ROE**
Supreme Court of the United States, 1977
432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484

**BACKGROUND & FACTS**
A regulation of the Connecticut Public Welfare Department limited receipt of Medicaid benefits for first-trimester abortions to those that were "medically necessary." The hospital or clinic where the procedure was to be performed had to submit in advance a certificate from the patient's attending physician, stating that the abortion was medically necessary. Roe, an indigent woman (not the same person as the plaintiff in **Roe v. Wade** who was unable to obtain a certificate of medical necessity, challenged the state regulation as a violation of her constitutional rights to due process and equal protection guaranteed by the Fourteenth Amendment. A three-judge federal district court ultimately held that the regulation denied equal protection, and Maher, Connecticut's Commissioner of Social Services, appealed.

Mr. Justice POWELL delivered the opinion of the Court.

***

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. Appellees' claim is that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth. This challenge to the classifications established by the Connecticut regulation presents a question arising under the Equal Protection Clause of the Fourteenth Amendment.

This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis. See [San Antonio School Dist. v.] Rodriguez, 411 U.S. at 29, 93 S.Ct., at 1294; Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970).

Accordingly, the central question in this case is whether the regulation "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." The District Court read our decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973), and the subsequent cases applying it, as establishing a fundamental right to abortion and therefore concluded that nothing less than a compelling state interest would justify Connecticut's

5. In cases such as Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956) and Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963), the Court held that the Equal Protection Clause requires States that allow appellate review of criminal convictions to provide indigent defendants with trial transcripts and appellate counsel. These cases are grounded in the criminal justice system, a governmental monopoly in which participation is compelled. * * * Our subsequent decisions have made it clear that the principles underlying Griffin and Douglas do not extend to legislative classifications generally. [Footnote by the Court.]
different treatment of abortion and childbirth. We think the District Court misconceived the nature and scope of the fundamental right recognized in Roe.

***

* * * [T]he right in Roe v. Wade * * * protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

*** The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in Roe.

***

The question remains whether Connecticut’s regulation can be sustained under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right. This test requires that the distinction drawn between childbirth and nontherapeutic abortion by the regulation be “rationally related” to a “constitutionally permissible” purpose. * * *

Roe itself explicitly acknowledged the State’s strong interest in protecting the potential life of the fetus. * * * [and] subsidizing of costs incident to childbirth is a rational means of encouraging childbirth.

*** Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds.* * *

The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability * * *. When an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. * * *

We emphasize that our decision today does not proscribe government funding of nontherapeutic abortions. It is open to Congress to require provision of Medicaid benefits for such abortions as a condition of state participation in the Medicaid program. * * * Connecticut is free—through normal democratic processes—to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

***

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice BLACKMUN join, dissenting.

***

[A] distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court’s analysis. * * * As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the
State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.

* * *

The Court's premise is that only an equal protection claim is presented here. * * *

* * * The Connecticut scheme clearly infringes upon * * * [the right] of privacy by bringing financial pressures on indigent women that force them to bear children they would not otherwise have. That is an obvious impairment of the fundamental right established by Roe v. Wade. * * *

* * *

Most recently, * * * the Court squarely reaffirmed that the right of privacy was fundamental, and that an infringement upon that right must be justified by a compelling state interest. Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010 (1977). That case struck down in its entirety a New York law forbidding the sale of contraceptives to minors under 16 years old, limiting persons who could sell contraceptives to pharmacists, and forbidding advertisement and display of contraceptives. There was no New York law forbidding use of contraceptives by anyone, including minors under 16, and therefore no "absolute" prohibition against the exercise of the fundamental right. Nevertheless the statute was declared unconstitutional as a burden on the right to privacy. In words that apply fully to Connecticut's statute, and that could hardly be more explicit, Carey stated: "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." * * * Carey relied specifically upon Roe, Doe, and Planned Parenthood, and interpreted them in a way flatly inconsistent with the Court's interpretation today: "The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." * * *

* * *

* * * The fact that the Connecticut scheme may not operate as an absolute bar preventing all indigent women from having abortions is not critical. What is critical is that the State has inhibited their fundamental right to make that choice free from state interference.

* * *

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court today, by its decisions in these cases, allows the States, and such municipalities as choose to do so, to accomplish indirectly what the Court in Roe v. Wade, * * * said they could not do directly. The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless, * * * the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake."

The result the Court reaches is particularly distressing in Poelker v. Doe, * * * where a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hind-
most. This is not the kind of thing for which our Constitution stands.

* * * To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.

Neither is it an acceptable answer, as the Court well knows, to say that the Congress and the States are free to authorize the use of funds for nontherapeutic abortions. Why should any politician incur the demonstrated wrath and noise of the abortion opponents when mere silence and nonactivity accomplish the results the opponents want?

There is another world "out there," the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. * * * This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.

Applying roughly the same logic as in Maher, the Court, in Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980), three years later, upheld 5–4 the constitutionality of the Hyde Amendment. Named for its sponsor, Rep. Henry Hyde (R-Ill.), the amendment to the Medicaid statute prohibited the expenditure of federal funds to reimburse costs incurred in the performance of abortions except where the life of the mother would be endangered if the fetus was carried to term or where the patient was the victim of rape or incest. Although state participation in the program is optional, once a state signs on, it must accept federal strings attached to the funding. The relevant question before the Court was whether the Hyde Amendment, by denying public funding for certain medically necessary abortions (those necessary to sustain the health of the mother but where her life is not at risk), violated the Constitution. By a bare majority, the Court held that "although government may not place obstacles in the path of a woman's right to exercise her freedom of choice, it need not remove those not of its own creation. * * * The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather her indigency." Speaking for the same dissenting trio as in Maher, Justice Brennan objected, "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the government literally makes an offer the indigent woman cannot afford to refuse. It matters not that in this instance the government has used the carrot rather than the stick."

Justice Stevens also dissented in Harris, although he had voted with the majority in Maher. In his view, this was a different case: "Unlike these plaintiffs, the plaintiffs[ ] in Maher did not satisfy the neutral criterion of medical need; they sought a subsidy for abortions * * * they did not need. * * * This case involves the special exclusion of women who * * * are confronted with a choice between two serious harms: serious health damage to themselves on the one hand and abortion on the other." He continued, "If a woman has a constitutional right to place a higher value on avoiding * * * serious harm to her own health * * * than on protecting potential life, the exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled." The majority's holding, he argued, "evades this critical though simple point." Regardless of the ruling in Harris, the states, of course, retain the authority to use their own public funds for subsidizing health-premised medically necessary abortions, and many have exercised that power.
In the same vein of approving the use of the federal government's spending power to disfavor choosing abortion, the Court upheld an administrative decision by President George Bush's Secretary of Health and Human Services, Dr. Louis Sullivan, to impose what became known as "the gag rule." Section 1008 of the Public Health Act, 84 Stat. 2506, specifies that no federal funds appropriated under the statute "shall be used in programs where abortion is a method of family planning." The secretary issued regulations in 1988 that prohibited projects funded under the law from engaging in counseling, medical referrals, or any activities advocating abortion as a method of family planning. In addition, the regulations also required all federally-funded projects to be maintained completely independent of any facilities, personnel, or recordkeeping related to abortion counseling. In Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759 (1991), the Supreme Court sustained the regulations against statutory and constitutional attack. After concluding that the secretary's regulations were not an abuse of discretion, and that they "reflect[ed] a plausible construction of the plain language of the statute[] and [did] not otherwise conflict with Congress's expressed intent[,]" Chief Justice Rehnquist rejected the contention that the regulations amounted to viewpoint discrimination in violation of the First Amendment and intruded on the doctor-patient relationship. Said Justice Rehnquist for the five-Justice majority: "Here the Government is exercising the authority it possesses under Maher and McRae to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion.' The Government can, without violating the Constitution, selectively fund a program to encourage activities to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint: it has merely chosen to fund one activity to the exclusion of the other. A federal grant recipient "can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives [federal] funds." He added, "Nothing in [the regulations] requires a doctor to represent as his own any opinion he does not in fact hold. * * * [A] doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking the doctor does not consider an abortion an appropriate option," he continued, because "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." In dissent, Justice Blackmun, speaking for himself and Justices Marshall and Stevens, thought the regulations amounted to viewpoint discrimination because they withheld "truthful information regarding constitutionally protected conduct of vital importance to the listener." This amounted to censorship with potentially significant consequences for the affected woman "by suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health." Rejecting the neat distinctions invoked by the majority, he argued many female clients "will follow the [physician's] perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them." (Emphasis added.) Justice O'Connor dissented on grounds the regulations did not reflect a reasonable construction of the statute.

On January 22, 1993, two days after taking office, President Clinton signed a memorandum, 58 Fed. Reg. 7455, that directed the Secretary of Health and Human Services to suspend the "gag rule" upheld by the Court in Rust v. Sullivan. He noted that the rule "contravened a clear majority" of both houses of Congress, which had twice passed legislation to block the rule's enforcement, but which had failed to override the vetoes of his predecessor. President Clinton also ordered the director of the Agency for International Development (AID) to repeal immediately what has become known as the
“Mexico City policy” that has effectively denied U.S. funding to any organization that facilitates abortion or disseminates information about abortion as an option, even when those organizations do so by using non-AID funds. Thus, Clinton’s order allowed organizations that receive AID funds to provide information regarding all family planning options to individuals in foreign countries. 29 Weekly Comp. Pres. Docs. 85–86 (Jan. 25, 1993). He also issued a directive ending the ban on performing any abortions at U.S. military facilities (even where the procedure was to be paid for by private funds), ending the prohibition of federal funding of transplantations using fetal tissue from induced abortions, and lifting the ban on importing RU-486 (the French abortion drug). 58 Fed. Reg. 6439, 7457, 7459.

President George W. Bush subsequently reversed these Clinton directives shortly after the new administration took office, thus returning government policy to what it had been under his father. The Mexico City policy, for example, was restored on March 28, 2001, 66 Fed. Reg. 17303; for discussion and history, see Congressional Quarterly Weekly Report (Jan. 27, 2001), pp. 235–236. In his remarks on January 22, 2001, two days after being sworn in, he announced he was reversing Clinton’s policies on abortion funding and counseling. 37 Weekly Comp. Pres. Doc. 214; see 67 Fed. Reg. 20876. Finally, in a step certain to stir controversy by appearing to undermine the premise of Roe v. Wade that a fetus is not a person, the Bush Administration has permitted the states to classify a fetus as an “unborn child” and thus include low-income pregnant women as eligible for government-paid care under the State Children’s Health Insurance Program. 67 Fed. Reg. 9936.

In addition to these reversals of Clinton Administration policies, President George W. Bush issued an executive order in August 2001 severely limiting federal funding of embryonic stem cell research to that using existing stem cell lines while permitting research to continue on adult stem cells. Critics called for the restriction to be eased in the hope of accelerating medical breakthroughs. Bush defended the limitation on pro-life grounds—that the use of embryonic stem cells requires the destruction of embryos and no more embryos should be destroyed. Both the House and Senate twice voted by substantial margins to lift the restriction by passing the Stem Cell Research Enhancement Act of 2005 but, following President Bush’s veto of the bill, the override attempts failed. However, several states (including California, Connecticut, Illinois, Maryland, and New Jersey) have approved extensive funding of stem cell research. See Congressional Quarterly Weekly Report, July 24, 2006, pp. 2014–2016, 2032, 2033, 2036; June 25, 2007, p. 1929; see also New York Times, June 8, 2007, p. A23; June 20, 2007, p. A21.

Other Lifestyle Issues

Proponents of a personal right of privacy have argued that the Court in Roe v. Wade implicitly rejected the view that government’s interest in enforcing its conception of morality is constitutionally sufficient in itself to justify prohibiting or regulating conduct. Seen in this light, privacy extended far beyond the contraception and abortion controversies. Once it is conceded that privacy inheres in the individual, it is only a short step to the recognition that privacy and consent are two sides of the same coin: Privacy establishes a barrier against governmental interference; a person’s consent governs what he or she will do in the realm of protected behavior. If the right to privacy is a personal right, as Roe declared it to be, would it be constitutional for the government to punish “crimes without victims”? By “crimes without victims” we mean those behaviors that are declared to be “crimes” only because the state is enforcing a particular notion of morality, but that in objective terms would seem not to be an offense because the individuals involved freely consented (for example, prostitution, drug possession, and homosexual
Morals legislation and other forms of governmental intervention justified as in the best interests of the individual or for the social betterment of the community would thus appear to be on a collision course with the right of privacy so defined. As you read the cases that follow, consider the extent to which the advocates of a personal right of privacy would constitutionalize the following principle articulated in 1859 by John Stuart Mill in his famous essay On Liberty:

The object of this Essay is to assert one simple principle, as entitled to govern absolutely the dealings of society with the individual by way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that * * * the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

One of the classic "crimes without victims" is sexual activity between consenting adults of the same sex. Decriminalization by the states began with Illinois' revision of its criminal laws in 1961. By the mid-1980s, 23 state legislatures had repealed laws prohibiting consensual homosexual relations, and supreme courts in three other states had struck down such statutes as a violation of the state constitution. Of the remaining states, 15 punished consensual same-sex behavior as a felony and nine others treated it as a misdemeanor. When Georgia's sodomy statute, as applied to private homosexual relations, was challenged as a violation of the U.S. Constitution in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 (1986), the Court (by a 5-4 vote) refused to recognize individual autonomy in matters of sex, but instead conditioned the right upon engaging in procreative sex. It thus cut short the development of the right of privacy, confining it to the decision to beget a child, the view taken in Griswold. As a matter of federal constitutional law at least, that was the way things stood for more than a decade and a half. Meanwhile, three more state legislatures voted for repeal and the highest courts in half a dozen other states struck down such statutes on state constitutional grounds. In Lawrence v. Texas, which follows, the Court granted cert. to consider the question "Should Bowers v. Hardwick be overruled?" In his opinion for a majority of the Court in Lawrence, Justice Kennedy makes it clear that the right of privacy, which Griswold anchored in the marital relationship, now extends to all persons as individuals, not because of their membership in a particular social group.

**Lawrence v. Texas**

Supreme Court of the United States, 2003

539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508

**Background & Facts**

Houston police responded to a report of a weapons disturbance at a private residence. When they entered an apartment, they found John Lawrence and Tyron Garner engaged in a sexual act. Lawrence and Garner were arrested, held in custody overnight, and charged with violating a provision of the Texas Penal Code that punished "sexual intercourse with another individual of the same sex." A trial court convicted them and imposed a fine of $200 each in addition to $141 in court costs. Lawrence and Garner appealed, arguing that the state law violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. A state appellate court affirmed the convictions and the U.S. Supreme Court granted their petitions for certiorari.

Justice KENNEDY delivered the opinion of the Court.
ing 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, expres-
sion, and certain intimate conduct. The 
instant case involves liberty of the person 
both in its spatial and more transcendent 
dimensions.

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.

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 v. Hardwick, 

The Court began its substantive discus-
sion in Bowers as follows: “The issue 
presented is whether the Federal Constitu-
tion confers a fundamental right upon 
homosexuals to engage in sodomy and 
hence invalidates the laws of the many 
States that still make such conduct illegal 
and have done so for a very long time.”

That statement, we now conclude, 
discloses the Court’s own failure to appreci-
ate the extent of the liberty at stake. To say 
that the issue in Bowers was simply the right 
to engage in certain sexual conduct de-
means the claim the individual put forward, 
just as it would demean a married couple 
were it to be said marriage is simply about 
the right to have sexual intercourse. The 
laws involved in Bowers and here are, to be 
sure, statutes that purport to do no more 
than prohibit a particular sexual act. Their 
penalties and purposes, though, have more 
far-reaching consequences, touching upon 
the most private human conduct, sexual 
behavior, and in the most private of places, 
the home. The statutes do seek to control a 
personal relationship that, whether or not 
entitled to formal recognition in the law, is 
within the liberty of persons to choose 
without being punished as criminals.

This, as a general rule, should counsel 
against attempts by the State, or a court, to 
define the meaning of the relationship or to 
set its boundaries absent injury to a person 
or abuse of an institution the law protects. It 
suffices for us to acknowledge that adults 
may choose to enter upon this relationship 
in the confines of their homes and their 
own private lives and still retain their 
dignity as free persons. When sexuality 
finds overt expression in intimate conduct 
with another person, the conduct can be 
but one element in a personal bond that is 
more enduring. The liberty protected by the 
Constitution allows homosexual persons the 
right to make this choice.

Bowers misapprehended the claim 
of liberty there presented to it, and thus 
state[d] the claim to be whether there is a 
fundamental right to engage in consensual 
sodomy.

At the outset it should be noted that 
there is no longstanding history in this 
state of laws directed at homosexual 
conduct as a distinct matter. Early 
American sodomy laws were not directed at 
homosexuals as such but instead sought to 
prohibit nonprocreative sexual activity 
more generally.

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.

Bowers made the 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. **

** In the past half century ** there has been an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. **

This emerging recognition should have been apparent when Bowers was decided. ** In 1961 Illinois changed its laws to decriminalize sexual acts between individuals of the same sex; other States soon followed. **

Almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today’s case. ** The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v. United Kingdom, 4 E.H.R.R. 149 (1982). Authorities in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. **

Two principal cases decided after Bowers cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. ** In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” **

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. **

The second post-Bowers case of principal relevance is Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado’s constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships,” ** and deprived them of protection under state antidiscrimination laws. We concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose. **

**
* * * 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 foundations of Bowers have sustained serious erosion from our recent decisions in Casey and Romer. * * *

* * * The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

* * *

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 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. * * * The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

* * *

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.

Justice O'CONNOR, concurring in the judgment.

* * *

This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. * * *

Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

* * * Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." * * * And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.

* * *

* * *

Whether a sodomy law that is neutral both in effect and application * * * would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law
would not long stand in our democratic society. * * *

Justice SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST] and Justice THOMAS join, dissenting.

* * *

The Court simply describes petitioners’ conduct as “an exercise of their liberty” and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. * * *

* * *

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its holding. * * *

* * *

[T]he Court * * * says: “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” (emphasis added). Apart from the fact that such an “emerging awareness” does not establish a “fundamental right,” the statement is factually false. States continue to prosecute all sorts of crimes by adults “in matters pertaining to sex”: prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced “in the past half century,” in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. * * *

* * *

In any event, * * *[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. * * *

* * *

Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters
is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.

The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. At the end of its opinion, the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”

Do not believe it. Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct and if “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution?”

Relying on the principles articulated by the Supreme Court in Lawrence, the Kansas Supreme Court, in State v. Limon, 280 Kan. 275, 122 P.3d 22 (2005), held that the state’s “Romeo and Juliet law,” which limits the punishment that can be imposed on older teenagers who have sex with younger teens but only if they are of the opposite sex, must also apply to teenagers who engage in homosexual sex. Otherwise, the court ruled, the dramatically different penalties imposed violate the Equal Protection Clause of the Fourteenth Amendment. Discriminating against same-sex offenders, the court held, was not justified: Moral disapproval alone did not constitute a legitimate state interest and there was no credible evidence that homosexual sex was more likely to transmit diseases. Matthew Limon, 18 at the time, had consensual oral sex with another boy who was just under 15. Limon was found guilty of criminal sodomy and sentenced to 17 years in prison; if Limon had engaged in the same act with a girl that age, the maximum penalty imposed on him would have been only 15 months.

Another lifestyle controversy is presented when requirements related to an individual’s employment have a significant effect on the person’s private life. In Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440 (1976), the Supreme Court rejected the constitutional claim of a patrolman that grooming regulations imposed by the police department governing the length of hair and sideburns and the style of mustaches and prohibiting beards and wigs infringed the officer’s personal liberty. The decision in Kelley, from which Justices Brennan and Marshall predictably dissented, is discussed and applied by a federal appeals court in Gruesendorf v. Oklahoma City, which follows. Gruesendorf revisits this conflict between an individual’s lifestyle and employment regulations in a lively contemporary context—a prohibition on smoking even during off-duty hours.
Grusendorf v. Oklahoma City
United States Court of Appeals, Tenth Circuit, 1987
816 F.2d 539

BACKGROUND & FACTS

Grusendorf, a city firefighter trainee, was fired for violating the terms of an agreement he signed as a precondition of employment not to smoke a cigarette, either on or off duty, for a period of one year from the time he started working for the city. The incident that precipitated his dismissal occurred during an unpaid lunch break on a particularly stressful day when he took about three puffs on a cigarette. Another city employee saw it and reported the incident. A federal district court granted the city’s motion to dismiss Grusendorf’s suit, and he appealed.

Barrett, Circuit Judge.

** **

* * * Grusendorf argues that although there is no specific constitutional right to smoke, it is implicit in the fourteenth amendment that he has a right of liberty or privacy in the conduct of his private life, a right to be let alone, which includes the right to smoke.

Grusendorf contends that the government may not unreasonably infringe upon its employees’ freedom of choice in personal matters that are unrelated to the performance of any duties. * * * Grusendorf concludes that since the defendants have failed to demonstrate a rational reason for the non-smoking rule, it is likewise constitutionally impermissible and unenforceable.

The defendants deny that the non-smoking regulation infringes upon any liberty or privacy interest. They point out that these rights of liberty and privacy have been recognized in only a limited number of circumstances[.] * * * embracing personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. The defendants argue that the act of smoking a cigarette does not rise to the level of a fundamental right and, further, that since there is no fundamental right to smoke a cigarette, no balancing test nor rationale of any kind is needed to justify the rule.

Though we agree with the defendants that cigarette smoking may be distinguished from the activities involving liberty or privacy that the Supreme Court has thus far recognized as fundamental rights, * * * it can hardly be disputed that the Oklahoma City Fire Department’s non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the workplace and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

* * * In a case similar to ours, for example, the Court considered whether a county regulation limiting the length of a police officer’s hair violated a liberty interest protected by the fourteenth amendment. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440 (1976). * * *

** **

[That case is similar to ours though the plaintiff there was a police officer rather than a firefighter and claimed a fourteenth amendment right to grow a beard rather than a right to smoke a cigarette.

In Kelley, the Court assumed a liberty interest in matters of personal appearance. The Court noted, however, that both the state and federal governments, as employers, have interests sufficient to justify compre-
prehensive and substantial restrictions upon the freedoms of their employees that go beyond the restrictions they might impose on the rest of the citizenry. * * * The Court in *Kelley* also observed that a county’s chosen mode of organization for its police force was entitled to the same deference and presumption of legislative validity as state regulations enacted pursuant to the state’s police powers. * * *

In *Kelley*, the Court explained that the issue was not whether there existed a genuine public need for the regulation but “whether respondent can demonstrate that there is no rational connection between the regulation * * * and the promotion of safety of persons and property.” * * * Indeed, the Court concluded, the respondent must demonstrate that the regulation is “so irrational that it may be branded ‘arbitrary’ and therefore a deprivation of respondent’s ‘liberty’ interest in freedom to choose his own hair style.” * * *

Recognizing that the overwhelming majority of state and local police officers are clean shaven and uniformed, either for the purpose of making them readily recognizable to the public or to foster an esprit de corps, the Court concluded that either purpose provided a sufficiently rational justification for the regulation to outweigh the respondent’s claim under the liberty guarantee of the fourteenth amendment. * * *

* * *

With this presumption of validity in mind, we consider whether there is a rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees. We need look no further for a legitimate purpose and rational connection than the Surgeon General’s warning on the side of every box of cigarettes sold in this country that cigarette smoking is hazardous to health. Further, we take notice that good health and physical conditioning are essential requirements for firefighters. We also note that firefighters are frequently exposed to smoke inhalation and that it might reasonably be feared that smoking increases this health risk. We conclude that these considerations are enough to establish, prima facie, a rational basis for the regulation.

The one peculiar aspect of the non-smoking regulation that does not appear entirely rational is that it is limited in its application to first year firefighter trainees only. The rest of the firefighters, for whom good health and physical conditioning are no doubt also important, are apparently free, as far as the Oklahoma City Fire Department is concerned, to smoke all the cigarettes they desire. * * * Since neither side mentioned, let alone explained, this aspect of the regulation in their briefs, we are not inclined to address it * * *.

* * * As we have seen in *Kelley*, * * * the burden is upon Grusendorf to prove that the regulation is irrational and arbitrary. Since the non-smoking regulation appears rational on its face and since Grusendorf has not challenged this prima facie rationality by specifying any irrational aspects of the regulation, we hold that the rule is valid and enforceable.

* * *

State constitutional law, as noted in introducing the *Lawrence* case, has frequently been ahead of federal constitutional law in protecting claims of a right to privacy. Recall from previous discussions of judicial federalism (see p. 407, for example) that state constitutional provisions can constitute an independent grounds for guaranteeing rights. In a federal system, where sovereignty is divided between two levels of government, states may recognize additional rights that go beyond what is mandated by the Supreme Court’s reading of the U.S. Constitution. In short, states may give more rights, but not less rights, than are guaranteed by the U.S. Constitution. The Alaska Supreme Court, for example, held that the “liberty” of the individual protected by Article I of that state’s constitution...
protects the right of students to determine the hairstyle they wear at school (Breese v. Smith, 501 P.2d 159 (1972)) and that the privacy amendment to the state’s constitution gives individuals the right to possess and use small amounts (less than 8 oz.) of marijuana in the privacy of their own homes (Ravin v. State, 537 P.2d 494 (1975)).

As distinguished from marijuana use by the general public, its possession and use by patients for medical reasons received impressive voter approval at the polls in the 1998 and 2000 elections. Not only did it triumph in all seven states where it appeared on the ballot, but its narrowest win still showed 54% of the voters in favor. This movement began two years earlier when California voters adopted Proposition 215. Notwithstanding its easy victory, Proposition 215 did not spell legitimization in the sense that really matters—removal of any legal barrier to its access, and freedom from prosecution for its use: California voters may have voted to approve the Compassionate Use Law in Proposition 215, but the federal Controlled Substances Act of 1970 (CSA) still prohibited all possession and use of marijuana.

In Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195 (2005), presented in Chapter 5 (p. 331), the Supreme Court held that the CSA trumped the Compassionate Use Law. Even with respect to medical marijuana that was home-grown and thus had never moved in interstate commerce, the Court held that the CSA constituted a valid exercise of Congress’s power to regulate interstate commerce and the Supremacy Clause dictated it must prevail in any conflict with California’s statute. By a 6–3 majority, the Court concluded that the CSA “directly regulated economic, commercial activity” because “[p]rohibiting the intrastate possession or manufacture of an/article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.” The Court reasoned it was “likely... that the high demand in the interstate market will draw * * * [home-grown] marijuana into that market” and thus have “a substantial effect on supply and demand in the national market for that commodity.” Although the Supreme Court held that California’s law could not be sustained in the face of an attack based on the Commerce Clause, the Justices remanded the case so that the appeals court could consider Raich’s other arguments for the right to use and possess medical marijuana. The appeals court’s decision on remand follows.

### RAICH v. GONZALES
United States Court of Appeals, Ninth Circuit, 2007
500 F.3d 850

**BACKGROUND & FACTS** Angel Raich suffered from multiple illnesses, among them a form of wasting disease that caused excruciating pain. Use of marijuana alleviated the pain so that she could eat. She had brought suit to enjoin Attorney General Alberto Gonzalez from enforcing the federal Controlled Substances Act. On remand following the Supreme Court’s adverse treatment of the Commerce Clause issue, the federal district court ruled against Raich’s other contentions. She appealed

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7. Favorable action by the New Mexico legislature in March 2007 brought to 12 the total number of states that have approved the use of marijuana for medical purposes by popular vote or action of the state legislature.
and a federal appellate court then addressed those claims—that the federal law denied due process under the Fifth Amendment by depriving her of essential medical treatment and violated the doctrine of necessity.

Before PREGERSON, BEAM, and PAEZ, Circuit Judges.

PREGERSON, Circuit Judge.

* * *

I. Common Law Necessity

Raich * * * argues * * * that the common law doctrine of necessity bars the federal government from enforcing the Controlled Substances Act against her medically necessary use of marijuana. Raich avers that she is faced with a choice of evils: to either obey the Controlled Substances Act and endure excruciating pain and possibly death, or violate the terms of the Controlled Substances Act and obtain relief from her physical suffering.

* * *

[A]lthough we ultimately conclude that Raich is not entitled to injunctive relief on the basis of her common law necessity claim, we * * * note that * * * Raich appears to satisfy the [four] threshold requirements for asserting a necessity defense under our case law. * * *

* * * We first ask whether Raich was faced with a choice of evils and whether she chose the lesser evil. Raich’s physician presented uncontroverted evidence that Raich “cannot be without cannabis as medicine” because she would quickly suffer “precipitous medical deterioration” and “could very well” die. If Raich obeys the Controlled Substances Act she will have to endure intolerable pain including severe chronic pain in her face and jaw muscles due to temporomandibular joint dysfunction and bruxism, severe chronic pain and chronic burning from fibromyalgia that forces her to be flat on her back for days, excruciating pain from non-epileptic seizures, heavy bleeding and severely painful menstrual periods due to a uterine fibroid tumor, and acute weight loss resulting possibly in death due to a life-threatening wasting disorder. Alternatively, Raich can violate the Controlled Substances Act and avoid the bulk of those debilitating pains by using marijuana. The evidence persuasively demonstrates that, in light of her medical condition, Raich satisfies the first prong of the necessity defense.

We next ask whether Raich is acting to prevent imminent harm. All medical evidence in the record suggests that, if Raich were to stop using marijuana, the acute chronic pain and wasting disorders would immediately resume. The Government does not dispute * * * [this].

Prong three asks whether Raich reasonably anticipated a causal connection between her unlawful conduct and the harm to be avoided. * * * Here, Raich’s licensed physician testified to the causal connection between her physical condition and her need to use marijuana. * * *

Finally, we ask whether Raich had any legal alternatives to violating the law. [Her doctor’s] testimony makes clear that Raich had no legal alternatives: Raich “has tried essentially all other legal alternatives to cannabis and the alternatives have been ineffective or result in intolerable side effects.” Raich’s physician explained that the intolerable side effects included violent nausea, shakes, itching, rapid heart palpitations, and insomnia. We agree that Raich does not appear to have any legal alternative to marijuana use.

* * *

Though a necessity defense may be available in the context of a criminal prosecution, it does not follow that a court should prospectively enjoin enforcement of a statute. Raich’s violation of the Controlled Substances Act is a legally recognized harm, but the necessity defense shields Raich from liability for criminal prosecution during such time as she satisfies...
the defense. Thus, if Raich were to make a miraculous recovery that obviated her need for medical marijuana, her necessity-based justification defense would no longer exist. Similarly, if [her doctor] found an alternative treatment that did not violate the law—a legal alternative to violating the Controlled Substances Act—Raich could no longer assert a necessity defense. That is to say, a necessity defense is best considered in the context of a concrete case where a statute is allegedly violated, and a specific prosecution results from the violation. Indeed, oversight and enforcement of a necessity defense-based injunction would prove impracticable: the ongoing vitality of the injunction could hinge on factors including Raich’s medical condition or advances in lawful medical technology. Nothing in the common law or our cases suggests that the existence of a necessity defense empowers this court to enjoin the enforcement of the Controlled Substances Act as to one defendant.

Because common law necessity prevents criminal liability, but does not permit us to enjoin prosecution for what remains a legally recognized harm, we hold that Raich has not shown a likelihood of success on the merits on her medical necessity claim for an injunction.

II. Substantive Due Process
Raich contends that the district court erred by failing to protect her fundamental rights. Her argument focuses on unenumerated rights protected by the Fifth and Ninth Amendments to the Constitution under a theory of substantive due process.

Raich asserts that she has a fundamental right to "make[ ] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life." We note that Raich’s carefully crafted interest comprises several fundamental rights that have been recognized at least in part by the Supreme Court. See Lawrence v. Texas, 539 U.S. 558, 574, 123 S.Ct. 2472 (2003) (recognizing that "the Constitution demands [respect] for the autonomy of the person in making [personal] choices"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S., at 849, 852 [112 S.Ct. 2791 (1992)] (noting importance of protecting "bodily integrity"); * * * [and] (observing that a woman’s "suffering is too intimate and personal" for government to compel such suffering by requiring woman to carry a pregnancy to term).

Yet, Raich’s careful statement does not narrowly and accurately reflect the right that she seeks to vindicate. Conspicuously missing from Raich’s asserted fundamental right is its centerpiece: that she seeks the right to use marijuana to preserve bodily integrity, avoid pain, and preserve her life. As in [Washington v.] Glucksberg, 521 U.S. 702, 117 S.Ct. 2258 (1997), * * * and Cruzan [by Cruzan, v. Director, Missouri Dept. of Public Health, 497 U.S. 261, 110 S.Ct. 2841 (1990)], the right must be carefully stated and narrowly identified before the ensuing analysis can proceed. Accordingly, we will add the centerpiece—the use of marijuana—to Raich’s proposed right.

Accordingly, the question becomes whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician’s advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed.

We turn to whether the asserted right is "deeply rooted in this Nation’s history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 720–21, 117 S.Ct., at 2268.

It is beyond dispute that marijuana has a long history of use—medically and otherwise—in this country. Marijuana was not regulated under federal law until Congress passed the Marijuana Tax Act of 1937 * * * (repealed 1970), and marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970. * * *
Raich argues that the last ten years have been characterized by an emerging awareness of marijuana’s medical value. She contends that the rising number of states that have passed laws that permit medical use of marijuana or recognize its therapeutic value is additional evidence that the right is fundamental. Raich avers that the asserted right in this case should be protected on the “emerging awareness” model that the Supreme Court used in *Lawrence v. Texas*.

The *Lawrence* Court noted that, when the Court had decided *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986), “[twenty-four] States and the District of Columbia had sodomy laws.” By the time a similar challenge to sodomy laws arose in *Lawrence* in 2003, only thirteen states had maintained their sodomy laws.

Though the *Lawrence* framework might certainly apply to the instant case, the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*. Since 1996, ten states other than California have passed laws decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill. Other states have passed resolutions recognizing that marijuana may have therapeutic value, and yet others have permitted limited use through closely monitored experimental treatment programs.

We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is “fundamental” and “implicit in the concept of ordered liberty.” For the time being, this issue remains in “the arena of public debate and legislative action.”

**III. Tenth Amendment**

Raich contends that the Controlled Substances Act infringes upon the sovereign powers of the State of California, most notably the police powers, as conferred by the Tenth Amendment.

Generally speaking, a power granted to Congress trumps a competing claim based on a state’s police powers. “The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 291, 101 S.Ct. 2352 (1981).

The Supreme Court held in *Gonzales v. Raich* [545 U.S. 1, 125 S.Ct. 2195 (2005)], that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act. Thus, after *Gonzales v. Raich*, it would seem that there can be no Tenth Amendment violation in this case.

**CONCLUSION**

We conclude that Raich has not demonstrated a likelihood of success on the merits of her action for injunctive relief. Accordingly, the judgment of the district court is AFFIRMED.

[Judge BEAM’s opinion, concurring and dissenting in part, is omitted.]

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**The Right to Die**

In addition to decisions about abortion and other lifestyle issues, individual autonomy protected by a constitutional right of privacy arguably extends to a person’s choice to
terminate life support where he or she—because of accident or illness—survives only in a persistent vegetative state with no realistic prospect of ever returning to a conscious life, let alone a functioning one. Here again state supreme courts have been in the forefront in recognizing such a right. In what is perhaps the most famous case of this kind, Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), the New Jersey Supreme Court held that the individual’s right to make such a choice is an aspect of the right of privacy guaranteed under state law.

The first case of this sort raising federal constitutional questions, Cruzan by Cruzan v. Director, Missouri Dept. of Public Health, 497 U.S. 261, 110 S.Ct. 2841 (1990), reached the U.S. Supreme Court nearly a decade and a half later. The Court assumed without deciding that the choice of how and when to die is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment so that it could focus instead on whether a state may constitutionally require clear and convincing evidence (as opposed to a showing by a preponderance of the evidence) that the decision to terminate life support is one the comatose patient would have made. Because patients like Nancy Cruzan and Karen Ann Quinlan are not capable of making that decision on their own, a family member or court-appointed guardian must make the decision for them. In such cases the question is less the substantive one of whether there is a right to die than the procedural one of meeting the standard of proof against which the available evidence of their wishes is to be measured.

A bare majority of the Court in Cruzan held that “a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.” When it comes to a decision so important as ending a life, the Court noted that “many courts which have adopted some sort of substituted judgment procedure in situations like this [where there is no Living Will or tangible previous expression of her wish that her life not be prolonged],” whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual’s decision would have been, require a clear and convincing standard of proof for such evidence.

The dissenters (Justices Brennan, Marshall, Blackmun, and Stevens) concluded that the rigid clear-and-convincing-evidence rule was an unjustified intrusion on the affected individual’s right of privacy. Noting that Nancy Cruzan had been in a persistent vegetative state for seven years with no possibility of recovery, Justice Stevens wrote, “The State’s unflagging determination to perpetuate [her] physical existence is comprehensible only as an effort to define life’s meaning, not an attempt to preserve its sanctity.” He continued, “It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.” And he concluded, “[T]he best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests. * * * The failure of Missouri’s policy to heed the interests of a dying individual with respect to matters so private is ample evidence of the policy’s illegitimacy.”

The interest in the dignity with which one dies is often equalled, if not exceeded, by the desire that the pain of one’s death be minimized. Faced with excruciating pain in the last stages of a terminal illness, many patients have sought the assistance of their physician in cutting short that prospect. Such patients are usually in a position quite different from Nancy Cruzan and Karen Ann Quinlan because they are still capable of making a thoughtful decision. The question then becomes whether the “liberty” protected by the Due Process Clause of the Fourteenth Amendment protects a right to personal privacy that includes a choice as to how and when one will die. In short, does federal constitutional law
protect a right to physician-assisted suicide? In the Glucksberg case that follows, the Supreme Court considered the issue, but the unanimity of its negative conclusion may have been a mask, attributable more to the specifics of the state law at issue than to across-the-board agreement on whether any such constitutional right exists. In Vacco v. Quill (p. 770), a companion case argued together with Glucksberg, the Court addressed certain equal protection objections in the denial of physician-assisted suicide.

WASHINGTON V. GLUCKSBERG

Supreme Court of the United States, 1997
521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772

BACKGROUND & FACTS

Washington state law makes it a felony if anyone “knowingly causes or aids another person to attempt suicide.” Four physicians who occasionally treat terminally ill patients, three gravely ill patients who have since died, and a nonprofit organization that advises individuals considering physician-assisted suicide brought suit challenging the constitutionality of the law. Plaintiffs asserted a liberty interest, protected by the Due Process Clause of the Fourteenth Amendment, that encompasses a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. A federal district court, relying extensively on Planned Parenthood of Southeastern Pennsylvania v. Casey, ruled that the law placed an "undue burden" on that constitutionally protected liberty interest. Judgment for the plaintiffs was affirmed by the U.S. Court of Appeals for the Ninth Circuit sitting en banc, and the U.S. Supreme Court then granted certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

* * *

* * * In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans * * * are longstanding expressions of the States' commitment to the protection and preservation of all human life. * * *

[For over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. * * *

* * * Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. * * *

* * * Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. * * * At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

* * * Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. * * *

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act,"
which legalized physician-assisted suicide for competent, terminally ill adults. Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted.

Attitudes toward suicide itself have changed, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Our established method of substantive due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

We are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Pointing to Casey and Cruzan, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy." According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference."

The right assumed in Cruzan, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that
any and all important, intimate, and personal decisions are so protected, * * * and Casey did not suggest otherwise.

The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests. * * * This requirement is unquestionably met here. * * *

First, Washington has an “unqualified interest in the preservation of human life.” * * * The State’s prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. * * *

Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups * * * (suicide is a leading cause of death in Washington of those between the ages of 14 and 54); * * * (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. * * *

Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. * * * Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. * * * Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. * * * [T]he American Medical Association, like many other medical and physicians’ groups, has concluded that “[p]hysician-assisted suicide is fundamentally incompatible with the physician’s role as healer.” American Medical Association Code of Ethics §2.211 (1994) * * *

And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. * * *

Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. * * *

The State’s interest * * * extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and “societal indifference.” * * *

The State’s assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s. * * *

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. * * * If suicide is protected as a matter of constitutional right, it is argued, “every man and woman in the United States must enjoy it.” * * * Thus, it turns out that what is couched as a limited right to “physician-assisted suicide” is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. Washington’s ban on assisting suicide prevents such erosion.

We need not weigh exactlying the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington’s ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that [the Washington statute] does not violate the Fourteenth Amendment,
either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." * * *

* * *

The decision of the en banc Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

* * *

I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here. * * *

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. * * *

Justice STEVENS, concurring in the judgments.

* * *

[A] decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A State * * * must acknowledge that there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.

* * *

The Cruzan case demonstrated that some state intrusions on the right to decide how death will be encountered are also intolerable. The now-deceased plaintiffs in this action may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain. * * *

While I agree with the Court that Cruzan does not decide the issue presented by these cases, Cruzan did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death. Although there is no absolute right to physician-assisted suicide, Cruzan makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs. The liberty interest at stake in a case like this differs from, and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die because they are already on the threshold of death. * * *

Similarly, the State's legitimate interests in preventing suicide, protecting the vulnerable from coercion and abuse, and preventing euthanasia are less significant in this context. I agree that the State has a compelling interest in preventing persons from committing suicide because of depression, or coercion by third parties. But the State's legitimate interest in preventing abuse does not apply to an individual who...
is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying. * * *

***
The final major interest asserted by the State is its interest in preserving the traditional integrity of the medical profession. The fear is that a rule permitting physicians to assist in suicide is inconsistent with the perception that they serve their patients solely as healers. But for some patients, it would be a physician's refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the healing role. * * *

*** Although, as the Court concludes today, these potential harms are sufficient to support the State's general public policy against assisted suicide, they will not always outweigh the individual liberty interest of a particular patient. * * *

***

Justice SOUTER, concurring in the judgment.

***

Legislatures * * * have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States.* * *

*** We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. * * *

***

Justice BREYER, concurring in the judgments.

***

I do not believe * * * that this Court need or now should decide whether or not * * * [a “right to die with dignity”] is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because, as Justice O'CONNOR points out, the laws before us do not force a dying person to undergo that kind of pain. * * * Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. * * *

Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'CONNOR suggests, the Court might have to revisit its conclusions in these cases.

[Justice GINSBURG concurred in the judgment of the Court and substantially agreed with the views expressed in Justice O'CONNOR's concurring opinion.]
Several physicians, including Timothy Quill, argued that, although it would be consistent with the standards of their profession to prescribe lethal medications for mentally competent, terminally ill adults who are suffering great pain and want assistance in ending their lives, the doctors were deterred from doing so by the state's ban on physician-assisted suicide. The physicians, and several terminally ill, adult patients now dead, brought suit against Dennis Vacco, the Attorney General of New York, contending that the state law violates the Equal Protection Clause. A federal district court upheld the law but was reversed on appeal. The federal appeals court concluded that prohibiting suicide and attempted suicide, but permitting the withdrawal of life support, accorded different treatment to competent, terminally ill, adult patients who wished to end their lives and that this unequal treatment was not rationally related to any legitimate state interests. The Supreme Court granted certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

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.

The Equal Protection Clause * * * embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. * * * 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." * * * New York's statutes outlawing assisting suicide * * * neither infringe fundamental rights nor involve suspect classifications. * * * These laws are therefore entitled to a "strong presumption of validity." * * *

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. * * *

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 and in our legal traditions, is both important and logical; it is certainly rational. * * * 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. * * *

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." * * * 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 may be, 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. * * *

Given these general principles, it is not surprising that many courts, including New York courts, have carefully distinguished refusing life-sustaining treatment from suicide. * * *

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. * * *

For all these reasons, we disagree with respondents' claim that the distinction between refusing lifesaving medical treatment and assisted suicide is "arbitrary" and "irrational." * * *

The judgment of the Court of Appeals is reversed.

It is so ordered.

[The views expressed by concurring Justices in this case were the same as those expressed in their opinions concurring in Washington v. Glucksberg.]

Although public opinion polls over the last decade have reported that a majority of Americans favor permitting physician-assisted suicide for the terminally ill or those in unrelenting pain, initiatives in several states to put such a law on the books nonetheless failed. In 1991 and 1992, voters in Washington and California, respectively, rejected physician-assisted suicide proposals, as did Michigan voters in 1998. In 1994, however, 51% of Oregon's voters approved a ballot proposition called the Death With Dignity Act, first-of-its kind legislation. The law allowed a terminally-ill patient to obtain a prescription for a fatal drug dosage, provided the patient was in fact terminal, initiated the discussion of suicide with the physician, waited a minimum of 15 days, and was examined by a second physician on referral by the attending physician. Shortly after its adoption, the law was challenged in federal district court by various right-to-life proponents, some of whom were suffering from terminal illnesses and who, subject to periodic bouts of depression, alleged that the statute failed to provide adequate protection for those who were both terminally and mentally ill. In Lee v. Oregon, 891 F.Supp. 1421 (D.Ore. 1995), vacated, 107 F.3d 1382 (9th Cir. 1997), cert. denied, 522 U.S. 927, 118 S.Ct. 328 (1997), the district judge held the Death With Dignity Act unconstitutional on grounds that it denied equal protection of the laws to terminally-ill patients who were severely depressed. After this judgment was vacated by a federal appeals court because the plaintiffs lacked standing, the Oregon legislature resubmitted the Death With Dignity Act to the state's voters in November 1997. The voters refused to repeal the law by more than 60% of the ballots cast.

As with the use of federal laws to discredit state initiatives making medical marijuana available to patients (see p. 761), the controversy over the Death With Dignity Act stoked
debate over the parameters of authority possessed by the states in a federal system. The vote to retain the Death With Dignity Act prompted efforts by federal opponents of the law to use the power of the national government to nullify it. These efforts came to a head when Attorney General John Ashcroft, a long-time opponent of both abortion and physician-assisted suicide, promulgated rules under the federal Controlled Substances Act (CSA) to impose sanctions on physicians who cooperated in patient suicides under the Oregon law. Ashcroft’s directive to the head of the Drug Enforcement Administration (DEA), summarily reversing the policy of the Clinton Administration, said, “I hereby determine that assisting suicide is not a ‘legitimate medical purpose’ within the meaning of * * * [federal regulations interpreting the CSA] and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA.” It “may ‘render [a physician’s] registration * * * inconsistent with the public interest’ and therefore subject to possible suspension * * *.” 66 Fed. Reg. 56608 (Nov. 9, 2001). Oregon then brought suit challenging the authority of the Attorney General to issue the directive.

In Gonzales v. Oregon, 546 U.S. 243, 126 S.Ct. 904 (2006), the Supreme Court held that neither on its face nor implicitly did the law give the Attorney General power to de-register doctors from among those physicians eligible to dispense narcotics because they wrote prescriptions with the purpose of assisting suicide by a terminally-ill patient. Whether physician-assisted suicide was not a “legitimate medical purpose” for the use of drugs regulated by the CSA was simply not a matter for him to determine. Because that was a matter calling for medical expertise, it was committed to the discretion of the Secretary of Health and Human Services. The structure and language of the CSA made it apparent that the Attorney General was confined to a law-enforcement role in administering the statute—levying sanctions because offending physicians engaged in drug-dealing or facilitated patients’ recreational use of drugs. The six-Justice majority, speaking through Justice Kennedy, made it clear that nothing in the statute provided grounds for inferring it was Congress’s intent to regulate the practice of medicine generally or to displace the states in an area traditionally subject to their police power. Chief Justice John Roberts and Justices Scalia and Thomas dissented. Although the appeals court below seemed to concede that, if Congress explicitly chose to override the Oregon law, it constitutionally could do so, the Supreme Court did not address the matter. The Court’s recent ruling in Gonzales v. Raich (see p. 331), the medical marijuana case, suggests the appeals court is probably right.

The Attorney General’s response to the Oregon statute, however, paled in comparison with the attempted intervention by the Bush Administration and congressional Republicans in a highly controversial Florida case in which the patient’s husband sought to have her disconnected from life support after she had languished in a vegetative condition for eight years. Opponents of the right to die in the Schiavo case, discussed in the following note, not only displayed contempt for the rulings of Florida’s courts in their determination to keep her alive at all costs, but went so far as to attempt to dictate that result to a federal court—a breach of constitutionality more than matched by the equally-determined efforts of the state legislature and the governor (the President’s brother).

**NOTE—THE UNENDING CASE OF TERRI SCHIAVO**

In 1990, Terri Schiavo, then 27 years old, collapsed in her Florida home from heart failure. The heart attack was not fatal but resulted in brain damage that left her unconscious. She had no written living will. Eight years later, her husband, Michael Schiavo, petitioned a state guardianship court to authorize the termination of life-support procedures. The petition was opposed by her parents, Robert and Mary Schindler. After a trial at which both sides presented evidence, the court held that there was clear and convincing evidence both that Terri Schiavo was in a “persistent vegetative...
state” and that, were the competent to make her own decision, she would choose to discontinue life-support. Although this decision was affirmed on appeal, the Schindlers attacked the final court order, alleging the misrepresentation of certain facts and asserting that they had new evidence. In the appeals and reconsiderations that followed, the courts over and over upheld the termination of life-support. In the process, the case became a cause célèbre of right-to-life advocates.

As a consequence of politicizing the issue, the Florida Legislature enacted a law to give Governor Jeb Bush “authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient” in the instance where someone challenged the withholding of nutrition and hydration from a family member who “as of October 15, 2003” was in a persistent vegetative state, had life-sustaining measures withheld, and failed to provide any advance directive to terminate life-support—all factors that described the Schiavo case. The governor’s subsequent order was challenged by Michael Schiavo, Terri’s court-recognized guardian, and a state circuit court held that the law was unconstitutional because it violated the right of privacy, amounted to a delegation of legislative power, and encroached upon the very nature of judicial power. On appeal in Bush v. Schiavo, 885 So.2d 321 (Fla. 2004), the state supreme court unanimously agreed that the state law was unconstitutional on separation-of-powers grounds because, “as applied in this case, it resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary.” In short, the court concluded that the statute unlawfully permitted the governor to substitute his judgment in place of that already rendered by the constituted judicial process. Moreover, the state supreme court pointed out that the legislature had provided no meaningful guidance for the governor to make his decision. The U.S. Supreme Court denied certiorari and, following further motions by the Schindlers to prevent life-support from being discontinued, a state trial court and intermediate appellate court reaffirmed the final court decree ending life-support. See In re Guardianship of Schiavo, 916 So.2d 814 (Fla.App. 2d Dist. 2005).

But there was more to come. Congressional Republicans, seeking to side-step the state courts and use a federal court to achieve a different outcome, called members of the House and Senate back into session from Easter Recess to vote on legislation to give a federal district court jurisdiction in the case. Labeled an act “for the relief of the parents of Theresa Marie Schiavo,” the bill gave the parents the right to sue in the U.S. District Court for the Middle District of Florida. It empowered the federal court “to issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding of food, fluids or medical treatment necessary to sustain her life.” Injunctive relief would extend to reinserting the feeding tube which had been disconnected following the last state court decision. Because the bill provided that the federal court hearing the case would hear it de novo—that is, anew—all of the previous state court decisions in effect would be legally disregarded. On March 19, 2005, the Senate passed the measure by a voice vote. In action the next day, the House passed the bill by a vote of 203–58, with virtually all Republicans supporting the legislation and those Democrats who participated breaking about evenly.9 See Congressional Quarterly Weekly Report, Mar. 21, 2005, pp. 704–706; Mar. 28, 2005, pp. 778–784.

9. Public opinion polling suggests that those members who voted against the bill, or who didn’t vote, more accurately reflected public sentiment. ABC News reported that 70% of the public thought it was inappropriate for Congress to intervene in the case compared with 19% who thought Congress did the right thing. Worse yet, there was strong evidence that the public took a dim view of the motives of officials behind the legislative effort: 67% of the public thought the intervention was motivated by trying to turn the situation to political advantage. On the question of whether the removal of Terri Schiavo’s feeding tube was the right thing to do, 63% said it was, 28% disagreed. More problematic for the law’s supporters were poll results that showed those who “strongly” disapproved Congress’s action outnumbered those who “strongly” favored the law by two to one. Disapproval of Congress’s action, it seemed, was both high and deep. Poll results from CBS News reflected much the same sentiment: 82% opposed congressional and presidential involvement and 74% took a dim view of the underlying motives. The Gallup Poll subsequently reported that Bush’s approval ratings also took a hit—down 7 points to 45% from a week earlier, the lowest point of his presidency to that date.
The legal battle then reverted to the courts. On the same day President George W. Bush signed the two-page law, 119 Stat. 15, the Schindlers were in federal district court moving for a temporary injunction to reinsert the feeding tube while the parties litigated the merits of the case. The following day, the federal district court denied the motion on grounds that, while the Schindlers could show irreparable harm if the tube was not temporarily reinserted, they had not shown a substantial likelihood of prevailing on the constitutional merits. On appeal, a panel of the Eleventh U.S. Circuit Court of Appeals held 2–1 that the district judge did not abuse his discretion in finding that the Schindlers had failed to show a substantial constitutional case. See Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp.2d 1378 (M.D.Fla. 2005), affirmed, 403 F.3d 1223 (11th Cir. 2005). On a petition for rehearing en banc—that is, by the entire complement of appeals judges for the Eleventh Circuit—the vote was 10–2 against. Further, on a petition for relief to Justice Kennedy, who then referred the matter to the U.S. Supreme Court, the Justices for the fifth time declined to hear the case. 544 U.S. 945, 125 S.Ct. 1692 (2005). The appeal to Justice Kennedy, as Circuit Justice for the Eleventh Circuit, had been supported by an amicus curiae brief filed by Republican leaders of the U.S. House arguing that the law Congress passed required the feeding tube to be reinserted until all constitutional issues were litigated and settled. Citing the plain language of the law, withdrawal of a previous version of the bill, and a colloquy on the Senate floor during passage which clearly showed an understanding to the contrary, the federal district court had already rejected the argument that Congress had intended to impose an automatic temporary stay on terminating life-support. (At one point, a congressional committee even attempted to use its subpoena power—ordering Terry Schiavo to appear at a hearing—in order to delay the court-ordered removal of the feeding tube; see Congressional Quarterly Weekly Report, Mar. 21, 2005, pp. 704–706).

In the meantime, a bill to reinstate life-support, which passed the Florida House, was voted down in the state Senate, and efforts by Governor Jeb Bush to have the state physically take custody of Terri Schiavo were rebuffed by a Florida circuit court. The governor and the state’s department of social services had argued there was new evidence from a neurologist who said he believed that Terri Schiavo has been misdiagnosed. (The doctor, strongly identified with various right-to-life causes, had not even conducted a physical examination of her.) New York Times, Mar. 24, 2005, pp. Al, A16.

However, the most stunning rebuke to the federal legislation came from a most unexpected source—Stanley F. Birch, a federal appeals judge appointed by President George W. Bush’s father and one noted for his conservative views on social issues. “Specially concurring” in yet another denial of rehearing en banc by the 11th Circuit, Judge Birch wrote: “If the Act only provided for jurisdiction consistent with Article III[,] *** [i]t would not be in violation of the principles of separation of powers. [But the Act] goes further *** [and] provides that the district court: (1) shall engage in ‘de novo’ review of Mrs. Schiavo’s constitutional and federal claims; (2) shall not consider whether these claims were previously ‘raised, considered, or decided in State court proceedings’; (3) shall not engage in ‘abstention in favor of State court proceedings;’ and (4) shall not decide the case on the basis of ‘whether remedies available in the State courts have been exhausted.’ *** Because these provisions constitute legislative dictate of how a federal court should exercise its judicial functions ***, the Act invades the province of the judiciary and violates the separation of powers principle.” Taking aim at the criticism that judges who refused to achieve the congressionally-desired outcome in the Schiavo case were “activist judges” (meaning the sort of judge “who decides the outcome of a controversy before him according to personal conviction’’), Judge Birch left the clear impression that it was Congress and the President who were the “activists.” He concluded, “By arrogating vital judicial functions to itself, *** Congress violated core constitutional separation principles” and thus acted “demonstrably at odds with our Founding Fathers’ blueprint for the governance of a free people—our Constitution.” Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005).

When it was all over, there had been more than two dozen court decisions in the case (all of which sided with Michael Schiavo). The sheer number of times the case had been decided made the constitutional claim that there had been a lack of due process seem truly ironic.
WHEN THE COURT’s affinity for protecting the economic liberties of the few came to be supplanted by judicial sympathy for civil liberties more widely and equally defined, the Justices, naturally enough, began by looking at the liberties contained in the First Amendment. The individual rights of speech, press, assembly, association, petition, and religion collectively protect the freedom of expression. As we saw in Chapter 8, the litmus for incorporating rights is their character as fundamental rights. The case for ranking freedom of expression as fundamental has rarely been made as effectively as Professor Thomas Emerson has made it:

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The First Amendment recognizes the paramount importance of such expressive liberties by its use of an absolute: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.”

The plain fact, however, is that "no" has meant “sometimes” because social values, such as public safety and order, the reputations of individuals, the impressionability of children, and public decency (whatever that may mean), are thought to be important, too. Because certain conduct by its very nature infringes the rights of others, “speech” cannot include a limitless variety of behavior. All conduct is expressive, but unless one wants to be left defending the position that shooting someone is a permissible form of expressing one’s dislike for the person, some sort of line drawing is inevitable when it comes to First Amendment rights. The question is not whether there should be some accommodation between expressive freedoms and social values, but how we should go about it. In this it is possible to discern three general approaches.

The Literal Meaning of “Speech”

The first possibility is that the boundary of protected expression is established by the very words of the First Amendment. Speech is precluded from regulation by government; anything else is not. Speech is natural oral or written expression. The amendment declares quite precisely that it is to receive absolute protection. Therefore, it is not a matter of judicial discretion how the balance between expressive interests and social values is to be struck because the First Amendment has already struck the balance. Until the Constitution is amended, judges are duty-bound to respect that balance.

Surely the most famous advocate of this view was Justice Hugo L. Black, joined much of the time by his colleague on the Court for over three decades, Justice William O. Douglas. Although Justice Black articulated this position in countless First Amendment cases, it probably received its most comprehensive, yet concise, statement in a series of lectures he
gave in 1968, three years before his death. As to the scope of protection afforded by the First Amendment, Justice Black said:

He was equally clear that the protection of the First Amendment extended to all speech, not simply political speech, because the wording of the amendment made no qualification. It followed from this that there could be no regulation whatever of obscenity, libel, or slander.

On the other hand, Justice Black resisted with equal determination attempts to define “freedom of speech” as “freedom of expression.” Forms of expression that included more than natural oral or written expression were not “speech,” but “conduct” or “speech plus” (a form of behavior in which speech and conduct elements are intertwined), and they did not fall within the amendment’s absolute protection. Justice Black continued:

Picketing, demonstrating, and similar activity usually consists in walking or marching around a building or place carrying signs or placards protesting against something that has been or is being done by the person picketed. Thus a person engaged in such activities is not only communicating ideas—that is, exercising freedom of speech or press—but is pursuing a course of conduct in addition to constitutionally protected speech and press. * * * This is not a new idea either with me or the Supreme Court since it has long been accepted constitutional doctrine that the First Amendment presents no bar to the passage of laws regulating, controlling, or entirely suppressing such a course of marching conduct even though speaking and writing accompany it. As picketing is made up of speech and press plus other conduct, so are what are popularly called demonstrations and street marches. And the conduct of demonstrators and street marchers, like that of pickets, can be regulated by government without violating the First Amendment.*

While both “conduct” and “speech plus” were constitutionally subject to reasonable regulation by government, Justice Black recognized two limitations on government’s regulation of “speech plus.” First, “regulatory laws in this area [must] be applied to all groups alike, and these laws must never be used as a guise to suppress particular views which the government dislikes”; otherwise, it “amounts to precisely the kind of governmental censorship the First Amendment was written to proscribe.” Second, “the First Amendment prohibits * * * [government] from regulating conduct in such a way as to affect speech indirectly where other means are available to accomplish the desired result without burdening speech or where the need to control the conduct in question is insufficient even to justify an indirect effect on speech.” A good example, Justice Black explained, would be an ordinance that banned the distribution of handbills in order to prevent littering.

4. ibid., p. 59.
5. ibid., p. 60.
Finally, the fact that government was prohibited from regulating the spoken or written word and from interfering with the presentation of petitions by citizens to their government did not entitle citizens to speak where they wanted, when they wanted, and to whom they wanted. The amendment did not provide for the unregulated use of sound amplification devices. It did not provide a license for speakers to harangue other citizens (as distinguished from speaking to the government). It did not guarantee the right to speak or demonstrate on private property, nor did it require government to provide a place for public speeches and demonstrations.

The literal distinction between “speech” and “conduct,” so central to Justice Black’s thinking about the First Amendment, clearly sets this approach apart from the others that follow and explains the very different votes Justice Black cast in the cases that comprise the first and second sections of this chapter. At least in the form he practiced it, absolutism provoked substantial criticism. Although the claim of “absolute” protection for First Amendment rights conveyed the impression that expressive freedoms were to be treated generously, in fact the approach permitted a good deal of regulation once the form of expression went beyond “pure speech.” Worse still, the greater regulation of “speech plus,” which absolutism allowed, had a class bias to it, since the poor and the powerless usually had to resort to marches, picketing, and demonstrations to make their grievances heard while the rich and powerful could express themselves quite effectively through forms of “pure speech” such as phone calls, lobbying, and letter writing.

Wiping out all libel laws, a result that illustrated absolutism’s extreme rigidity, also bothered critics who thought that precious individual interests in reputation and privacy were being subjected to exorbitant sacrifice for the sake of consistency in constitutional doctrine. Furthermore, Justice Black’s approach encountered practical difficulties in cases that confront the judge with a choice between competing absolute rights. Although it might be possible to devise criteria to govern which should prevail when the fair trial guarantee of the Sixth Amendment clashes with the First Amendment’s protection of a free press or when the Free Exercise Clause collides with the Establishment Clause, the text of the Constitution provides little guidance.

The Social Function of Speech

A second approach anchors the protection of speech in the social function speech is supposed to serve. When freedom of speech was originally declared to be a “fundamental” right, its placement in a “preferred position” with respect to governmental regulation was justified on the ground that it was indispensable to the democratic process, Emerson’s third function of free speech.

The advocates of elevated constitutional scrutiny found implicit support for this social-function justification in footnote 4 of the Carolene Products case (see the discussion at p. 86 or in the essay at the end of the second paperback volume). This rationale was explicitly stated in Justice Murphy’s opinion for a unanimous Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572, 62 S.Ct. 766, 769 (1942). Upholding the conviction of a Jehovah’s Witness, who called a police officer “a God damned racketeer” and “a damned fascist,” Justice Murphy explained: “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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 that 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.” The Court repeated this
justification on succeeding occasions, perhaps the most notable being Justice Brennan’s
opinion in Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309 (1957), where,
speaking for the Court, he declared that obscenity does not constitute protected speech
under the First Amendment because it is “utterly without redeeming social importance.”

Although some proponents of strict scrutiny latched onto the democratic-process
function as perhaps the most persuasive basis for distinguishing the expressive freedoms of
the First Amendment from property rights and economic liberties,6 one of the earliest and
most effective advocates of the social-function theory was an absolutist, Professor
Alexander Meiklejohn. Because his exposition is one of the clearest illustrations of this
position, it is worth reviewing.

In his essay “Free Speech and Its Relation to Self-Government,”7 Meiklejohn began
from the well-accepted premise that the Constitution is a contract establishing citizen self-
government. Self-government embodies a mutual pledge that free individuals make one
another: Citizens agree to obey all laws made pursuant to the Constitution even if they
disagree with them, and those who govern, in turn, agree to respect constitutional
guarantees of citizen participation in the democratic process. If the government fails to
guarantee those rights, it forfeits its claim to the citizens’ obedience.

According to Meiklejohn, the Constitution protects two very different kinds of speech.
The more important of these is the freedom of political speech protected by the First
Amendment. Such “public speech” is absolutely protected because oral and written
expression on the issues of the day is an essential part of the deliberative process by which
public policy is made in a democracy. The First Amendment’s absolute guarantee of freedom
of speech to the citizen on political matters is analogous to the absolute immunity afforded
senators and representatives by the Speech or Debate Clause of Article I, section 6, as
participants in the legislative process. Absolute freedom of discussion exists not because
individuals need to express themselves, but because it is imperative that all relevant views on
an issue be aired before policy is made. Meiklejohn wrote, “What is essential is not that
everyone shall speak, but that everything worth saying shall be said.”8 The evil of censorship,
constitutionally speaking, is that it mutilates the thought process of the community.
Although no speaker can be declared out of order because we disagree with what he wants to
say, he can be prevented from speaking if what he says is simply repetitive, if he is abusive, or if
he threatens violence. Freedom of speech is not an individual right, but a social obligation.

The right to speak is also included within the meaning of “liberty” secured by the Due
Process Clause of the Fifth Amendment, but it concerns a very different kind of speech
than that protected by the First Amendment. In Meiklejohn’s view, the Fifth Amendment
secures “private speech,” that is, the right to personal self-expression. Private speech
includes such things as personal conversations and other forms of expression such as
obscenity, libel, slander, and insults. Because such expressions are purely personal, they are
not beyond the regulatory power of government. So long as government observes due
process—in other words, as long as the regulation or prohibition is reasonable—private
speech can constitutionally be limited.

This is by no means a complete account of Meiklejohn’s theory of free speech, but it is
sufficient to provide a concrete illustration of the social-function rationale. His defense of free

Political Process (1980). Both defend judicial activism based on the importance of fundamental rights to the
operation of the democratic process.
7. Although the essay was originally published in 1948 as a book, it is more widely available as the lead essay in
his later volume, Political Freedom (1960), pp. 3–89.
speech was an early and perhaps somewhat primitive statement of the position. In more sophisticated and quite varied forms, this collectivist or communitarian perspective is experiencing a revival under the label “civic republicanism.” But whether freedom of speech is primarily valued (and, therefore, limited) because of its linkage to democratic deliberation, or its promotion of virtue or the public good, or its enhancement of that respect and human dignity to which all citizens are equally entitled, the central theme is the same: Free speech is justified because of the social end it serves, not because it is a right rooted in the individual.

Putting aside the troublesome distinction between what is private speech and what is public speech, the most important problem posed by the social-function rationale is that it necessarily countenances content-based limitations on the right to speak. Whatever disagreement persists about which social function justifies free speech, the upshot of this position is that it permits government to limit the right to speak on the basis of what the speaker has to say. Although Supreme Court decisions have repeatedly made it clear that obscenity, libel, and “fighting words” are disqualified from First Amendment protection, denial of First Amendment rights on the basis of the content of speech still remains a matter of heated controversy. Content-based regulation of speech, it is argued, amounts to discrimination based on whether the government agrees with the speaker’s point of view. From this, it is a short step to political correctness and thought control.


11. Those who defend free speech because it serves fundamental interests of the community usually share other traits as well: an emphasis upon people as social beings, a positive view of the role of government, a belief that public institutions play an important role in shaping the character of private citizens, a commitment to strengthening the common values that people share, and a vision of the community as more than merely the sum of the individuals living in it. Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988), p. 6.

12. Meiklejohn’s categories are just too pat. How about lurid and possibly unfounded charges about a politician’s sex life? What about an antiwar dramatization that uses pornographic displays to shock the audience? The distinction between public and private speech, like the distinction between speech and conduct, is probably more accurately understood as a difference in degree, not a difference in kind.

The Effects of Speech

Despite its disqualification of certain classes of speech from constitutional protection on the ground that they have little to contribute to society, the Supreme Court’s First Amendment decisions have been dominated by the view that freedom of speech is a personal right of the individual. Probably the most eloquent statement of this justification, the first of the four functions of free speech identified by Emerson, is to be found in Justice Brandeis’s concurring opinion in Whitney v. California (p. 787). Although eight years earlier, Justice Holmes had defended the value of free speech in Abrams v. United States (p. 785) in terms of Emerson’s second function, the search for truth, most Supreme Court decisions appear to have accepted the individual-right rationale. As Justice Holmes saw it, just as prosperity in a capitalistic system results from individuals’ pursuit of their own self-interest, so truth emerges from the clash of opposing points of view. In the words of Holmes’s dissent in Abrams, “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the marketplace.” However, social-function proponents of free speech, like Meiklejohn, argued that truth was no more likely to result from the clash of opposing points of view in the marketplace of ideas than fairness was likely to result from the clash of economic forces in the free market.

Because Justices Holmes and Brandeis proceeded from an individual-right conception of free speech that saw individuals as ends in themselves rather than simply as means to some social end, the test they fashioned judged the permissibility of speech on the basis of its effects, not its purpose. Whether speech could constitutionally be permitted depended upon whether it threatened public safety. Justice Holmes couched the threat to public safety in terms of the dichotomy between speech and conduct (or action), but, unlike Justice Black’s view, conduct differed from speech because it produced an unacceptable risk of adverse consequences to the public’s safety. In Justice Black’s view, speech and action were different in kind; in Justice Holmes’s view, the two were different only in degree. What was needed, then, was a test that would measure the risk.

Justice Holmes fashioned his test from the law of criminal attempts, according to which the perpetrator of a crime could be punished for coming very close to reaching his criminal target. Government did not need to wait until the criminal objective was achieved and injury inflicted before it could intervene. In criminal law, Justice Holmes argued that it was enough the defendant had come dangerously close to achieving his criminal goal. His design of the “clear and present danger” test in constitutional law thus parallels the “dangerous proximity” doctrine he formulated in criminal law.

Although Justice Holmes used the phrase “clear and present danger” for the first time in Schenck v. United States (p. 784), neither Justice Brandeis nor he ever presented a very systematic statement of the test. As best we can reconstruct it from the discussion in their opinions, it consisted of three factors: (1) whether the defendant intended the achievement of particular criminal consequences (known in criminal law as “specific intent”); (2) whether his actions presented a “clear and present danger” that the criminal target offense would be reached; and (3) whether the criminal objective amounted to a grave evil. “Clear and present danger” was not the test, but only part of the test. If there was an affirmative finding on each of these factors, then the behavior in question amounted to conduct that the government was entitled to regulate, and it was not “speech” protected by the First Amendment. The context of the expressive behavior also had to be considered.

Speech does not occur in a vacuum, and each of these findings was necessarily affected by the circumstances in which the behavior took place. By focusing on the effects of speech, the “clear and present danger” test aimed at having judges decide cases on grounds that would be neutral in the clash of opposing points of view. Judging free speech cases on the basis of the content of speech, by contrast, jeopardized judicial impartiality and increased the likelihood that people would be allowed to speak on the basis of whether the government and the judge agreed with them. From the time it was first articulated by Justice Holmes in 1919 until it was finally adopted as law by the Court in Brandenburg v. Ohio (p. 803), the “clear and present danger” test dominated the Supreme Court’s decision of free speech cases. The first section of this chapter highlights that history and thus sheds light on both the problems the Justices encountered with the test and the political influences that made it the object of a tug of war between the Court’s activist and restraintist wings.

A. THE “CLEAR AND PRESENT DANGER” TEST

Despite possibilities during the course of American history, questions involving the regulation of speech did not arrive at the Supreme Court until World War I. The Sedition Act of 1798 provided the most conspicuous example of our interference with freedom of expression, yet the law never got to the Supreme Court. Ten persons were convicted under the statute, which made it unlawful to publish “false, scandalous, and malicious” writings against the government, Congress, or the President if the intent was to defame any of them or to promote hatred against them among the people. When President Jefferson assumed office, he pardoned all those who had been imprisoned under the Act, and years later Congress refunded with interest all fines that had been paid.

By the time a question of curtailing freedom of expression finally reached the Court, it was met by a judiciary that displayed a far keener interest in economic liberties than civil liberties. Complicating matters was the fact that the curtailment of speech occurred during a time of national emergency. Neither the country nor the Court had any burning desire to be on the lookout for violations of personal rights.

Justices Holmes and Brandeis and the “Clear and Present Danger” Test

As an instrument for the protection of basic civil liberties, the “clear and present danger” test did not have an impressive debut. Justice Holmes’s brief opinion for the Court in Schenck v. United States, which follows, barely took time to coin the phrase as it affirmed the defendant’s conviction under the military censorship provisions of the Espionage Act. It was one of a spate of decisions during the Court’s 1918 Term that unanimously upheld criminal convictions under the Espionage Act for interfering with the war effort. Eight months after the decision in Schenck, Justices Holmes and Brandeis dissented in Abrams v. United States (p. 785). In his Abrams dissent, Holmes took care to point out why the defendant’s conviction could not constitutionally be affirmed if the “clear and present danger” test were applied. Which element of the “clear and present danger” test that was satisfied in Schenck was not satisfied by the defendant’s behavior in Abrams? Despite his votes to sustain the convictions of all the free speech defendants earlier in the year, Justice Holmes’s Abrams dissent contained one of the most eloquent defenses of freedom of speech ever penned.

Eight years after the Holmes dissent in Abrams, Justice Brandeis had occasion to reflect on the "clear and present danger" test in Whitney v. California (p. 787). Although he felt the defendant's conviction could not be overturned because of her failure during the trial to object on constitutional grounds, Justice Brandeis's concurrence in Whitney showed his determination to strengthen the test: first, by replacing the word "present" with the word "imminent" to emphasize that immediacy of the threat was required; and second, by subordinating other functions of free speech to its importance as a vehicle for self-expression and thus as a personal right of the individual.

SCHENCK V. UNITED STATES

Supreme Court of the United States, 1919
249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470

BACKGROUND & FACTS The Espionage Act of 1917 authorized military and postal censorship. It was amended in 1918 by the more comprehensive Sedition Act, which punished insubordination in the armed forces, attempting to obstruct enlistment and recruiting, and disseminating false statements with the intent to hinder military operations. The law also gave the Postmaster General discretion to ban reasonable and seditious material from the mail. A multi-count indictment accused Schenck, the general secretary of the Socialist Party, of conspiring to cause and attempting to cause insubordination in the army and navy and also of obstructing recruitment and enlistment in the armed forces when the United States was at war with Germany. Specifically, the indictment charged that Schenck and others printed and attempted to distribute to men who had been called and were accepted for military service a circular that advocated noncooperation in the war effort. The indictment also charged Schenck with sending non-mailable matter—the circular—through the mail. There was evidence from the minutes of a Socialist Party meeting that Schenck had printed some 15,000 leaflets and that some of these had been mailed to men who had already been selected for military service. The leaflet recited the text of the Thirteenth Amendment and argued that conscription was a form of involuntary servitude. It said that draftees who complied were little better than slaves to the interests of "Wall Street's chosen few." It encouraged the men to "Assert Your Rights" in opposition to the draft and portrayed the war effort as an "infamous conspiracy" by "cunning politicians" and "a mercenary capitalist press." The leaflet condemned the "cold-blooded ruthlessness" of a government that "sent[ed] * * * citizens away to foreign shores to shoot up the people of other lands" and argued that individuals who said and did nothing about the draft thereby "silent[ly] consent[ed]." Schenck and those accused with him defended the publication and distribution of the pamphlet under the First Amendment. They were convicted and appealed to the Supreme Court.

Mr. Justice HOLMES delivered the opinion of the Court.

* * *

* * * 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. * * *

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. * * * 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. * * * 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. * * * 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. * * * 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 section 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. * * *

Judgments affirmed.

NOTE—JUSTICE HOLMES DISSenting in Abrams v. United States

Abrams and several other Russian immigrants, who were avowed anarchists and revolutionaries, were charged under the Espionage Act as amended in 1918 with writing, publishing, and disseminating some 5,000 circulars that (1) used “scurrilous and abusive language” to characterize the American form of government, (2) brought the government into disrespect, (3) intended to incite and encourage resistance to the war, and (4) advocated curtailment in the production of materials necessary to fight the war. The defendants condemned as hypocrisy American participation in the World War and efforts of the Wilson administration to aid in crushing the Russian Revolution, referring in their leaflets to the President as a “coward” and to his administration as “the plutocratic gang in Washington.” The leaflets also appealed to soldiers and to workers in the munitions factories to stop killing their Russian comrades. The defendants were convicted in federal district court on all four counts and sentenced to 20 years in prison; they appealed to the Supreme Court. In Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17 (1919), the Court, per Justice Clarke, upheld the convictions, focusing principally on the third and fourth counts and noting particularly that defendants’ circulars, in which they sounded a call for a general strike, were distributed “in the greatest port of our land, from which great numbers of soldiers were at the time taking ships daily, and in which great quantities of war supplies were at the time being manufactured for transportation overseas.”

Justice Holmes dissented and was joined in his opinion by Justice Brandeis. He first gave a careful and detailed portrayal of the defendants’ behavior and then proceeded to explain the nature of the “clear and present danger” test and its application:

[To make the[r] conduct criminal th[e] statute requires that it should be “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.” It seems to me that no such intent is proved.

* * * [A] deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.
A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. *

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. *

But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime. *

It is necessary where the success of the attempt depends upon others because if that intent is not present, the actor’s aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant’s words. *

If it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. *

I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given, I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check
the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. * * *

**NOTE**—JUSTICE BRANDEIS CONCURRING IN WHITNEY V. CALIFORNIA

Along with other radicals who split off from the Socialist party, Charlotte Whitney formed the Communist Labor party. The party espoused revolutionary goals and methods, on the order of those at issue in Gitlow and in contrast to the democratic propensities of the old-line socialists. Miss Whitney was convicted on several counts under California’s criminal syndicalism statute for helping to form and becoming a member of an organization that was “advocating, teaching or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence * * * as a means of accomplishing a change in industrial ownership or control, or effecting any political change.” The California Supreme Court affirmed the conviction.

In Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927), the United States Supreme Court upheld the constitutionality of the statute against a challenge predicated on the Due Process Clause of the Fourteenth Amendment. Justice Sanford, on behalf of the majority, sustained the regulation as a valid protection of state interests:

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. * * * 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.

Justice Brandeis, in an opinion also representing the views of Justice Holmes, concurred in the judgment of the Court. He cautioned:

[Under this statute] the mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is * * * [criminal]. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

[Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. * * *

* * *

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.
Those who won our independence believed that the final end of the state was to make men free to
develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary.
They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and
courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you
think are means indispensable to the discovery and spread of political truth; that without free speech and
assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection
against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that
public discussion is a political duty; and that this should be a fundamental principle of the American
government. They recognized the risks to which all human institutions are subject. But they knew that
order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to
discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that
hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed
grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in
the power of reason as applied through public discussion, they eschewed silence coerced by law—the
argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they
amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches
and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify
suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is
practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There
must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of
existing law tends in some measure to increase the probability that there will be violation of it. Condonation
of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the
criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still
further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free
speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would
be immediately acted on. The wide difference between advocacy and incitement, between preparation and
attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear
and present danger it must be shown either that immediate serious violence was to be expected or was
advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

* * * Only an emergency can justify repression. * * *

The “Bad Tendency” Test

Regardless of Justice Holmes’s intentions in framing the “clear and present danger”
document, until the 1940s a majority of the Court rejected any formula that placed primary
emphasis on free speech. This is not to say that “clear and present danger” faded into
oblivion. On the contrary, the phrase appeared in the Court’s opinions from time to time, but Justices of this period used it as a conclusion rather than a test. “Clear and present danger” became a peg onto which Court decisions were often hung after a decision had been reached by other avenues.

Although he served only two and a half years as President before his death in 1923, Warren Harding made a disproportionately large number of appointments to the Supreme Court, each as politically reactionary as he was. His four appointees were Chief Justice Taft and Justices Pierce Butler, George Sutherland, and Edward Sanford. Added to Justices Van Devanter and McReynolds, this gave right-wing Justices complete control of the Court throughout the 1920s. The result was a decade of Supreme Court decisions that staunchly defended property rights and economic liberties (see Chapter 7, section B), but were remarkably insensitive to First Amendment freedoms. Illustrative of the nonprotection of freedom of speech characteristic of the period was the following decision of the Taft Court in *Gitlow v. New York*.

Justice Sanford’s opinion rejected virtually every premise that guided Holmes and Brandeis’s application of the “clear and present danger” test. Raising the banner of judicial self-restraint to new heights, the Taft Court virtually abdicated the power of judicial review in free speech cases. For reasons that should become quite evident when you read it, the free speech standard that emerged from the *Gitlow* decision became widely known as the “bad tendency” test.

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**Gitlow v. New York**

Supreme Court of the United States, 1925
268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138

**Background & Facts**

Benjamin Gitlow, a leader of the Left Wing Section of the Socialist party, which had been formed to oppose “moderate socialism,” was tried and convicted by a New York court of violating a state law that punished advocating the overthrow of the government by force and violence. The indictment, which specifically charged that by publishing and disseminating “The Left Wing Manifesto,” a compendium of the section’s beliefs, in *The Revolutionary Age*, the movement’s paper, Gitlow had distributed materials that advocated, advised, and taught “the doctrine that organized government should be overthrown by force, violence and unlawful means.” The publication sounded a general call to emulate the Russian Revolution and to throw off capitalism, which it described as being “in the process of disintegration and collapse.” As a start, it called for using “mass industrial revolts to broaden the strike [the then-recent labor disputes in Seattle and Winnipeg], make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.” There was no evidence that publication of the manifesto had any effect. Gitlow did not challenge the accuracy of the state’s factual assertions, but defended by attacking the constitutionality of the statute. His conviction was affirmed by the New York Court of Appeals, and he appealed to the U.S. Supreme Court.

Mr. Justice SANFORD delivered the opinion of the Court.

***

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. ***

***

*** The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of “doctrine” having no
quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences. * * *

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. * * *

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

"The proletariat revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle!"

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

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. * * *

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, * * * 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. * * *

[A] State in the exercise of its police power * * * 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 * * * 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. * * * 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. * * *

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. * * * 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. * * *

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. * * * 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. * * *

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. * * * The general statement in the Schenck Case * * * that 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,"—upon which great reliance is placed in the defendant's argument—* * * 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. * * *

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. * * *

Affirmed.
[Although he was a member of the Court by the time the decision was announced, Mr. Justice STONE did not participate because he had not been appointed until after the case was argued.]

Mr. Justice HOLMES (dissenting).

Mr. Justice BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word “liberty” as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in Schenck v. United States applies. * * *

* * * If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. * * * But the indictment alleges the publication and nothing more.

The Preferred Freedoms Approach

The political hold of the Court’s conservatives slackened with the appointments of Chief Justice Hughes and Justice Owen Roberts in 1930 to replace Chief Justice Taft and Justice Sanford; the political power of the Court’s right wing evaporated completely with the succession of judicial retirements that began several months after President Franklin Roosevelt’s November 1936 reelection landslide that also brought record numbers of Democrats to both Houses of Congress. During his first term, FDR had not been able to make a single appointment to the Court; he had been the only President in American history to have served a full four-year term and yet been denied the opportunity. Between 1937 and 1943, he appointed a total of nine Justices. Although all had arrived on the Court committed to the practice of judicial self-restraint when it came to legislation dealing with business and economic regulation, FDR’s appointees soon split over whether they were equally obligated to practice it when legislation infringed basic civil liberties. In Thomas v. Collins following, a bare majority of the Court, speaking through Justice Rutledge, set out the framework for a revitalized version of the “clear and present danger” test that soon was named the “preferred freedoms” test and eventually evolved into what is known today as strict scrutiny. Although Thomas retained the “clear and present danger” component, it toughened Justices Holmes and Brandeis’s test considerably by reversing the customary burden of proof as to constitutionality and by requiring that legislation regulating freedom of speech be precisely tailored to the evil at hand.
The preferred freedoms test reached its zenith in the late 1940s with the Court’s decision in *Terminiello v. Chicago* (p. 796). In that case, the Court overturned the defendant’s conviction for breach of the peace because, it concluded, the trial judge’s instructions to the jury were overbroad—that is, they were not precisely tailored in defining the offense—and, therefore, violated the First Amendment. In an insightful and eloquent dissent, Justice Jackson criticized the majority’s simplistic juxtaposition of liberty and order. With his experience as chief American prosecutor at the Nuremberg war crimes trial still fresh in mind, Justice Jackson, reflecting on the tactics by which the Nazis had come to power in Germany during the early 1930s, argued that the Court’s rigid conception of free speech played right into the hands of political extremists who wanted nothing more than to use the First Amendment to wreck the political system.

**Thomas v. Collins**
Supreme Court of the United States, 1945
323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430

**BACKGROUND & FACTS** A Texas statute required all labor organizers to register with the Texas secretary of state and receive a permit before undertaking such activity. Thomas, president of the United Automobile, Aircraft, and Agricultural Implements Workers Union and a vice-president of the Congress of Industrial Organizations, came into the state to address a mass meeting sponsored by the Oil Workers Industrial Union in their effort to organize workers at the Bay Town, Texas, plant of the Humble Oil & Refining Co. Anticipating noncompliance with the law, the Texas attorney general sought and received a restraining order from the county court, forbidding Thomas to address the labor rally. Upon receiving a copy of the order, Thomas determined to defy it because, he concluded, it abridged his right of free speech under the Constitution. At the conclusion of his speech to the mass meeting, Thomas openly solicited new union members. He was subsequently arrested, judged to be in contempt, and sentenced to three days in jail and a $100 fine. After his petition for habeas corpus was rejected by the Texas Supreme Court, Thomas sought relief from the U.S. Supreme Court.

Mr. Justice RUTLEDGE delivered the opinion of the Court.

**A. THE “CLEAR AND PRESENT DANGER” TEST**

The case confronts us with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised.
in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. * * *

This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. * * * Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

The idea is not sound therefore that the First Amendment’s safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one “engaged in business activities” or that the individual who leads it in exercising these rights receives compensation for doing so. * * *

* * * Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community’s relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. * * * And the answer, under that tradition can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.

* * * This Court has recognized that “in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * Freely discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.” Thornhill v. Alabama, 310 U.S. 88, 102, 103, 60 S.Ct. 736, 744 (1940). * * *

The present application does not involve the solicitation of funds or property. Neither * * * [the section of the statute in question here] nor the restraining order purports to prohibit or regulate solicitation of funds, receipt of money, its management, distribution, or any other financial matter. Other sections of the Act deal with such things. And on the record Thomas neither asked nor accepted funds or property for the union at the time of his address or while he was in Texas. Neither did he “take applications” for membership * * *.

Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers’ organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by * * * [the National Labor Relations Board] pursuant to the guaranties of national law. Those guaranties include the workers’ right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such
organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials to discuss with and inform the employees concerning matters involved in their choice. These rights of assembly and discussion are protected by the First Amendment.

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. The statute requires no specific formula. It is not contended that only the use of the word "solicit" would violate the prohibition. Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation.

How one might "laud unionism," as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case.

No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means that workingmen should unite for collective bargaining. The vice is not merely that invitation is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely. The restriction's effect was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card. Thomas knew this and faced the alternatives it presented. When served with the order he had three choices: (1) To stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. We think he was within his rights in doing so.

The assembly was entirely peaceable, and had no other than a wholly lawful purpose. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. Moreover, the State has shown no justification for placing restrictions on the use of the word "solicit." We have here nothing comparable to the case where use of the word "fire" in a crowded theater creates a clear and present danger which the State may undertake to avoid or against which it may protect. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247 (1919). We cannot say that "solicit" in this setting is such a dangerous word. So far as free speech alone is concerned, there can be no ban or restriction or burden placed on the use of such a word except on showing of exceptional circumstances where the public safety, morality or health is involved or some other substantial interest of the community is at stake.

When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at
an end. A restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.

***

"Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. ***

The judgment is reversed.

[Chief Justice STONE and Justices ROBERTS, REED, and FRANKFURTER dissented.]

**TERMINIELLO v. CHICAGO**

Supreme Court of the United States, 1949

337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131

**BACKGROUND & FACTS** Arthur Terminiello was charged with disorderly conduct when he was arrested for violating Chicago’s “breach of the peace” ordinance. His arrest grew out of a speech that he gave that attracted considerable public attention. The auditorium in which he spoke was filled with about 800 people, almost all of them admirers, while outside the hall a hostile crowd approximately double the size angrily milled about, protesting the meeting. Terminiello in vigorous and sometimes vicious terms castigated certain political and racial groups. Specifically, he assailed several prominent figures in the Roosevelt administration as Communists and tauntingly portrayed those of a leftist persuasion as “scum” and called them other names. He also lashed out at and vilified people of the Jewish faith. Despite efforts of the police to cordon off the area, there were several disturbances in the crowd. There was much pushing and shoving, rocks were thrown, 28 windows were broken, stink bombs were set off, and there were efforts to break in through the back door of the meeting hall. Though the defendant continually asserted that the application of the ordinance to his behavior violated the Constitution’s guarantee of free speech, the jury returned a verdict of guilty, and he was fined $100. The Illinois Supreme Court upheld the conviction, and Terminiello appealed to the U.S. Supreme Court.

Mr. Justice DOUGLAS delivered the opinion of the Court.

***

The argument here has been focused on the issue of whether the content of petitioner’s speech was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees. See Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942) ***. We do not reach that question, for there is a preliminary question that is dispositive of the case.

As we have noted, the statutory words “breach of the peace” were defined in instructions to the jury to include speech which “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.” *** That construction of the ordinance is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance. ***

The vitality of civil and political institutions in our society depends on free discussion. *** It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high
purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

* * * For all anyone knows [Terminiello] was convicted under the parts of the ordinance (as construed) which, for example, make it an offense merely to invite dispute or to bring about a condition of unrest. * * *

Reversed.

[Chief Justice VINSON dissented.]

Mr. Justice FRANKFURTER, dissenting.

For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court.

* * *

* * * If such a federal claim was neither before the State court nor presented to this Court, this Court unwarrantably strays from its province in looking through the record to find some federal claim that might have been[,] but was not, urged here. This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.

Freedom of speech undoubtedly means freedom to express views that challenge deep-seated, sacred beliefs and to utter sentiments that may provoke resentment. But those indulging in such stuff as that to which this proceeding gave rise are hardly so deserving as to lead this Court to single them out as beneficiaries of the first departure from the restrictions that bind this Court in reviewing judgments of State courts.

On the merits of the issue reached by the Court I share Mr. Justice JACKSON'S views.

Mr. Justice JACKSON and Mr. Justice BURTON join this dissent.

Mr. Justice JACKSON, dissenting.

* * *

[The local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two. When the trial judge instructed the jury * * * he was saying * * * in effect, that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of peace. When the light of the evidence not recited by the Court is thrown upon the Court's opinion, it discloses that underneath a little issue of Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order. This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.

* * *

[Several pages follow, containing excerpts from Terminiello's caustic speech]
Hitler summed up the strategy of the mass demonstration as used by both fascism and communism: “We should not work in secret conventicles but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but by the conquest of the streets. We must teach the Marxists that the future master of the streets is National Socialism, just as it will some day be the master of the state.” [Emphasis supplied] *** from Mein Kampf. First laughed at as an extravagant figure of speech, the battle for the streets became a tragic reality when an organized Sturmabteilungen [the SA or storm troopers] began to give practical effect to its slogan that "possession of the streets is the key to power in the state." ***

The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements, of all shades of opinion but who, whatever their differences, submit them to free elections which register the results of their free discussion. The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions so fraught with violence and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: “Christian Nationalism or World Communism—Which?”

This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials. This is such a case. The group of which Terminiello is a part claims that his behavior, because it involved a speech, is above the reach of local authorities.

If the mild action those authorities have taken is forbidden, it is plain that hereafter there is nothing effective left that they can do. If they can do nothing as to him, they are equally powerless as to rival totalitarian groups. Terminiello’s victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets.

I am unable to see that the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak. It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State’s policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others. There is no claim that the proceedings against Terminiello are designed to discriminate against him or the faction he represents or the ideas that he bespeaks. There is no indication that the charge against him is a mere pretext to give the semblance of legality to a covert effort to silence him or to prevent his followers or the public from hearing any truth that is in him.

Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish. Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. “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 [or the State or City] has a right to prevent.” [Emphasis supplied.] Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249 (1919). No one ventures to contend that the State on the basis of this test was not justified in punishing Terminiello. In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate. If this Court has not silently abandoned this long standing test and substituted for the purposes of this case an unexpressed but more stringent test, the action of the State would have to be sustained.

Only recently this Court [unanimously] held that a state could punish as a breach of the peace use of epithets such as “damned racketeer” and “damned fascists,” addressed to only one person, an official, because likely to provoke the average person to retaliation. But these are mild in comparison to the epithets “slimy scum,” “snakes,” “bedbugs,” and the like, which Terminiello hurled at an already inflamed mob of his adversaries. * * *

* * *

However, these wholesome principles are abandoned today and in their place is substituted a dogma of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics. * * *

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

I would affirm the conviction.

Mr. Justice BURTON joins in this opinion.

The “Clear and Probable Danger” Test

But the activist posture of judicial review reflected in the Terminiello decision was fleeting. Justices Murphy and Rutledge died during the summer of 1949, less than four months after Terminiello had been decided, and with their passing the number of Justices who supported use of the preferred freedoms test was cut in half. The pendulum effect, in which judicial protection of the First Amendment followed a change in the Court’s composition, then repeated itself. President Harry Truman’s selections of Justices Minton and Clark, combined with his previous appointments of Chief Justice Vinson and Justice Burton and buttressed by longtime judicial restraintists such as Justices Frankfurter and Reed, created a solid majority that had little sympathy for the approach of Thomas and Terminiello.

All of the free speech cases decided by the Court since Justice Holmes articulated the “clear and present danger” test in Schenck involved a single actor acting alone. If faithfully and carefully applied—arguably not characteristic of the Court before the 1940s—the concept of criminal attempt implicit in Holmes’ test seemed to strike an appropriate balance between the competing interests of freedom and order. But did this test strike the proper balance when the threat to public safety and security emanated from the concerted action of a well-disciplined group? In the post–World War II world, where the chief aim of American foreign policy was the containment of Communism, the U.S. Communist Party soon came to be seen as an insidious domestic political force—a third-column
boring from within—to help the Soviet Union defeat American interests. In post-war
Europe, subversion by domestic Communist elements in control of unions and important
government departments was credited with softening up the democratic regime in
Czechoslovakia to the point that it was easily toppled in a coup d’etat. Communist
victories overseas increased American anxiety at home about the risk posed by an
organized, single-minded political cadre bent on overthrowing the American govern-
ment. In short, the American Communist Party, regarded throughout the 1930s as a
lawful party advocating far-reaching economic reform, had now come to be seen—with
the collapse of the American-Soviet partnership following victory in World War II—as a
criminal conspiracy.

In light of the perception that the American Communist Party was no longer a political
party but a criminal conspiracy, the model underlying an appropriate free speech test had to
take account of the relevant fact that the actor was now a group, not an individual. This
was the premise from which the federal government proceeded when it began prosecution
of the leaders of the American Communist Party in the late 1940s. It was also the
assumption that underlay congressional investigations of domestic Communists during the
1950s. As with Schenck, Abrams, and Gitlow, there is now ample evidence for arguing that
the government overreacted in its criminal prosecutions and its congressional investigations
and that the motivation behind both was political.

Eugene Dennis and ten other high-ranking members of the American Communist
Party were prosecuted under the Smith Act of 1940, the first peacetime sedition law
enacted by Congress since the infamous Sedition Act of 1798. The indictment charged
the defendants with (1) conspiring to organize the Communist Party, and (2) conspiring
to teach and advocate the overthrow and destruction of the United States Government
by force and violence. The defendants were found guilty, and their convictions were
upheld by the Supreme Court in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857
(1951). A four-Justice plurality, speaking through Chief Justice Vinson, adopted a
revision of the “clear and present danger” test to take account of the heightened risk. In
doing so, the plurality adopted as its own the restatement of the test formulated by
Learned Hand, one of the appeals court judges that had heard the Dennis case. Chief
Justice Vinson wrote:

The situation with which Justices Holmes and Brandeis were concerned in Gitlow was a
comparatively isolated event, bearing little relation in their minds to any substantial threat to
the safety of the community. * * * They were not confronted with any situation comparable to
the instant one—the development of an apparatus designed and dedicated to the overthrow

Chief Judge Learned Hand, writing for the majority below, interpreted the phase as follows:

“In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its
improbability, justifies such invasion of free speech as is necessary to avoid the danger.” 183
F.2d at 212. We adopt this statement of the rule. * * * It takes into consideration those factors
which we deem relevant, and relates their significances. * * *

In other words, whereas the “clear and present danger” test, as originally formulated by
Holmes and Brandeis, required an affirmative finding on each of its three component
elements, Hand’s rewriting of the test now allowed the gravity of the evil to be balanced
against its imminence. And, as applied by the Justices, accuracy in foreseeing the threat fell
by the wayside.

* * * The mere fact that from the period 1945 to 1948 petitioners’ activities did not result in
an attempt to overthrow the Government by force and violence is of course no answer to the
fact that there was a group that was ready to make the attempt. The formation by petitioners of
such a highly organized conspiracy, with rigidly disciplined members subject to call when the
leaders, these petitioners, felt that the time had come for action, coupled with the inflammable
nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. * * * If the ingredients of the reaction were present, we cannot bind the Government to wait until the catalyst is added.

Justice Frankfurter, concurring in the judgment, thought that the "primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to Congress" and saw the Court as entitled to set aside the judgment below "only if there is no reasonable basis for it." He explained:

* * * The Communist party was not designed by these defendants as an ordinary political party. For the circumstances of its organization, its aims and methods, and the relation of the defendants to its organization and aims we are concluded by the jury's verdict. The jury found that the Party rejects the basic premise of our political system—that change is to be brought about by nonviolent constitutional process. The jury found that the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. It found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherents and as a policy to be translated into action.

In determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, most of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

In a separate concurring opinion, Justice Jackson wrote that the Communist Party was "realistically a state within a state" which demands constitutional "freedoms, not for its members, but for the organized party." He observed:

* * * Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

The "clear and present danger" test was appropriate to assessing the risk posed in certain settings—the "criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading some zealots behind a red flag"—because "it is not
beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision * * * *.

And, said Jackson, "I would save it unmodified, for application as a 'rule of reason' in the kind of case for which it was devised."

But Holmes and Brandeis's test was clearly unworkable in the context presented by Dennis. Justice Jackson explained:

If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a "clear and present danger" of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist coup would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.

He added, "The authors of the clear and present danger test never applied it to a case like this, nor would I."

To the dissenters, Justices Black and Douglas, all of this was constitutionally indefensible. After all, they pointed out, the defendants were not convicted of attempting to overthrow the government, or even of conspiring to overthrow the government, but of conspiring to advocate the overthrow of the government. If this were a case where the defendants were charged with "teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, [or] the art of street warfare," their acts would be punishable, but this was a case about speech, not action. Said Justice Black, "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'" In Justice Black's view, the problem with effects tests was that they too often permitted the punishment of advocacy. Since speech was punishable when it created a high probability that those who heard it would act on it and since this was largely a matter of the context in which the advocacy occurred—a point Justice Holmes had conceded previously in his Abrams dissent—the usual consequence was that speech was cut off just when it might have been most persuasive. But advocacy of what? Dennis seemed far from clear about that and in fact appeared to suggest that any advocacy of overthrowing the government by force or violence would suffice. Subsequent Supreme Court decisions in Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957), and Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469 (1961), addressed this concern, but not necessarily to the satisfaction of Justices Black and Douglas.

Having tasted success in prosecuting the top echelon of the Communist party leadership in Dennis, the government then went after 14 second-string party functionaries in Yates. Like those in Dennis, the defendants in Yates were indicted for organizing the party and for conspiring to advocate the overthrow of the government by force and violence. The Court rejected the government's theory that "organizing" the party—even a revolutionary party—could be a continuing offense. Speaking for the Court, Justice Harlan reasoned that the U.S. Communist party had already been founded and that, while new members could certainly be said to have joined the party, they could not be said to have founded it again, much less to have kept on founding it. To adopt the government's open-ended definition of "organize" would have violated the canon that criminal statutes be construed strictly, lest
the law be found to deny due process by failing to provide adequate notice of the conduct that was forbidden.

The Yates Court then turned to the conspiracy-to-advocate charge. Eschewing constitutional interpretation in favor of statutory construction, the Court held that advocacy within the meaning of the Smith Act required “that those to whom the advocacy be addressed must be urged to do something, now or in the future, rather than merely to believe in something.” The punishment of advocacy, therefore, extended only to the advocacy of action, not the advocacy of ideas. Justices Black and Douglas also voted to acquit all of the defendants, but on First Amendment grounds.

In Scales, the Court reviewed the defendant’s conviction under the membership clause of the Smith Act, which made it a felony to acquire or hold knowing membership in any organization that advocated the overthrow of the government by force and violence. Scales had been a Communist party member since the mid-1940s. Speaking through Justice Harlan, a bare majority of the Court held that no First Amendment problem was presented where the defendant’s membership in the party was “active” and “knowing.” The Court distinguished this from “passive,” “nominal” membership—what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.” Chief Justice Warren and Justice Brennan dissented on statutory grounds in Scales, and Justices Black and Douglas dissented on First Amendment grounds.

Although both Yates and Scales accepted and endorsed Dennis’s enunciation of the “clear and probable danger” test, the Court’s holdings reflected a continuing adherence to the concept of specific intent (the defendant’s intent to achieve a criminal objective). Yates demonstrated this in its requirement that the advocacy pertain to inciting acts (not beliefs). Scales demonstrated it with the requirement that one’s affiliation with a subversive group be characterized by “active” and “knowing” membership, since such members are more likely than casual supporters to know of and share the organization’s criminal aims and directly facilitate their achievement. These refinements to the holding in Dennis were effected by a Court on which the Truman appointees came to be replaced by more libertarian Justices, though not enough of them to actually overrule Dennis.

“Clear and Present Danger” Triumphant

Fifty years and three months after its first traces were articulated in the Schenck opinion, the Court finally embraced “clear and present danger” as the controlling free speech standard in Brandenburg v. Ohio. Five decades of the pendulum effect, in which the changing membership of the Court alternatingly undermined and strengthened the standard, had come to an end. Today, of course, application of Holmes and Brandeis’s standard in “pure speech” cases takes the form of strict scrutiny. The great irony in Brandenburg was that, just as the Court finally came to accept “clear and present danger,” Justices Black and Douglas abandoned all hope for it, concluding that it had demonstrated a history of such malleability, it simply could not be trusted to protect against violations of the First Amendment.

BRANDENBURG V. OHIO
Supreme Court of the United States, 1969
395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430

BACKGROUND & FACTS Charles Brandenburg, the leader of a local 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 assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The prosecution's case rested most heavily on two films that had been made at a rally by a Cincinnati television reporter attending the gathering at Brandenburg's request. The first film aired by the prosecution showed 12 hooded men, some of whom carried firearms, standing around a burning cross. Most of what the men said was inaudible, but a few scattered phrases could be understood as being derogatory toward African-Americans and, in one instance, Jews. The same film showed Brandenburg making a speech before those assembled at the rally. During the course of his remarks, Brandenburg suggested that, if the President, Congress, and the Court continued "to suppress the white, Caucasian race, it's possible that there might have to be some re\textit{vengeance} taken." The speech ended with Brandenburg's announcement that they were planning a march on Washington for July 4 and separate marches in St. Augustine, Florida, and in Mississippi. A second film presented by the prosecution showed Brandenburg delivering essentially the same speech to five hooded men. Again, some of the men carried firearms, but Brandenburg did not. During this second speech, Brandenburg omitted the reference to the possibility of "re\textit{vengeance}" but added, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Appealing his conviction, Brandenburg challenged the constitutionality of the statute under the First and Fourteenth Amendments. An intermediate Ohio appellate court affirmed his conviction, and the state supreme court dismissed his appeal as failing to raise a substantial constitutional question. Brandenburg then sought review by the U.S. Supreme Court.

PER CURIAM.

** **

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, 274 U.S. 357, 47 S.Ct. 641 (1927). 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. ** ** But Whitney has been thoroughly discredited by later decisions. ** ** 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, 367 U.S. 290, 297–298, 81 S.Ct. 1517, 1520–1521 (1961), "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." ** ** 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. ** **

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, supra, cannot be supported, and that decision is therefore overruled.

Reversed.

Mr. Justice BLACK, concurring.

I agree with the views expressed by Mr. Justice DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which Dennis purported to rely.

Mr. Justice DOUGLAS, concurring. * * *

* * * I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

* * *

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. * * * They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.

Although Brandenburg involved a criminal prosecution, the constitutional requirement that unprotected speech must constitute a "clear and present danger" has also been applied in some interesting civil cases. At first glance, personal injury suits between private parties would appear to be beyond the reach of the Constitution, but where a state permits a plaintiff to recover damages and compels or is prepared to compel enforcement of that judgment, such involvement constitutes "state action" and is limited by constitutional provisions, such as the First Amendment. The two notes that follow discuss the application of Brandenburg in the context of personal damage suits for threats, injuries, or deaths alleged to have resulted from reading how-to manuals, murder-for-hire advertisements, or website-posted information. In those suits, plaintiffs alleged that conveying such material was not protected speech and that the purveyor of the information properly should be made to assume liability.
Paladin Enterprises published two books, *Hit Man: A Technical Manual for Independent Contractors* and *How to Make a Disposable Silencer*. Since their publication in 1983, each book had sold about 13,000 copies nationally. The books were sold by mail order, and each carried the following statement on the page preceding the table of contents: "WARNING: IT IS AGAINST THE LAW to manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only!" Murder victims' families brought wrongful death and survival actions against the publisher of these books, which were read by the victims' killer.

In *Rice v. Paladin Enterprises, Inc.*, 940 F.Supp. 836 (D.Md. 1996), a federal district court granted defendants' motion to dismiss the complaint. Based on the ruling in *Brandenburg*, the district judge concluded that the books merely advocated or taught murder but did not incite or encourage it, thus entitling the publisher to immunity under the First Amendment.

The murders were committed by James Perry, who, the district court conceded, had followed rather closely many of the suggestions appearing in *Hit Man*: using an AR-7 rifle, drilling out its serial number, employing a homemade silencer, and shooting the victims at close range to ensure accuracy. The district judge continued, "Perry followed additional instructional references * * * including how to solicit for and obtain prospective clients in need of murder for hire services; requesting up-front money for expenses; how to register at a motel in the vicinity of the crime, paying with cash and using a fake license tag number; committing the murders at the victims' home; * * * mak[ing] the crime scene look like a burglary; * * * clean[ing] up and carry[ing] away the ejected shells; breaking down the gun and discard[ing] the pieces along the roadside after the murders; and using a rental car, a stolen tag on the rental car and the discard[ing] of the tag after the murders."

Citing *Brandenburg*, the district judge observed that the publications could only be said to fall outside First Amendment protection if they constituted "words likely to incite imminent lawless action." He continued, "[I]n order to justify a claim that speech be restrained or punished because it was an incitement to imminent lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct." Under *Brandenburg*, plaintiffs would have to show that the "[d]efendants must have intended that James Perry would go out and murder * * * [the victims] immediately." The district judge continued, "That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books. * * * Nothing in *Hit Man* or *Silencers* could be characterized as a command to immediately murder the three victims." He added: "Instead, the book seems to say, in so many words, 'If you want to be a hit man this is what you need to do.' This is advocacy, not incitement. Advocacy is mere abstract teaching. * * * The book does not cross th[e] line between permissible advocacy and impermissible incitation to crime or violence.* * * The book does not purport to order or command anyone to any concrete action at any specific time, much less immediately."

"Nor," said the district judge, "does the book have a tendency to incite violence." He continued: "[O]ut of the 13,000 copies of *Hit Man* that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation." Moreover, "the advertisement in

Paladin's mail order catalogue contains the disclaimer "[for academic study only]." The book itself also contains, in part, the disclaimer "[for informational purposes only]." Such disclaimers may be interpreted as an attempt to dissuade readers from engaging in the activity it describes. The court concluded, "First Amendment protection is not eliminated simply because publication of an idea creates a potential hazard."

In a pointed reversal of the district court's judgment, a federal appellate court, in Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074, 118 S.Ct. 1515 (1998), overturned summary judgment for the publisher and remanded the case for trial. Speaking for a unanimous three-judge appeals panel, Judge J. Michael Luttig wrote:

"The law is now well established that the First Amendment, and Brandenburg's "imminence" requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' "advocacy" of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes." * * *

"Here, it is alleged, and a jury could reasonably find * * * that Paladin aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder; there is not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy. * * *

"Aid and assistance in the form of this kind of speech bears no resemblance to the "theoretical advocacy," * * * or any of the other forms of discourse critical of government, its policies, and its leaders, which have always animated, and to this day continue to animate, the First Amendment. * * * It is the teaching of the "techniques" of violence, Scales, 367 U.S. at 233, 81 S.Ct. at 1468, the "advocacy and teaching of concrete action," Yates, 354 U.S. at 132, 77 S.Ct. at 1077 * * *. As such, the murder instructions in Hit Man are, collectively, a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected * * *.

"Applying much the same line of reasoning, some federal courts have held that the First Amendment also does not shield publishers of murder-for-hire advertisements from wrongful death suits. Perhaps the premier case is Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071, 113 S.Ct. 1028 (1993). That case grew out of the following advertisement:

"GUN FOR HIRE. 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Bodyguard, courier, and other special skills. All jobs considered. [Daytime and nighttime phone numbers and home address followed.]

"In support of its conclusion that this ad was not protected by the First Amendment and that liability for compensatory damages could be imposed for negligently publishing it, the appeals court explained:

"Our review of the language of Savage's [the hired killer] ad persuades us that [Soldier of Fortune] had a legal duty to refrain from publishing it. Savage's advertisement (1) emphasized the term "Gun for Hire," (2) described Savage as a "professional mercenary," (3) stressed Savage's willingness to keep his assignments confidential and "very private," (4) listed legitimate jobs involving the use of a gun—bodyguard and courier—followed by a reference to Savage's "other special skills," and (5) concluded by stating that he would consider "all jobs." The ad's combination of sinister terms makes it apparent that there is substantial danger of harm to the public. The ad expressly solicits all jobs requiring the use of a gun. When the list of legitimate jobs—i.e., bodyguard and courier—is followed by "other special skills" and "all jobs considered," the implication is clear that the advertiser would consider illegal jobs. We agree with the district court that "the language of this advertisement is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did."
The substantial danger of harm posed by the ad was apparent "on its face and without the need for investigation * * *." See also Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D.Ark. 1987). However, not all federal courts agree; see Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 880 (5th Cir. 1989), cert. denied, 493 U.S. 1024, 110 S.Ct. 729 (1990).

NOTE—THE “NUREMBERG FILES” CASE

Two operators of abortion clinics and five individual physicians brought suit against two antiabortion organizations and a dozen individual antiabortion activists for damages and injunctive relief for alleged violations of the Freedom of Access to Clinic Entrances Act (FACE) (see p. 745) and federal and state RICO statutes (see p. 745). The complaint stated that certain materials created and disseminated by the defendants posed a true threat such that the plaintiffs experienced reasonable apprehension of bodily harm to themselves and their families. Defendants responded that their production of a bumper sticker, certain posters, and a website fell within the protection afforded by the First Amendment.

The bumper sticker at issue was yellow with large black lettering that said "Execute Murderers" and directly under the word "Murderers" appeared the word "Abortionists." Although the antiabortion groups and activists produced posters that were critical of abortion in general terms, some posters that were created and disseminated were much more specific. The "Deadly Dozen" poster, for example, was a simulated "wanted poster" headed in large lettering "Guilty of Crimes Against Humanity." The poster then went on to make a statement about the prosecution of abortion as a "war crime" and gave the names, addresses, and phone numbers of twelve individuals it labeled abortionists. The poster offered a $5,000 reward for information leading to their arrest, conviction, and revocation of their license to practice medicine. Another poster, like the Deadly Dozen poster, identified Robert Crist by name, gave his address and phone number, and advertised a $500 reward.

Last, but not least, was the so-called "Nuremberg Files" website. It began by asking the viewer to "Visualize Abortions on Trial," a message set against a courtroom sketch. It made the point that, when public opinion had changed on the issue of permitting abortion, those who engaged in it would be brought to justice. Payback, it assured the viewer, was inevitable because the tide of public opinion was sure to change. When this happened, the antiabortionists wanted to see that trials were held to punish abortion providers, much as the Nuremberg Trials had meted out justice for war crimes and crimes against humanity following World War II. The website message then railed against "Third Trimester Butchers" and others who performed partial-birth abortions. The Nuremberg Files website reputedly contained information on 225 physicians who had performed abortions, including their business and home addresses, phone numbers, family information, and descriptions of their cars. Some included photos of the individuals and their homes. The website solicited additional information. There was a list of physicians identified as abortionists with the names of those who had been slain graphically crossed off. Plaintiff’s complaint described in detail a period of escalating violence against abortion providers, detailing threats against certain physicians and the fact that, on the advice of law enforcement authorities, some had taken to wearing disguises and bullet-proof vests. The complaint argued that the bumper sticker, posters, and website promoted the atmosphere of violence surrounding the antiabortion movement.

A federal district judge denied the defendants’ motion for summary judgment in Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 23 F.Supp.2d 1182 (D.Ore. 1998). As the judge pointed out, "If the trier of fact determines that defendants have made ‘true threats,’ then defendants’ statements are not ‘protected expression’ under either the Oregon Constitution or the First Amendment.” A jury subsequently awarded the plaintiffs $107 million in damages and, in an opinion issued about three weeks later, 41 F.Supp.2d 1130 (D.Ore. 1999), the judge upheld the award of damages, issued an order banning the antiabortion
demonstrators from threatening doctors and clinic workers in the future, and enjoined future dissemination of certain posters and the website, although the website had been dropped two weeks before by its Internet service. Because their advocacy was in general terms, the bumper sticker and those posters not naming individual physicians were not affected by the injunction. Although the judge noted that there were no explicit threats contained in the materials, he reasoned that one must consider the context over all in deciding whether a reasonable person would consider the identifying posters and website “a serious expression of the intent to harm” and thus whether there had been a violation of the 1994 clinic protection law that outlaws “threats of force” to intentionally intimidate abortion providers. The American Coalition of Life Activists (ACLA) and the other defendants appealed. The judgment against the antiabortion protestors was reversed by a three-judge appeals panel, and the plaintiffs sought and received a rehearing of the case by the U.S. Court of Appeals for the Ninth Circuit sitting en banc.

In Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. en banc, 2002), the appeals court overturned the three-judge panel, affirmed the district court’s judgment, and remanded the case. By the razor-thin margin of 6–5, the appeals court held that the posters and files constituted a “true threat” and therefore were not protected by the First Amendment. The majority reasoned that “If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected,” but “while advocating violence is protected, threatening a person with violence is not.” A “true threat,” the appeals court said, was “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.” It was “not necessary,” the court continued, “that the defendant intend or be able to carry out his threat, only that he intend to intentionally or knowingly communicate it.” Like “fighting words,” true threats are proscribable.” That the message was publicly conveyed did not bring it within the ambit of First Amendment protection; that merely made it a public threat, not public speech. The posters and the files (to some extent) were not protected under the Supreme Court’s ruling in Brandenburg.

Although the “true threats” hinged on the poster pattern, the posters themselves did not use language that was overtly threatening. They constituted a true threat, nonetheless, because “they connote something they do not literally say, yet both the actor and the recipient get the message.” Summing up, the court said:

We * * * are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs’ listing in the Nuremberg Files constitute a true threat. In three prior incidents, a “wanted”-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that “wanted” or “guilty” posters had a threatening meaning that physicians would take seriously. In conjunction with the “guilty” posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

The appeals court held that ACLA was accountable through the award of damages for its conduct and that “[r]estraining it from continuing to threaten these physicians burdens speech no more than necessary.” The court affirmed the judgment in all respects but remanded the case as to punitive damages.

The dissenters argued that the “crushing damages and strict injunction” punished political speech. At most, they said, the posters could be viewed as a call to arms for other antiabortion protestors to harm the plaintiffs. The dissenters continued:
The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, “Stop smoking or you’ll die of lung cancer,” that is not a threat because the doctor obviously can’t cause the harm to come about. Similarly, “If you walk in that neighborhood late at night, you’re going to get mugged” is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging. They concluded that “none of the statements on which liability was premised were overtly threatening” and the two posters and the web page explicitly “foresaw the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so.” However, the dissenter recognized “because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities.” But that was insufficient to strip the speech of First Amendment protection since expression does not lose its protected character merely because “it may embarrass others or coerce them into action.” NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910, 102 S.Ct. 3409 (1982) (emphasis added). “In other words,” said the dissenters, “some forms of intimidation enjoy constitutional protection.”

The “Heckler’s Veto”

The Court’s acceptance of “clear and present danger” in Brandenburg made it clear that advocacy of the use of violence was constitutionally protected unless it incited lawless action. But the premise of “clear and present danger”—that, if the risk of violence were high enough, speech could be suppressed—raised a disturbing possibility: Could someone who disagreed with a speaker shut him up (or, more accurately, get the police to shut him up) simply by threatening harm? This obstacle to free speech has been labeled the “heckler’s veto.” The following note describes two versions of it. The first is a rather simple version of the problem that confronted the Court in Feiner v. New York the same year it decided the Dennis case. Another, more sophisticated, potential version surfaced in Forsyth County, Georgia v. Nationalist Movement four decades later. As Justice Black pointed out in his dissent in Feiner, the remedy for the “heckler’s veto” lies in making it clear to the police that their first priority when they see threats being made against a speaker is to protect the speaker’s right to speak by constraining the heckler. If their first response is to shut the speaker up, as they did Feiner, they have allowed the heckler to veto the speech.

Note—The Feiner and Forsyth County Cases

After receiving a telephone complaint about 6:30 p.m., the Syracuse, New York, police arrived to find Feiner standing on a wooden box on a sidewalk in a largely black ward of the city, addressing a crowd by means of a loudspeaker system attached to an automobile. Although the purpose of his speech was to get people to attend a meeting of the Young Progressives of America later that evening at a downtown hotel, in the course of his remarks Feiner made derogatory references to President Truman, the American Legion, the mayor of Syracuse, and other local politicians, most of whom he characterized as “bums,” referring to the mayor at one point as a “champagne-sipping bum.” Although the police initially made no attempt to interfere with the speech, they observed that the crowd was spilling into the street, forcing pedestrians to go around the crowd and impeding the flow of passing traffic. They attempted to get the crowd back on the sidewalk and also saw some pushing, shoving, and milling around in the audience. Feiner was speaking in a
loud, high-pitched voice, exhorting his listeners to rise up in arms in the fight for equal rights. It was a mixed audience—some agreed with Feiner and some did not—so the speech “stirred up a little excitement.” The crowd pressed closer to the speaker, and one man threatened to punch him. He had been speaking for over half an hour. At this point, the police approached Feiner to get him to break up the crowd. When the police asked him to step down off the box, Feiner refused and continued talking. After Feiner ignored a third police instruction to stop speaking, he was arrested.

In Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951), the Supreme Court affirmed Feiner’s conviction for disorderly conduct. Chief Justice Vinson, speaking for the Court, concluded that Feiner had been arrested and convicted not for the substance of his speech, but for “the reaction which it actually engendered.” He explained, “When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”

After firing an opening salvo at what he saw as the majority’s blind deference to the assessment of the facts by the state courts, Justice Black, in dissent, scorned the Court’s conclusion as “far-fetched to suggest that the ‘facts’ show any imminent threat of riot or uncontrollable disorder.” He continued:

It is neither unusual nor unexpected that some people at public street meetings mutter, mull about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things. Nor does one isolated threat to assault the speaker forebode disorder. Especially should the danger be discounted where, as here, the person threatening was a man whose wife and two small children accompanied him and who, so far as the record shows, was never close enough to petitioner to carry out the threat.

Moreover, assuming that the “facts” did indicate a critical situation, I reject the implication of the Court’s opinion that the police had no obligation to protect petitioner’s constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. According to the officers’ testimony, the crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect petitioner’s right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

Justices Douglas and Minton also dissented.

A sophisticated variation of the “heckler’s veto” is suggested by the facts in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395 (1992). In that case, the county board of commissioners enacted an ordinance that conditioned the issuance of any permit to hold a parade, demonstration, or assembly on public roads or other property upon payment of a fee to help cover the cost of maintaining order and protecting the safety of the people involved. Although the ordinance gave the county administrator latitude to adjust the fee depending upon the estimated cost above the expense normally required to preserve the peace, the ordinance set a maximum charge of $1,000 for each permit applicant for each day that the parade, demonstration, or assembly was to last.

Forsyth County, a largely rural, all-white county, 30 miles northeast of Atlanta, had a history of racial intolerance and violence. The county seat had become the scene of several marches by civil rights supporters and countermarches by the Ku Klux Klan and their local supporters. These demonstrations brought in thousands of people who did not live in the county, and there were clashes between marchers and onlookers. In one instance, it took about 1,000 local and state police and national guardsmen to maintain order at a cost of over $670,000, of which the county paid a
small part. The county ordinance resulted from these marches. After the Nationalist Movement, an
independent white group, proposed to demonstrate in opposition to the federal holiday honoring Dr.
Martin Luther King, Jr., by holding a two-and-a-half-hour rally on the courthouse steps, the group
was informed the county would not grant the permit unless a fee of $100 was paid. The movement
did not pay the fee or demonstrate, but instead brought suit to enjoin enforcement of the ordinance.
A federal district court denied the injunction, but was reversed on appeal.

The U.S. Supreme Court affirmed the federal appellate court’s judgment that the ordinance was
unconstitutional. Speaking for a closely divided Court, Justice Blackmun explained:

* * * The decision how much to charge for police protection or administrative time—or even whether to
charge at all—is left to the whim of the administrator. There are no articulated standards either in the
ordinance or in the county’s established practice. The administrator is not required to rely on any
objective factors. He need not provide any explanation for his decision, and that decision is unreviewable.
Nothing in the law or its application prevents the official from encouraging some views and discouraging
others through the arbitrary application of fees. The First Amendment prohibits the vesting of such
unbridled discretion in a government official.

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled
discretion. As construed by the county, the ordinance often requires that the fee be based on the content
of the speech.

* * *

Although petitioner agrees that the cost of policing relates to content, * * * it contends that the
ordinance is content-neutral because it is aimed only at a secondary effect—the cost of maintaining public
order. * * *

The costs to which petitioner refers are those associated with the public’s reaction to the speech.
Listeners’ reaction to speech is not a content-neutral basis for regulation. * * * Speech cannot be
financially burdened, any more than it can be punished or banned, simply because it might offend a
hostile mob. * * *

* * * The county offers only one justification for this ordinance: raising revenue for police services.
While this undoubtedly is an important government responsibility, it does not justify a content-based
permit fee. * * *

* * *

* * * Neither the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the
ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of speech
does not become more constitutional because it is a small tax.

Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, dissented. He began by
quoting the question that led the required number of Justices to grant certiorari in the case:

“Whether the provisions of the First Amendment to the United States Constitution limit the
amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal
sum or whether the amount of the license fee may take into account the actual expense incident to
the administration of the ordinance and the maintenance of public order in the matter licensed, up
to a sum of $1,000 per day of activity.” After observing that the majority’s “discussion of this
question is limited to an ambiguous and noncommittal paragraph toward the very end of the opinion,” he set
forth his response to the issue for which cert. had been granted:

The answer to this question seems to me quite simple, because it was authoritatively decided by this Court
more than half a century ago in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941). There we
confronted a State statute which required payment of a license fee of up to $500 to local governments for
the right to parade in the public streets. The Supreme Court of New Hampshire had construed the
 provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee “for
a circus parade or a celebration procession of length, each drawing crowds of observers, would take into
account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." ** This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying:

“There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

“There is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require.” **

He then went on to fault the majority for disposing of the case on another ground:

Instead of deciding the particular question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. ** But, because the lower courts did not pass on these issues, the Court is forced to rely on its own interpretation of the ordinance in making these rulings. The Court unnecessarily reaches out to interpret the ordinance on its own at this stage, even though there are no lower court factual findings on the scope or administration of the ordinance. Because there are no such factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a “heckler's veto,” but would instead remand the case to the lower courts to initially consider these issues.

The Court’s half-century-long struggle with “clear and present danger” illustrates the faultiness of trying to find one speech test to fit all situations. In a now-classic article, Professor Emerson offered a sensible proposal—that different kinds of tests are appropriate to different contexts of speech because different competing interests are implicated in different free speech situations.17 To do this and remain faithful to the values of the First Amendment would present a challenge. It was this challenge to which the Court next turned its attention.

** B. TIME, PLACE, AND MANNER LIMITATIONS

The Justices’ preoccupation for half a century with whether challenged exercises of free speech constituted a “clear and present danger” to public safety exposed some significant weaknesses in that test, even when it was faithfully applied. As Emerson demonstrated in the law review article mentioned on the preceding page, “clear and present danger,” on the one hand, insufficiently protected freedom when people’s beliefs were under attack (as in the controversy of the 1950s and 1960s over loyalty oaths).18 On the other hand, it seemed unreasonably demanding when it came to the constitutionality of neutral regulations that restricted the time, place, and manner of expression, lest unfettered public speech tie traffic up in knots.

Perhaps most troublesome was the speech-conduct dichotomy, which reflected the belief that it was useful and necessary to distinguish between the two, even though “clear and

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present danger" acknowledged that the context of speech could convert otherwise protected expression into punishable action. The plain fact, however, was that "pure speech" was not the only kind of expression. Instances of "speech plus"—those circumstances where speech and conduct elements become intertwined—presented as much of a problem for Justice Holmes's approach as they did for Justice Black's.

The free speech cases of the 1940s typically involved an individual distributing pamphlets, soliciting house to house, or speaking on street corners. By the 1960s, the Court was confronted with mass demonstrations, sit-ins, and public vigils. The traditional distinction between speech and action thus became increasingly clouded by forms of expression that mixed these elements.

Speech in a "Public Forum"

Since its decision in Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1965), the Supreme Court has taken the position that, whatever benefit it afforded in analyzing "pure speech" cases, "clear and present danger" had limited utility in "speech plus" controversies. In Cox, the majority rejected the contention that Holmes's test should be used to judge the constitutional applicability of an obstruction-of-justice statute to participants engaged in a mass demonstration on courthouse grounds.

A situation similar to that in Cox occurred in Adderley v. Florida that follows. Refusing to accept the proposition that public property becomes a public forum simply because people want to use it for that purpose, Justice Black, speaking for the Court, rejected the notion "that people who want to propagate protests or views have a constitutional right to do so whenever and however and wherever they please." A jail, the Court concluded, was not a public forum because its function was incompatible with protest activity. Justice Black, with his usual passion for neatly drawn categories, seemed to be saying that some places were public forums and others simply were not. Subsequent Court decisions appeared to endorse this pigeonholing of locations: Public streets and sidewalks fell into the "public forum" category (United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702 (1983); Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157 (1988)), but military bases (Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211 (1976); Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594 (1980)) and mailboxes (United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 101 S.Ct. 2676 (1981)) did not. The dissenters in Adderley not only objected to resolving "public forum" questions by identifying places that qualified and those that did not—because, as Justice Douglas pointed out, some areas and buildings combined functions and thus frustrated easy categorization—but also believed that, even in places where government had an interest in minimizing or prohibiting protests and demonstrations, regulation of expression should be closely scrutinized.

The Court has imposed strict scrutiny on regulations that restrict expression in a "traditional public forum" and in a "designated public forum," but has employed reasonableness as the standard for reviewing restrictions on speech in "nonpublic forums." In the ISKCON cases (p. 817), Chief Justice Rehnquist identified the proper category into which an airport should be placed and evaluated accordingly the constitutionality of prohibitions on the distribution of literature and the solicitation of money. In an opinion reminiscent of the perspective that characterized the Adderley dissenters, Justice Kennedy criticized Chief Justice Rehnquist's approach and reached different conclusions on the distribution and solicitation questions. Although the 9/11 attacks radically changed public access to airports, the ISKCON cases remain important to any understanding of the public-forum doctrine.
BACKGROUND & FACTS

Harriett Adderley and other university students gathered at a jail in Tallahassee to protest continuing state and local policies of racial segregation, including segregation in the jail itself, and to protest against earlier arrests of demonstrators. The county sheriff warned the students that he would arrest them if they did not leave the premises. Those who remained were arrested and later convicted for violating a state statute prohibiting trespass "committed with a malicious and mischievous intent." Two state courts affirmed the convictions, and the U.S. Supreme Court granted certiorari.

Mr. Justice BLACK delivered the opinion of the Court.

* * *

Petitioners have insisted from the beginning of this case that it is controlled by and must be reversed because of our prior cases of Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680 (1963), and Cox v. State of Louisiana, 379 U.S. 536, 559, 85 S.Ct. 453, 476 (1965). We cannot agree.

The Edwards case, like this one, did come up when a number of persons demonstrated on public property against their State's segregation policies. They also sang hymns and danced, as did the demonstrators in this case. But here the analogies to this case end. In Edwards, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not. The demonstrators at the South Carolina State Capitol went in through a public driveway and as they entered they were told by state officials that they had a right as citizens to go through the State House grounds as long as they were peaceful. Here the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff. More importantly, South Carolina sought to prosecute its State Capitol demonstrators by charging them with the common-law crime of breach of the peace. This Court in Edwards took pains to point out at length the indefinite, loose, and broad nature of this charge; indeed, this Court pointed out * * * that the South Carolina Supreme Court had itself declared that the "breach of the peace" charge is "not susceptible of exact definition." South Carolina's power to prosecute, it was emphasized * * * would have been different had the State proceeded under a "precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed" such as, for example, "limiting the periods during which the State House grounds were open to the public."

* * * The South Carolina breach-of-the-peace statute was thus struck down as being so broad and all-embracing as to jeopardize speech, press, assembly and petition. * * * And it was on this same ground of vagueness that in Cox v. State of Louisiana * * * the Louisiana breach-of-the-peace law used to prosecute Cox was invalidated.

The Florida trespass statute under which these petitioners were charged cannot be challenged on this ground. It is aimed at conduct of one limited kind, that is, for one person or persons to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary.

Petitioners seem to argue that the Florida trespass law is void for vagueness because it requires a trespass to be "with a malicious
and mischievous intent.” * * * But these words do not broaden the scope of trespass so as to make it cover a multitude of types of conduct as does the common-law breach-of-the-peace charge. On the contrary, these words narrow the scope of the offense.19

The trial court charged the jury as to their meaning and petitioners have not argued that this definition * * * is not a reasonable and clear definition of the terms. The use of these terms in the statute, instead of contributing to uncertainty and misunderstanding, actually makes its meaning more understandable and clear.

* * *

Petitioners’ summary of facts, as well as that of the Circuit Court, shows an abundance of facts to support the jury’s verdict of guilty. * * *

* * *

[The only question remaining is] whether conviction of the state offense * * * unconstitutionally deprives petitioners of their rights to freedom of speech, press, assembly or petition. We hold it does not.

The sheriff, as jail custodian, had power, as the state courts have here held, to direct that this large crowd of people get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose. Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners’ argument that they had a constitutional right to stay on the property, over the jail custodian’s objections, because this “area chosen for the peaceful civil rights demonstration was not only ‘reasonable’ but also particularly appropriate.” * * * Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in [the very] cases petitioners rely on. * * * We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

These judgments are affirmed.

Mr. Justice DOUGLAS, with whom THE CHIEF JUSTICE [WARREN], Mr. Justice BRENNAN, and Mr. Justice FORTAS concur, dissenting.

* * *

The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself (Edwards v. South Carolina, supra) is one of the seats of governments whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest. The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not

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19. Presumably, this is so because the trespasser already would have been given notice, as in this case, that he or she is intruding on property where he or she has no right to be. Remaining there, after having been given notice of this, would clearly indicate an intentional act. The word “malicious”—meaning “intentional”—therefore narrows the application of the statute; this is not a statute that traps the unwary. The alleged trespasser might well argue, as in this case, that he or she did have a legal right to be there, but the act of remaining would nonetheless be intentional.
confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. * * * Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

There is no question that petitioners had as their purpose a protest against the arrest of Florida A. & M. students for trying to integrate public theatres. * * * There was no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners’ conduct did not upset the jailhouse routine; things went on as they normally would. * * *

* * *

* * * When we allow Florida to construe her “malicious trespass” statute to bar a person from going on property knowing it is not his own and to apply that prohibition to public property, we discard Cox and Edwards. Would the case be any different if, as is common, the demonstration took place outside a building which housed both the jail and the legislative body? I think not.

There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put. * * * But this is quite different from saying that all public places are off limits to people with grievances. * * *

* * *

* * * It is said that the sheriff did not make the arrests because of the views which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit. * * * Arrests [arising from protests] are usually sought to be justified by some legitimate function of government. Yet by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us.

**Note—Free Speech at the Airport: The ISKCON Cases**

The Port Authority of New York and New Jersey, which operates three major airports in the Greater New York City area, adopted regulations forbidding the sale or distribution of merchandise; the sale or distribution of flyers, brochures, pamphlets, and books; and the solicitation and receipt of funds “within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner.” However, such activities were permitted on the sidewalks outside the terminal buildings. The International Society for Krishna Consciousness (ISKCON) brought suit against Lee, the Port Authority’s police superintendent, challenging the regulations because they interfered with the performance of a ritual known as sankirtan, which consists of distributing religious literature and soliciting funds in public places.
A federal district court concluded that the terminals were traditional public forums and granted judgment to the Krishnas because the blanket prohibition on soliciting and leafletting inside the terminals failed to survive strict scrutiny. The U.S. Court of Appeals for the Second Circuit subsequently ruled that the terminals were not public forums, concluded that reasonableness was the applicable constitutional standard, and upheld the ban on solicitation of money, but struck down the prohibition on leafletting. Both parties sought certiorari from the Supreme Court.

In International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701 (1992), and Lee v. International Society for Krishna Consciousness, Inc., 505 U.S. 830, 112 S.Ct. 2709 (1992), the Supreme Court affirmed the judgment of the appeals court. In the first of these cases, Chief Justice Rehnquist delivered the Court’s opinion. He began by recognizing that “the solicitation at issue in this case is a form of speech protected under the First Amendment.” “But,” he observed, “it is also well settled that the government need not permit all forms of speech on property that it owns and controls.” He explained:

The cases reflect **a “forum-based” approach for assessing restrictions that the government seeks to place on the use of its property.** **Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny.** Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. **The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the state has opened for expressive activity by part or all of the public.** **Regulation of such property is subject to the same limitations as that governing a traditional public forum.** **Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.**

The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the “reasonableness” review governing nonpublic fora, should that prove the appropriate category. **Chief Justice Rehnquist concluded that “the lateness with which the modern air terminal has made its appearance” hardly qualified it as a traditional public forum, like a street or a park—something that had “immemorially” been held in the public trust and used for purposes of expressive activity.” Nor had airports “been intentionally opened by their operators to such activity.”** **Unlike traditional public fora or designated fora, airports cannot be said to be associated with the purpose of ‘promoting the free exchange of ideas.’”** Since an airport was a nonpublic forum, the restrictions on expression there “need only satisfy a requirement of reasonableness.” The Chief Justice had no doubt that under this standard the prohibition on solicitation passed constitutional muster. He explained:

We have on many prior occasions noted the disruptive effect that solicitation may have on business. “Solicitation requires action by those who would respond. The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor’s literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.” **Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded.” **This is especially so in an airport, where “air travelers, who are often weighed down by cumbersome baggage” **may be hurrying to catch a plane or to arrange ground transportation.” **Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.**

In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. **The
unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. * * * Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

Speaking for Justices White, Scalia, and Thomas, as well as himself, Chief Justice Rehnquist concluded that the distribution ban was also reasonable, since "[leafletting presents risks of congestion similar to those posed by solicitation]." Justices Blackmun, Stevens, and Souter voted to strike down both the solicitation and the leafletting prohibitions. Justices O'Connor and Kennedy voted to invalidate the distribution prohibition, but sustain the ban on soliciting money. Thus, the vote on the solicitation ban was 6–3 to uphold, but the vote on the leafletting prohibition was 5–4 to strike down.

In an opinion that Justices Blackmun, Stevens, and Souter joined in part, Justice Kennedy objected to the Chief Justice's conclusion that the entire interior of the airline terminals constituted a nonpublic forum. Said Justice Kennedy, "In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles." He concluded that "[t]he Port Authority's blanket ban on the distribution or sale of literature cannot meet those stringent standards." However, the ban on soliciting money was "a narrow and valid regulation of the time, place, and manner of protected speech in this forum, or else is a valid regulation of the nonspeech element of expressive conduct."

Justice Kennedy thought the Chief Justice's analysis was "flawed at its very beginning":

* * * It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public-forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property. * * *

The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there. * * *

The Court's approach is contrary to the underlying purposes of the public forum doctrine. The liberties protected by our doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy. * * * Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. * * *

A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The public forum doctrine vindicates that principle by recognizing limits on the government's control over speech activities on property suitable for free expression. * * * The notion that traditional public forums are property which have public discourse as their principal purpose is a most doubtful fiction. * * * It would seem apparent that the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse, and we have recognized as much. * * * [T]he purpose for the creation of public parks may be as much for beauty and
open space as for discourse. Thus under the Court’s analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum.

The effect of the Court’s narrow view of the first category of public forums is compounded by its description of the second purported category, the so-called “designated” forum. The requirements for such a designation are so stringent that I cannot be certain whether the category has any content left at all. * * * Under the Court’s analysis today few if any types of property other than those already recognized as public forums will be accorded that status.

* * * In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

One of the places left in our mobile society that is suitable for discourse is a metropolitan airport. It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public. Given that private spaces of similar character [such as privately-owned shopping centers] are not subject to the dictates of the First Amendment, see Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029 (1976), it is critical that we preserve these areas for protected speech. In my view, our public forum doctrine must recognize this reality, and allow the creation of public forums which do not fit within the narrow tradition of streets, sidewalks, and parks. * * *

Placed in this light, “public spaces of the Port Authority’s airports are public forums.” First, because “the public spaces in the airports are broad public thoroughfares full of people and lined with stores and other commercial activities,” there are “physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons * * * as streets and sidewalks * * *.” Second, the airports here “are open to the public without restriction.” Third, “when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports.”

“The danger of allowing the government to suppress [such] speech,” Justice Kennedy declared, was that “[a] grant of plenary power allows the government to tilt the dialogue heard by the public, to exclude many, more marginal voices.” He went on to conclude that the distribution regulation “is not drawn in narrow terms and it does not leave open ample alternative channels of communication.” However, the ban on soliciting money within the terminals he thought was sustainable because “[i]n-person solicitation of funds, when combined with immediate receipt of the money, creates a risk of fraud and duress which is well recognized, and which is different in kind from other forms of expression or conduct. Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country and its language, are easy prey for the money solicitor.” The prohibition on solicitation and receipt of money in this case was “directed at these abusive practices and not at any particular message, idea, or form of speech” and thus was a “content-neutral rule serving a significant government interest.” It was also “drawn in narrow terms to accomplish its end and leaves open alternative channels of communication.”

Justice Souter, speaking also for Justices Blackmun and Stevens, agreed with Justice Kennedy, except for his conclusion that the ban on soliciting and receiving money was unconstitutional. The trio were of the view that a total ban on solicitation was overbroad.

In light of substantially tightened airport security following the September 2001 attacks on the World Trade Center and the Pentagon and the fact that most airports now admit only ticketed passengers to airport concourses, some of the activities at issue in the ISKCON cases have become a thing of the past. But Chief Justice Rehnquist’s approach to
identifying public forums and Justice Kennedy’s critique of that approach have lost none of their relevance.

Probably the model of the Court’s treatment of non-content-based regulation of public forums is presented in Ward v. Rock Against Racism, which follows. In that case, the Court upheld New York City’s regulation of the loudness of performances permitted at the city’s bandshells and public parks. Rock Against Racism remains the touchstone of constitutional analysis for across-the-board, content-neutral, time, place, and manner regulations.

**WARD v. ROCK AGAINST RACISM**
Supreme Court of the United States, 1989
491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661

**BACKGROUND & FACTS** New York City adopted a guideline for all uses of its bandshell in Central Park. The regulation specified that the city would provide high-quality sound equipment and an independent, experienced sound technician who would control the sound level and sound mix at all events. The policy stemmed from several problems that arose from private sponsors’ failure to control the level and quality of sound at previous events. One such problem was the unresponsiveness of groups such as Rock Against Racism (RAR), an organization that held annual rock concerts to espouse and promote antiracist views, to city requests to turn down the volume after numerous complaints by neighborhood residents and the users of Sheep Meadow, a nearby area designated by the city for passive recreation. After repeated requests by the city were ignored, the city pulled the plug. In other instances, promoters of events failed to provide sound equipment adequate to amplify or mix the sound for the bandshell area. In both sets of circumstances, the disappointed audiences became disruptive and abusive. RAR sued city officials for damages and also sought a declaratory judgment that the guideline violated the First Amendment because it required event sponsors to use the city’s equipment and technician. The city responded that, although its technician controlled the sound and mix, its practice was to allow the sponsor autonomy as to the sound mix and permitted the sponsor to confer with the technician before the volume was turned down. In any event, the city argued, the amplification was adequate for RAR’s needs. A federal district court upheld the regulations, but its judgment was overturned on appeal, at least with respect to the volume-control policy, which, the appellate court held, was not the least intrusive means of regulating the volume. City officials then successfully petitioned the Supreme Court for certiorari.

Justice KENNEDY delivered the opinion of the Court.

* * *

Music, as a form of expression and communication, is protected under the First Amendment. * * *

We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. * * *

[The city justifies its guideline as a regulatory measure to limit and control noise. Here the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government’s right to regulate expression is subject to the protections of the First Amendment. * * *

Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to
the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069 (1984) * * *.

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. * * * The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * *

The principal justification for the sound-amplification guideline is the city’s desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification satisfies the requirement that time, place, or manner regulations be content neutral.

The only other justification offered below was the city’s interest in “ensur[ing] the quality of sound at Bandshell events.” * * *

* * * The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix. * * * [T]he city’s concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix. Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. * * *

Respondent argues further that the guideline, even if not content based in explicit terms, is nonetheless invalid on its face because it places unbridled discretion in the hands of city officials charged with enforcing it. * * *

* * * Respondent contends * * * that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. * * *

* * * The city’s guideline states that its goals are to “provide the best sound for all events” and to “insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow.” * * * While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. * * * By its own terms the city’s sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. * * *

* * *

The city’s regulation is also “narrowly tailored to serve a significant governmental interest.” * * * [I]t can no longer be doubted that government “ha[s] a substantial interest in protecting its citizens from unwelcome noise.” * * * This interest is perhaps at its greatest when government seeks to protect “‘the well-being, tranquility, and privacy of the home.’” * * * but it is by no means limited to that context for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. * * *

We think it also apparent that the city’s interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an
adverse affect on the ability of some
audiences to hear and enjoy performances
at the bandshell. The city enjoys a sub-
stantial interest in ensuring the ability of its
citizens to enjoy whatever benefits the city
parks have to offer, from amplified music to
silent meditation. * * *

We reaffirm today that a regulation of
the time, place, or manner of protected
speech must be narrowly tailored to serve the
government’s legitimate, content-neutral
interests but that it need not be the least
restrictive or least intrusive means of doing
so. * * * So long as the means chosen are not
substantially broader than necessary to
achieve the government’s interest, however,
the regulation will not be invalid simply
because a court concludes that the govern-
ment’s interest could be adequately served by
some less-speech-restrictive alternative. * * *

It is undeniable that the city’s substantial
interest in limiting sound volume is served
in a direct and effective way by the
requirement that the city’s sound technician
control the mixing board during perfor-
manences. * * *

By providing competent sound
technicians and adequate amplification
equipment, the city eliminated the problems
of inexperienced technicians and insuffi-
cient sound volume that had plagued some
bandshell performers in the past. No doubt
this concern is not applicable to respon-
dent’s concerts, which apparently were
characterized by more-than-adequate sound
amplification. But that fact is beside the
point * * * [because] the regulation’s
effectiveness must be judged by considering
all the varied groups that use the bandshell,
and it is valid so long as the city could
reasonably have determined that its inter-
ests overall would be served less effectively
without the sound-amplification guideline
than with it. * * * [Emphasis supplied.]

Respondent nonetheless argues that the
sound-amplification guideline is not nar-
rowly tailored because, by placing control of
sound mix in the hands of the city’s
technician, the guideline sweeps far more
broadly than is necessary to further the city’s
legitimate concern with sound volume. * * *

If the city’s regulatory scheme had a
substantial deleterious effect on the ability of
bandshell performers to achieve the quality of
sound they desired, respondent’s concerns
would have considerable force. * * *

The final requirement, that the guideline
leave open ample alternative channels of
communication, is easily met. * * * [T]he
guideline * * * does not attempt to ban any
particular manner or type of expression at a
given place or time. * * * Rather, the
guideline continues to permit expressive
activity in the bandshell, and has no effect
on the quantity or content of that expres-
sion beyond regulating the extent of
amplification. That the city’s limitations
on volume may reduce to some degree the
potential audience for respondent’s speech
is of no consequence, for there has been no
showing that the remaining avenues of
communication are inadequate. * * *

* * * The judgment of the Court of
Appeals is
Reversed.
Justice BLACKMUN concurs in the
result.
Justice MARSHALL, with whom Justice
BRENNAN and Justice STEVENS join,
dissenting.

[T]he majority plays to our shared
impatience with loud noise to obscure the
damage that it does to our First Amendment
rights. * * * Because New York City’s Use
Guidelines * * * are not narrowly tailored to
serve its interest in regulating loud noise,
and because they constitute an impermis-
sible prior restraint, I dissent.

* * *

Government’s interest in avoiding
loud sounds cannot justify giving govern-
ment total control over sound equipment,
any more than its interest in avoiding litter
could justify a ban on handbill distribution.
In both cases, government’s legitimate goals
can be effectively and less intrusively served
by directly punishing the evil—the persons responsible for excessive sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally limiting noise but has chosen not to enforce it. **

**

The majority’s conclusion that the city’s exclusive control of sound equipment is constitutional is deeply troubling ** because it places the Court’s imprimatur on a quintessential prior restraint, incompatible with fundamental First Amendment values. ** **In 16th- and 17th-century England, government controlled speech through its monopoly on printing presses. Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government’s exclusive control of the means of communication enables public officials to censor speech in advance of its expression. Here, it is done by a single turn of a knob.

The majority’s implication that government control of sound equipment is not a prior restraint because city officials do not “enjoy unguided discretion to deny the right to speak altogether” ** is startling. ** Whether the city denies a performer a bandshell permit or grants the permit and then silences or distorts the performer’s music, the result is the same—the city censors speech. **

**

As a system of prior restraint, the Guidelines are presumptively invalid. ** They may be constitutional only if accompanied by the procedural safeguards necessary “to obviate the dangers of a censorship system.” Freedman v. Maryland, 380 U.S. 51, 58, 85 S.Ct. 734, 740 (1965). The city must establish neutral criteria embodied in “narrowly drawn, reasonable and definite standards,” in order to ensure that discretion is not exercised based on the content of speech. ** ** Moreover, there must be “an almost immediate judicial determination” that the restricted material was unprotected by the First Amendment. **

The Guidelines contain neither of these procedural safeguards. ** ** Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself, government control of the sound-mixing equipment necessitates detailed and neutral standards.

**

Today’s decision has significance far beyond the world of rock music ** because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself, government control of the sound-mixing equipment necessitates detailed and neutral standards.

**

Reaffirming the principle applied in Rock Against Racism, that time, place, and manner restrictions on speech do not trigger the more intense judicial scrutiny required of content-based regulations, the Supreme Court, a dozen years later, in Thomas v. Chicago Park District, 532 U.S. 1051, 122 S.Ct. 775 (2002), unanimously upheld an ordinance requiring any assembly, parade, picnic, or event involving more than 50 people or any event emitting amplified sound to obtain a permit first. Completed applications were processed in order of receipt, had to be accepted or denied within two weeks, and required reasons to be given by Park District officials for any extended consideration or denials of applications. The ordinance identified 11 specific grounds on which permits could be denied, including failure to pay the fee, an incomplete application, use or activity by the applicant that was illegal or conflicted with previously organized Park District activities, false statements made on the application, legal incapacity of the applicant group to be sued, or failure to pay for damage sustained by Park District property from a previously conducted event by the group. The Court held that these grounds sufficiently circumscribed the Park District’s discretion and applied across the board “to all activity conducted in a public park” so that the Park District’s decision making didn’t “ha[ve] anything to do with what a speaker might say.”
Since "the object of the permit system * * * [was] not be exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of park facilities, to prevent uses that are dangerous [or] unlawful, * * * and to assure financial accountability for damage caused by the event[,]" stiffer procedural requirements and heightened judicial scrutiny necessary for systems of prior restraint did not apply here.

Like parks, public sidewalks are a quintessential public forum and have from time immemorial been used as a venue for expression, solicitations, and protest. Although numerous Supreme Court decisions over the decades have dealt with the rights of religious proselytizers, political campaign workers, charitable groups, pushcart vendors, and other salesmen to ask for donations, signatures, and votes or to peddle their wares in public places and door to door (see p. 930), the Court has never really addressed the banning of outright begging.20 But several federal courts have. The following note discusses two such decisions by the U.S. Court of Appeals for the Second Circuit as its judges confronted constitutional challenges to a state law that prohibited panhandling.

NOTE—CAN BEGGING BE BANNED?

Homeless people filed a class action against the New York City police department challenging a state statute that punished anyone who "[l]oiterers, remains or wanders about in a public place for the purpose of begging" as an infringement of free speech. The law furnished a basis for charging violators with a misdemeanor and also provided grounds for police officers to repeatedly prod the homeless to "move along." In Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir. 1993), a federal three-judge panel held that the ban on begging violated the First Amendment. In defense of the law, the city argued that:

[B]eggars congregate in certain areas and become more aggressive as they do so. Residents are intimidated and local businesses suffer accordingly. Panhandlers * * * station themselves in front of banks, bus stops, automated teller machines and parking lots and frequently engage in conduct described as "intimidating" and "coercive." Panhandlers have been known to block the sidewalk, follow people down the street and threaten those who do not give them money. * * * [T]hey often make false and fraudulent representations to induce passersby to part with their money. The City Police * * * contend that it is vital * * * to have the statute available for the officers on the "beat" to deal with those who threaten to harass the citizenry through begging.

The city contended that, although begging may begin peaceably, "unless stopped, [the panhandlers] tend to increase their aggressiveness and ultimately commit more serious crimes."

The appeals court noted at the outset that there were already on the books a number of state statutes—such as those punishing harassment, disorderly conduct, fraudulent accosting, and menacing—to deal with the more aggressive and assaultive forms of begging when they happened. The court distinguished this case from a previous decision, Young v. New York City Transit Authority, 903 F.2d 146 (2d Cir. 1990), cert. denied, 498 U.S. 1043, 111 S.Ct. 516 (1990), which dealt with an identical constitutional challenge to a regulation that imposed a ban on begging in the city's subway system. For many of the same reasons the Supreme Court gave in the ISKCON cases (p. 817) in which it

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20. The closest the Supreme Court has come is its decision in Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839 (1972), in which it unanimously struck down a vagrancy ordinance as void for vagueness. Among other conduct, such as begging, the ordinance criminalized "loitering" and "prowling." It took aim at "persons wandering or strolling about from place to place without any lawful purpose or object, habitual loafers, disorderly persons, [and persons] habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served * * *." The Court held that the ordinance "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute * * * and because it encourages arbitrary and erratic arrests and convictions."
upheld a ban on soliciting inside the city’s airline terminals, the appeals court held that begging could not be accommodated with the special features of the city’s subway. But the appeals court in Young observed that, outside the subway system, there still remained “ample alternative channels of communication,” implicitly referring to the city’s sidewalks and other aboveground public spaces. To now uphold a city-wide prohibition on begging would directly contradict this assurance in Young.

Furthermore, the statute was not content-neutral, since it banned speech seeking money for oneself but not for charities, a discrimination among messages that was unsupportable in principle. Given that there were other ways to deal with the problems associated with overly aggressive panhandling (as embodied in other existing statutes) and the fact that a total prohibition on begging could hardly be characterized as a narrowly-tailored response to the difficulties, there was simply no compelling reason the state could offer. In short, said the appeals court, “A verbal request for money for sustenance or a gesture conveying that request carries no harms of the type enumerated by the City Police, if done in a peaceful manner.”

As annoying and intimidating as begging can be, the prospect of danger increases substantially when sidewalks and other public spaces become gang havens. Striking a balance between the protection of public safety and the recognition that people have a right to be in public spaces presented the Supreme Court with a difficult problem in City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849 (1999). At issue was a municipal ordinance that made it an offense to congregate in a public place if one of two or more of the individuals is reasonably believed by a police officer to be a “criminal street gang member.” The persons had to be “loitering,” that is “remaining in any one place with no apparent purpose.” Individuals were subject to arrest if, under these circumstances, they did not disperse and remove themselves from the area after being directed by a police officer to do so. More than 40,000 individuals had been arrested for failure to comply. The Court, by a 6–3 vote, held the ordinance to be unconstitutional, but it skirted the First Amendment issue of whether the terms of the ordinance were overbroad in favor of holding that the ordinance denied due process, guaranteed against state infringement by the Fourteenth Amendment, because it was void for vagueness. Vagueness, Justice Stevens pointed out, “may invalidate a criminal law for either of two independent reasons[] First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” The test is whether a law identifies prohibited conduct with reasonable clarity to a person of normal intelligence. Said Justice Stevens, “‘To remain in any one place with no apparent purpose’—does not.” He continued, “It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an ‘apparent purpose.’ If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?” It was not a constitutionally sufficient defense of the ordinance to argue, as the city did, that “whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do.” As Justice Stevens’ plurality opinion explained:

Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. **[T]he police **[will be] **able to decide arbitrarily which members of the public they will order to disperse.** Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. **
Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." * * * This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? * * *

Justice O'Connor's concurring opinion argued that the ordinance could and should have been construed by the Illinois Supreme Court more narrowly and it would have been saved from its fatal vagueness. She explained, "The term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.' Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance * * *.

Since the Supreme Court's 1973 decision in Roe v. Wade (p. 722) recognizing a woman's constitutional right to choose to terminate her pregnancy, sidewalks have furnished a venue for protest as with other political causes. As subsequent Supreme Court decisions have reaffirmed that right and refused to overrule Roe, the level of frustration has grown among antiabortion protesters. Use of public sidewalks by right-to-life advocates to confront, persuade, harass, or obstruct patients entering health care facilities furnishing abortion services provides another illustration of the problems encountered in regulating expression in a public forum. In Madsen v. Women's Health Center, Inc., which follows, the Supreme Court considered an appeal from the order of a federal judge imposing distance limits on antiabortion protesters seeking to confront patients attempting to enter the clinic. Among the issues dominating the Court's decision of this difficult case were whether such distance limits amounted to content-based regulation and whether an injunction should be measured by a constitutionally more demanding standard than that applied to legislation.

MADSEN V. WOMEN'S HEALTH CENTER, INC.
Supreme Court of the United States, 1994
512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593

BACKGROUND & FACTS Madsen and other antiabortion demonstrators picketed and demonstrated at the point where a public street provides access to a Florida abortion clinic. In September 1992, a state court enjoined the protesters both from blocking or interfering with public access to the clinic and from abusing people entering and leaving the clinic by harassing, crowding, pushing, shoving, and touching them. Six months later, the clinic sought to broaden the injunction, arguing that access to the clinic was still being impeded and that the protesters' activities discouraged patients from coming to the clinic and had a very stressful effect on many who did come. The state court then widened the injunction. The amended injunction, which applied to the protesters and others acting "in concert" with them, excluded the demonstrators from a 36-foot buffer zone around the clinic's entrances and driveway; restricted excessive noise making (by chants, bullhorns, boomboxes, sound amplification devices, etc.) easily audible by, and signs with "images observable" by, patients inside the clinic; prohibited abortion opponents from approaching patients and potential patients within 300 feet of the clinic who did not consent to talk to them; and imposed a similar 300-foot buffer zone around the residences of the clinic staff.

Madsen and other protesters challenged the injunction on First Amendment grounds. The Florida Supreme Court, recognizing that the protest activities occurred in a traditional public forum, nevertheless refused to apply heightened scrutiny
because the injunction’s restrictions were content-neutral and sustained the provisions of the injunction as narrowly tailored to serve significant government interests while leaving open ample alternative means of expression. The U.S. Supreme Court later granted the demonstrators’ petition for certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

* * *

The state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court’s original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court’s order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based. * * * Accordingly, the injunction issued in this case does not demand the level of heightened scrutiny * * *.

If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in Ward v. Rock Against Racism, 491 U.S., at 791, 109 S.Ct., at 2753–2754, and similar cases. * * *

There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. * * * Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. * * * Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. * * *

* * * Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. * * *

The Florida Supreme Court * * * noted that the State has a strong interest in protecting a woman’s freedom to seek lawful medical or counseling services in connection with her pregnancy. * * * The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens. * * * In addition, the court believed that the State’s strong interest in residential privacy * * * applied by analogy to medical privacy. * * * The court observed that while targeted picketing of the home threatens the psychological well-being of the “captive” resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held “captive” by medical circumstance. * * * We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them. We now examine each contested provision of the injunction to see if it burdens more speech than necessary to accomplish its goal.

We begin with the 36-foot buffer zone. The state court prohibited petitioners from “congregating, picketing, patrolling, demonstrating or entering” any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic. This speech-free buffer zone requires that petitioners move to the other side of * * * [the street] and away from the driveway of the clinic, where the state court found
that they repeatedly had interfered with the free access of patients and staff. * * *

*** We hear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order. * * * On balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.

In response to high noise levels outside the clinic, the state court restrained the petitioners from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the [clinic] during the hours of 7:30 A.M. through noon on Mondays through Saturdays. We must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary. * * *

We hold that the limited noise restrictions imposed by the state court order burden no more speech than necessary to ensure the health and well-being of the patients at the clinic. The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. "If overamplified loudspeakers assault the citizenry, government may turn them down." Grayned [v. City of Rockford, 408 U.S., at 116, 92 S.Ct., at 2303. That is what the state court did here, and we hold that its action was proper.

The same, however, cannot be said for the "images observable" provision of the state court's order. Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all "images observable." This broad prohibition on all "images observable" burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families. * * * The only plausible reason a patient would be bothered by "images observable" inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

The state court ordered that petitioners refrain from physically approaching any person seeking services of the clinic "unless such person indicates a desire to communicate" in an area within 300 feet of the clinic. The state court was attempting to prevent clinic patients and staff from being "stalked" or "shadowed" by the petitioners as they approached the clinic. * * *

But it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, * * * this provision cannot stand. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Boos v. Barry, 485 U.S., at 322, 108 S.Ct., at 1164.

* * * The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

The final substantive regulation challenged by petitioners relates to a prohibition against picketing, demonstrating, or using
sound amplification equipment within 300 feet of the residences of clinic staff. * * *

The same analysis applies to the use of sound amplification equipment here as that discussed above: the government may simply demand that petitioners turn down the volume if the protests overwhelm the neighborhood. * * *

As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as "the last citadel of the tired, the weary, and the sick." Frisby v. Schultz, 487 U.S., at 484, 108 S.Ct., at 2502. We stated that "[t]he State's interest in protecting the well-being, tranquillity, and privacy of the home is certainly of the highest order in a free and civilized society." * * *

But the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in Frisby. * * * The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

* * *

In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court's injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the "images observable" provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction. Accordingly, the judgment of the Florida Supreme Court is

Affirmed in part, and reversed in part.

* * *

Justice STEVENS, concurring in part and dissenting in part.

* * *

Unlike the Court, I believe that injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity. Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

* * *

In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.

* * *

[Justice STEVENS voted to sustain the 36-foot buffer zone on all sides of the clinic, but dissented from the Court's decision to strike down the 300-foot no-approach zone. Because, in his view, they were not challenged in the questions on which certiorari had been granted, Justice STEVENS did not reach the noise restrictions or the "images observable" provision of the injunction, although he indicated he was inclined to agree with the Court's disposition of those issues.]

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

* * *

Because I believe that the judicial creation of a 36-foot zone in which only a
particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions, I dissent.

The record of this case contains a videotape, with running caption of time and date, displaying what one must presume to be the worst of the activity justifying the injunction * * * partially approved today by this Court. * * *

* * *

The videotape and the rest of the record, including the trial court’s findings, show that a great many forms of expression and conduct occurred in the vicinity of the clinic. * * * What the videotape, the rest of the record, and the trial court’s findings do not contain is any suggestion of violence near the clinic, nor do they establish any attempt to prevent entry or exit.

* * *

* * * The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim. But that same danger exists with injunctions. Although a speech-restricting injunction may not attack content as content * * * it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably. * * *

The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: they are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman. And the third reason is that the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards. Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. * * * Thus, persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson’s choice: they must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings. This is good reason to require the strictest standard for issuance of such orders.

* * *

Having upheld 15-foot fixed buffer zones in Madsen, the Court had little difficulty sustaining fixed buffer zones half that distance in Colorado v. Hill, 530 U.S. 703, 120 S.Ct. 2480 (2000), three years later. The Court mustered a 6–3 majority in Hill to sustain a state statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility. Within that area, the law made it unlawful to “knowingly approach” an unconsenting individual closer than 8 feet for the purpose of passing a leaflet, displaying a sign, engaging in oral protest, educating, or counseling her. The law did not prohibit speakers from approaching unwilling listeners further away, did not require a standing speaker to move away from passers-by, and did not limit the content of any sign. The Court, through Justice Stevens, concluded the statute passed the three-part test identified in Rock Against Racism as a content-neutral time, place, and manner regulation: (1) it was not a regulation of speech but of the places where speech may occur; (2) it was not adopted because of government’s disagreement with the message expressed; (3) and it protected the interests of preserving access to medical centers and patients’ privacy with clear guidelines for the police unrelated to
the content of a demonstrator’s message. Stevens rejected the contention that the statute was content-based because liability turned on the intent to communicate a message to an unwilling listener from a distance closer than 8 feet. Justice Stevens explained:

It is common in the law to examine the content of a communication to determine the speaker’s purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether “sidewalk counselors” are engaging in “oral protest, education, or counseling” rather than pure social or random conversation.

Observing that the statute aims “to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her[,]” Justice Stevens continued, “[t]he statute does not distinguish among speech instances that are * * * likely to raise the legitimate concerns to which it responds.” The fact that “a statute is ‘viewpoint based’ simply because it was motivated by the conduct of the partisans on one side of a debate is without support.” And, he added, “Unlike the 15-foot [floating buffer] zone [struck down] in Schenck [v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S.Ct. 855 (1997)], this 8-foot zone allows the speaker to communicate at a ‘normal conversational distance.’”

Justices Kennedy, Scalia, and Thomas were unpersuaded. They argued in dissent that the statute was content-based because the Colorado legislators explicitly aimed the law at dealing with problems presented by the “right to protest or counsel against certain medical procedures” on the sidewalks and streets surrounding health care facilities.21 It was, in the dissenters’ view, content-based because “those who wish to speak for purposes other than protest, counsel, or education may do so at close range without the listener’s consent, while those who wish to speak for other purposes may not.” Unlike certain kinds of content that were constitutionally proscribable (such as obscenity), “‘protest, education, and counseling’ [could not be consigned] to that category.” The statute, which the dissenters said heavily burdened leafleting, impermissibly protected people only from “unwelcome communications.” Finally, the dissenters criticized the statute as vague and overbroad because criminal penalties were imposed for “protest,” “counseling,” and “education,” behaviors the statute imprecisely defined.22

21. In a footnote, the majority opinion took pains to note that “[t]he legislature also heard testimony that other types of protests at medical facilities, such as those involving animal rights, create difficulties for persons attempting to enter the facility.”

22. As contrasted with the controversy surrounding minimum distance regulations for protests at abortion clinics, there was widespread agreement to limit demonstrations taunting mourners at military funerals. In May 2006, Congress unanimously passed the Respect for America’s Fallen Heroes Act, 120 Stat. 387, that imposes time and distance regulations on protesters at funerals in national cemeteries. The problem was created by members of a fundamentalist group, the Westboro Baptist Church, who show up to picket military funerals for soldiers killed in the Iraq war to communicate the message that the Nation is being punished for its tolerance of homosexuality. Demonstrators often carry signs communicating the message “You’re Going to Hell,” for example. The federal legislation, which applies to 122 national cemeteries, prohibits protests within 300 feet of the entrance to the cemetery and 150 feet within a road into the cemetery from 60 minutes before to 60 minutes after a funeral. Violators face a maximum fine of $100,000 and up to a year in prison. Many states are considering the adoption of minimum distance requirements at nonfederal cemeteries ranging from 100 to 500 feet. New York Times, Apr. 17, 2006, p. A14.
The venues, whose labeling divided the Justices in the ISKCON cases, were spatial or geographical. But the debate, especially over designated public fora, has extended beyond physical locations. In Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439 (1985), for example, the Court took up the questions (1) whether, constitutionally speaking, an organized program of charitable contributions from federal employees constituted a public forum; and, if so, (2) whether the President could exclude from the solicitation program organizations “that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves.” A narrowly divided Court upheld restricting the coordinated solicitation campaign to contributions for “national voluntary health and welfare agencies.” The Court concluded that the Consolidated Federal Campaign (CFC) was a nonpublic forum and that the exclusion of advocacy organizations was reasonably justified (1) because solicitation of funds would then be focused on those groups most benefiting the needs of the poor, which was the original purpose of the program; (2) because the exclusion of advocacy organizations would avoid any appearance of political favoritism; and (3) because any controversy associated with the views of some of the advocacy organizations, which was believed to reduce the amount of charitable contributions, would be eliminated. Like the CFC, the printing subsidy at issue in Rosenberger v. Rector and Visitors of the University of Virginia, which follows, could only figuratively be described as a forum. Unlike the banning of certain organizations from the CFC, however, the restricted availability of the subsidy at issue in Rosenberger implicated the Religion Clauses of the First Amendment as well.

ROSENBERGER V. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA
Supreme Court of the United States, 1995
515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700

BACKGROUND & FACTS The University of Virginia, a state institution, authorized payments from its Student Activity Fund (SAF) to outside vendors for printing costs associated with a variety of publications produced by student groups it recognized, known as Contracted Independent Organizations (CIOs). The money received by the SAF came from mandatory student fees and supported activities of a variety of student organizations related to the educational purpose of the university. To be recognized as a CIO by the university, an organization had to have its constitution approved, had to have students as a majority of its membership, and had to be managed by students. In their dealings with vendors, the CIOs had to include a statement that the organizations functioned independently of the university and that the university assumed no responsibility for their agreements. The university withheld authorization for payment of printing costs for “Wide Awake,” a newspaper put out by Wide Awake Productions (WAP), a Christian student group, because—according to university guidelines (which prohibited funding political electioneering and lobbying as well)—it implicated the university in the promotion of a religion. Rosenberger, a founder of WAP, brought suit against university officials, arguing that refusal to authorize payment for the publication of “Wide Awake” violated freedom of speech. A federal district court granted summary judgment for the university, and a federal appeals court affirmed, concluding that, although there was viewpoint discrimination, such discrimination was necessary to comply with the dictates of the Establishment Clause. Rosenberger then successfully sought review by the U.S. Supreme Court.
Justice KENNEDY delivered the opinion of the Court.

***

Government may not regulate speech based on its substantive content or the message it conveys. *** In the realm of private speech or expression, government regulation may not favor one speaker over another. *** Discrimination against speech because of its message is presumed to be unconstitutional. *** Government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. ***

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. *** The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. *** Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not discriminate against speech on the basis of its viewpoint. *** Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations. ***

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. *** The most recent and most apposite case is our decision in Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141 (1993). There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. *** Our conclusion was unanimous: “[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.” ***

***

When the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. *** When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. ***

It does not follow, however, *** that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmission of a message it favors but instead expends funds to encourage a diversity of views from private speakers. *** The University’s regulation now before us *** has a speech-based restriction as its sole rationale and operative principle.

The distinction between the University’s own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. *** The University declares that the student groups eligible for SAF support are not the University’s agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

The University urges that, from a constitutional standpoint, funding of speech
differs from provision of access to facilities because money is scarce and physical facilities are not. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

We hold that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. It remains to be considered whether the violation following from the University's action is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion.

With respect to the Establishment Clause, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation. The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to [the] Establishment Clause. The exacting here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.

The money goes to a special fund from which any group of students with CIO status can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to private financial support for a church.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. It follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion-neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis.
There is no Establishment Clause violation in the University’s honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. * * *

* * * The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake’s mission in a letter to the readership signed, “Love in Christ”: it is “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” * * *

* * * Even featured essays on facially secular topics become platforms from which to call readers to fulfill the tenets of Christianity in their lives. * * *

This writing * * * is straight-forward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ.

* * * It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled * * *. Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance Against Religious Assessments, which played the central role in ensuring the defeat of the Virginia tax assessment bill in 1786 and framed the debate upon which the Religion Clauses stand * * *.

* * * Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter. * * *

* * * Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter. * * *

* * * The Court’s claim of support from the forum-access cases is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. * * * There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. * * *

* * * The Establishment Clause * * * was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government. * * * Since the corrupting effect of government support does not turn on whether the Government’s own money comes from taxation or gift or the sale of public lands, the Establishment Clause could
hardly relax its vigilance simply because tax
revenue was not implicated. * * *

* * * The Court is ordering an instrumentality of the State to support religious
evangelism with direct funding. This is a flat
violation of the Establishment Clause.

* * *

There is no viewpoint discrimination in
the University’s application of its Guidelines to deny funding to Wide Awake. * * *

If the Guidelines were written or applied
so as to limit only such Christian advocacy
and no other evangelical efforts that might
compete with it, the discrimination would
be based on viewpoint. But that is not what
the regulation authorizes; it applies to
Muslim and Jewish and Buddhist advocacy
as well as to Christian. And since it limits
funding to activities promoting or manifest-
ing a particular belief not only “in” but
“about” a deity or ultimate reality, it applies
to agnostics and atheists as well as it does to
deists and theists * * *. The Guidelines
* * * do not skew debate by funding one
position but not its competitors. * * *

[T]hey simply deny funding for hortatory
speech that “primarily promotes or man-
ifests” any view on the merits of religion;
they deny funding for the entire subject
matter of religious apologetics.

* * *

In Rosenberger, the Court explicitly abstained from addressing “whether an objecting
student has the First Amendment right to demand a pro rata return to the extent the
[student activity] fee is expended for speech to which he or she does not subscribe.” The
Alliance Defense Fund (ADF), a conservative interest group whose money and resources
produced the litigation success for fundamentalist Christian students in Rosenberger, then
backed a suit by Scott Southworth and several other right-wing students at the University
of Wisconsin (UW) to recoup those portions of their student fees used to support the
activities of registered student organizations that espoused feminist, socialist, environ-
mental, AIDS-related, and gay/lesbian/bisexual views. The university argued that this line
of argument had no logical stopping point and was fundamentally inconsistent with the
purpose of education and the role of a university as a forum for facilitating the expression
and examination of diverse ideas: A student might just as well be allowed to insist on a
proportional rebate of tuition, if he or she disagreed with the views expressed by a professor
teaching a course. Other critics argued that ADF’s advocacy of first Rosenberger’s then
Southworth’s position amounted to little more than the narrow pursuit of self-interest (the
right-wing students wanted to be subsidized, but they didn’t want to subsidize others).

In Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217,
120 S.Ct. 1346 (2000), the Supreme Court unanimously upheld the allocation of
mandatory student activity fee money to all qualifying registered student organizations on a
content-neutral basis. As Justice Kennedy explained for the Court:

The University may determine that its mission is well served if students have the means to
engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects
in their extracurricular campus life outside the lecture hall. If the University reaches this
conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students’ First Amendment interests,
however. The proper measure, and the principal standard of protection for objecting students,
we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.

* * * When a university requires its students to pay fees to support the extracurricular speech
of other students, all in the interest of open discussion, it may not prefer some viewpoints to
others. There is symmetry then in our holding here and in Rosenberger: Viewpoint neutrality is
the justification for requiring the student to pay the fee in the first instance and for ensuring
the integrity of the program’s operation once the funds have been collected. * * *
The Court remanded the case for a determination by the federal district court whether there was assurance that viewpoint-neutral standards would be used in the allocation of funds. The UW program appeared to provide that an organization could be funded or defunded by majority vote of the student body, in which case viewpoint neutrality would not be guaranteed. Justice Kennedy continued, "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum * * * does not depend upon majoritarian consent. That principle is controlling here." The university subsequently modified its student-fee procedures in a manner that was viewpoint-neutral, sufficiently limited the university's discretion, gave all groups equal access to the funds, and its new policy was generally upheld (Southworth v. Board of Regents, 307 F.3d 566 (7th Cir. 2002)).

"Compelled subsidy" cases, such as Southworth, are constitutionally distinguishable from cases of "compelled support of the government." In the former, the First Amendment is implicated because the individual is required by the government to subsidize the message of a private entity with which he disagrees; in the latter, government is speaking for itself. Some government programs involve, or consist entirely of, advocating a position, and taxpayer support of the government is—to use Justice Scalia's words—"perfectly constitutional." The distinction was not readily identifiable in the facts of Johanns v. Livestock Marketing Association, 544 U.S. 550, 125 S.Ct. 2055 (2005), decided five years after Southworth. At issue, was a First Amendment challenge to a promotional program famous for its use of the line "Beef—it's what's for dinner." The advertisements were produced by the government under the authority given it by the Beef Promotion and Research Act of 1985, which aimed to promote the sale and consumption of beef in general. Certain livestock producers who raised grain-fed cattle and others who raised Angus or Hereford cattle objected to paying the dollar fee levied by the government on all cattle sales and imports to pay for the ads and for other purposes. They argued that they were compelled to subsidize the promotion of generic beef when, in fact, they wanted to promote only the consumption of their specific variety of beef. Moreover, the advertising carried the tag line "funded by America's Beef Producers" which, they said, conveyed the distinct impression the ads spoke for all beef producers. By a 6–3 vote, the Court held that the advertising was an example of government advocating a policy and not compelling support for a private group's message.

Justice Souter, joined in his dissent by Justices Stevens and Kennedy, argued that the ranchers ought to prevail because it was not at all clear that it was the government that was speaking. Said Justice Souter: "[R]eaders would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. * * * [T] is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so." He concluded, "[E]xpression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, cannot constitute government speech sufficient to justify enforcement of a targeted subsidy to broadcast it." Otherwise, he said, it would not be possible to hold the government accountable for the policy.

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23. The State of Washington allowed public-sector unions to charge employees who were not union members an agency fee equal to union dues through payroll deductions. Consistent with the principles of Southworth, the Court, in Davenport v. Washington Education Association, 551 U.S. — , 127 S.Ct. 2372 (2007), upheld a state law requiring these unions to obtain the approval of the non-members before spending agency-fee money for electoral or ideological purposes not relevant to the unions' collective bargaining duties.
However, where a governmental subsidy is designed to facilitate private speech and encourage a diversity of viewpoints, the Court made it clear in Rosenberger that content-based restrictions are particularly disfavored. But what about those instances where government conditions the receipt of funds on abiding by certain limitations on expression? In National Endowment for the Arts v. Finley (p. 1000), the Court upheld Congress’s authority to require the agency to take into account “general standards of decency and respect for the diverse beliefs and values of the American public” as well as artistic “merit” and “excellence” such that “indecent” art counted as a negative factor in the funding decision. More pointedly, the Court in Rust v. Sullivan (p. 751) upheld the constitutionality of the “gag rule” prohibiting recipients of federal family planning funds from engaging in counseling, medical referrals, or any activities advocating abortion as a method of family planning.

Speech on Private Property

It may seem ironic that just about the time the Warren Court held in Adderley that the right to demonstrate on public property was limited, it recognized a right to protest on private property in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601 (1968). Relying on a previous Court decision from the 1940s that free speech rights on the streets and sidewalks of a company town equated with expressive freedoms on the streets and sidewalks of the typical municipality, the Warren Court extended the equivalency to the sidewalks of the modern shopping mall. In Hudgens v. National Labor Relations Board, which follows, the Supreme Court reviewed the reasoning of the Logan Valley Plaza decision and its subsequent limitation four years later in Lloyd Corp. v. Tanner and explained why both were being overruled. Justice Black had dissented from the Logan Valley Plaza ruling in the first place, saying: “To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create court-made law wholly disregarding the constitutional basis on which ownership of private property rests in this country. * * * These pickets do have a constitutional right to speak about * * * [the supermarket’s] refusal to hire union labor, but they do not have a constitutional right to compel * * * [the supermarket] to furnish them a place to do so on its property.” Intoning a famous principle underlying public regulation of business from the nineteenth century, Justice Marshall, dissenting in Hudgens, responded that businesses in a shopping mall had opened themselves to the public and thus had become “clothed with a public interest * * *.”

Hudgens, however, was the last word only as a matter of federal constitutional law. As the Supreme Court, first under Chief Justice Burger and then under Chief Justice Rehnquist, narrowed the scope of federal constitutional rights, a number of progressive state supreme courts have widened the protection afforded individuals as a matter of state constitutional law.24 This new judicial federalism is evident in the note summarizing the U.S. Supreme

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Court’s decision in PruneYard Shopping Center v. Robins (p. 845). After the California Supreme Court held that individuals had free speech rights on private property under the state constitution, the shopping center owners unsuccessfully challenged this court-created state constitutional liberty as a violation of their federal constitutional rights under both the First and the Fifth Amendments.

HUDGENS v. NATIONAL LABOR RELATIONS BOARD
Supreme Court of the United States, 1976
424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196

BACKGROUND & FACTS
Striking employees of the Butler Shoe Company decided to picket not only the company’s warehouse, but also all nine of its retail stores. When several employees showed up to picket Butler’s store in the North DeKalb Shopping Plaza located outside Atlanta, Georgia, the shopping center manager informed them that they could not picket within the mall or parking lot and threatened them with arrest for trespassing should they choose to do so. After a second warning, the picketers left, but the union filed an unfair labor practice complaint with the National Labor Relations Board against Hudgens, the owner of the shopping center. Relying upon a previous Supreme Court decision in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601 (1968), the board entered a cease-and-desist order against Hudgens, who appealed to the U.S. Court of Appeals, Fifth Circuit. Though the appeals court ultimately affirmed the board’s order, its decision to do so was the result of a lengthy process during which the case was passed back and forth between the appeals court and the board, with the movement of the board being steadily away from reliance upon a constitutional basis for its decision to one of its interpretation of statutes governing labor-management relations. Hudgens sought further review, and the Supreme Court granted certiorari. In its opinion, the Court recounts the origin and substance of its Logan Valley Plaza decision, traverses the modification that holding subsequently underwent, and spells out reasons why it finally decided to overrule Logan Valley Plaza.

Mr. Justice STEWART delivered the opinion of the Court.

* * *

It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. * * *

[Al]n exception to this * * * was recognized almost 30 years ago in the case Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946). In Marsh, a Jehovah’s Witness who had distributed literature without a license on a sidewalk in Chickasaw, Ala., was convicted of criminal trespass. Chickasaw was a so-called company town, wholly owned by the Gulf Shipbuilding Corporation. * * *

The Court pointed out that if the “title” to Chickasaw had “belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant’s conviction must be reversed.” * * * Concluding that Gulf’s “property interests” should not be allowed to lead to a different result in Chickasaw, which did “not function differently from any other town,” * * * the Court invoked the First and Fourteenth Amendments to reverse the appellant’s conviction.

It was the Marsh case that in 1968 provided the foundation for the Court's
decision in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601 (1968). That case involved peaceful picketing within a large shopping center near Altoona, Pa. One of the tenants of the shopping center was a retail store that employed a wholly nonunion staff. Members of a local union picketed the store, carrying signs proclaiming that it was nonunion and that its employees were not receiving union wages or other union benefits. The picketing took place on the shopping center’s property in the immediate vicinity of the store. A Pennsylvania court issued an injunction that required all picketing to be confined to public areas outside the shopping center, and the Supreme Court of Pennsylvania affirmed the issuance of this injunction. This Court held that the doctrine of the Marsh case required reversal of that judgment.

The Court’s opinion pointed out that the First and Fourteenth Amendments would clearly have protected the picketing if it had taken place on a public sidewalk:

“It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. **The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.**

The Court’s opinion then reviewed the Marsh case in detail, emphasizing the similarities between the business block in Chickasaw, Ala., and the Logan Valley shopping center and unambiguously concluded:

“The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in Marsh.” **

Upon the basis of that conclusion, the Court held that the First and Fourteenth Amendments required reversal of the judgment of the Pennsylvania Supreme Court.

**

Four years later the Court had occasion to reconsider the Logan Valley doctrine in Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219 (1972). That case involved a shopping center covering some 50 acres in downtown Portland, Ore. On a November day in 1968 five young people entered the mall of the shopping center and distributed handbills protesting the then ongoing American military operations in Vietnam. Security guards told them to leave, and they did so, “to avoid arrest.” ** They subsequently brought suit in a federal district court, seeking declaratory and injunctive relief. The trial court ruled in their favor, holding that the distribution of handbills on the shopping center’s property was protected by the First and Fourteenth Amendments. The Court of Appeals for the Ninth Circuit affirmed the judgment expressly relying on this Court’s Marsh and Logan Valley decisions. This Court reversed the judgment of the Court of Appeals.

The Court in its Lloyd opinion did not say that it was overruling the Logan Valley decision. Indeed a substantial portion of the Court’s opinion in Lloyd was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the handbilling in Lloyd, the picketing in Logan Valley had been specifically directed to a store in the shopping center and the picketers had had no other reasonable opportunity to reach their intended audience. ** The fact is that the reasoning of the Court’s opinion in Lloyd cannot be squared with the reasoning of the Court’s opinion in Logan Valley.

It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the
performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court’s decision in the Lloyd case. Not only did the Lloyd opinion incorporate lengthy excerpts from two of the dissenting opinions in Logan Valley, * * * the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley:

“In the basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd’s private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only.” * * *

* * *

“Respondents contend * * * that the property of a large shopping center is ‘open to the public,’ serves the same purposes as a ‘business district’ of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

“The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, Marsh v. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.” * * *

* * *

“We hold that there has been no such dedication of Lloyd’s privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.” * * *

If a large self-contained shopping center is the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech’s content. For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes * * * and may even forbid altogether such use of some of its facilities, see Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242 (1967), what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. * * * It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the respondents in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Company.

We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.

* * *

For * * * reasons stated in this opinion, the judgment is vacated and the case is remanded to the Court of Appeals with directions to remand to the National Labor Relations Board, so that the case may be there considered under the statutory criteria of the National Labor Relations Act alone.

It is so ordered.

Vacated and remanded.

Mr. Justice STEVENS took no part in the consideration or decision of this case.
Mr. Justice WHITE, concurring in the judgment.

While I concur in the result reached by the Court, I find it unnecessary to inter Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601 (1968), and therefore do not join the Court's opinion. I agree that "the constitutional guarantee of free expression has no part to play in a case such as this," * * * but Lloyd Corp. v. Tanner * * * did not overrule Logan Valley, either expressly or implicitly, and I would not, somewhat after the fact, say that it did.

One need go no further than Logan Valley itself, for the First Amendment protection established by Logan Valley was expressly limited to the picketing of a specific store for the purpose of conveying information with respect to the operation in the shopping center of that store:

"The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." * * *

On its face, Logan Valley does not cover the facts of this case. The pickets of the Butler Shoe Company store in the North DeKalb Shopping Center were not purporting to convey information about the "manner in which that particular [store] was being operated" but rather about the operation of a warehouse not located on the Center's premises. The picketing was thus not "directly related in its purpose to the use to which the shopping center property was being put."

The First Amendment provides no protection for the picketing here in issue and the Court need say no more. Lloyd v. Tanner is wholly consistent with this view. There is no need belatedly to overrule Logan Valley, only to follow it as is.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

* * *

*** I continue to believe that the First Amendment principles underlying Logan Valley are sound, and were unduly limited in Lloyd. But accepting Lloyd, I am not convinced that Logan Valley must be overruled.

The foundation of Logan Valley consisted of this Court's decisions recognizing a right of access to streets, sidewalks, parks, and other public places historically associated with the exercise of First Amendment rights. * * * Thus, the Court in Logan Valley observed that access to such forums "cannot constitutionally be denied broadly and absolutely." * * * The importance of access to such places for speech-related purposes is clear, for they are often the only places for effective speech and assembly.

Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946), which the Court purports to leave untouched, made clear that in applying those cases granting a right of access to streets, sidewalks and other public places, courts ought not let the formalities of title put an end to analysis. The Court in Marsh observed that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." * * *

That distinction was not determinative:

"Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." * * *

Regardless of who owned or possessed the town in Marsh, the Court noted, "the public
... has an identical interest in the functioning of the community in such manner that the channels of communication remain free;" ... and that interest was held to prevail.

... Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication ...

In *Logan Valley* we recognized what the Court today refuses to recognize— that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the "state" from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town. I simply cannot reconcile the Court's denial of any role for the First Amendment in the shopping center with *Marsh*'s recognition of a full rule for the First Amendment on the streets and sidewalks of the company-owned town.

My reading of *Marsh* admittedly carried me farther than the Court in *Lloyd*, but the *Lloyd* Court remained responsive in its own way to the concerns underlying *Marsh*. *Lloyd* retained the availability of First Amendment protection when the picketing is related to the function of the shopping center, and when there is no other reasonable opportunity to convey the message to the intended audience. Preserving *Logan Valley* subject to *Lloyd*'s two related criteria guaranteed that the First Amendment would have application in those situations in which the shopping center owner had most clearly monopolized the forums essential for effective communication. This result, although not the optimal one in my view, ... is nonetheless defensible.

... No one would seriously question the legitimacy of the values of privacy and individual autonomy traditionally associated with privately owned property. But property that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of those values diminishes. A degree of privacy is necessarily surrendered; thus, the privacy interest that petitioner retains when he leases space to 60 retail businesses and invites the public onto his land for the transaction of business with other members of the public is small indeed. ... And while the owner of property open to public use may not automatically surrender any of his autonomy interest in managing the property as he sees fit, there is nothing new about the notion that that autonomy interest must be accommodated with the interests of the public. As this Court noted some time ago, albeit in another context:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn v. Illinois*, 94 U.S. 113, 126, 24 L.Ed. 77, 84 (1877).

The interest of members of the public in communicating with one another on subjects relating to the businesses that occupy a modern shopping center is substantial. Not only employees with a labor dispute, but also consumers with complaints against business establishments, may look to the location of a retail store as the only reasonable avenue for effective communication with the public. As far as these groups are concerned, the shopping center owner has assumed the traditional role of the state in its control of historical First Amendment forums. *Lloyd* and *Logan Valley* recognized the vital role the First Amendment has to play in such cases, and I believe that this Court errs when it holds otherwise.
B. TIME, PLACE, AND MANNER LIMITATIONS

NOTE—PRUNEYARD SHOPPING CENTER V. ROBINS

PruneYard is a privately owned, 21-acre shopping center, open to the public for the purpose of patronizing its more than 65 specialty shops, 10 restaurants, and movie theater. The shopping center maintained a nondiscriminatory policy of not permitting any visitor or tenant to engage in expressive activity, including the circulation of petitions, not directly related to the conduct of business. Robins and other high school students, attempting to gain support for their opposition to a United Nations resolution condemning “Zionism,” set up a card table in a corner of the central courtyard of the shopping center and began to distribute pamphlets and solicit signatures for petitions addressed to the President and Congress. The students were promptly informed by a security guard that these activities violated shopping center regulations and were asked to leave. It was suggested that the students move to a public sidewalk on the perimeter of the shopping center. The students left and subsequently filed suit to enjoin the shopping center from denying them access in order to circulate their petitions. A state superior court rendered judgment for the shopping center, but this ruling was later reversed by the California Supreme Court on state constitutional grounds. The owner of the shopping center then appealed to the U.S. Supreme Court.

In its disposition of this case, PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980), the Supreme Court considered “whether state constitutional provisions [as construed by the state supreme court], which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner’s property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.” Speaking for the Court, Justice Rehnquist noted that neither Lloyd nor Hudgens controlled this case because the holdings in those cases were predicated on federal constitutional law, whereas here the decision below was specifically grounded in construction of the state constitution. Said Justice Rehnquist, “It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.” Addressing the first of the two constitutional contentions, Justice Rehnquist noted that, while “[t]he right to exclude others is the right to exclude others,” nevertheless “it is well-established that ‘not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.’” Armstrong v. United States, 364 U.S. 40, 48, 80 S.Ct. 1563, 1568 (1960). Although Robins and the other students “may have ‘physically invaded’ appellants’ property,” the intrusion here had not reached the point where “reasonable investment backed expectations” were so extensively damaged when the “right to exclude others” was destroyed that the government-mandated intrusion amounted to a “taking.” In this case, “[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large.” The Court also pointed out that Robins and the others conducted themselves in an orderly fashion and that the California court made clear that PruneYard was entitled to impose reasonable time, place, and manner restrictions to minimize disruption of its commercial function.

Turning to the First and Fourteenth Amendment challenge, the Court rejected the contention that, like the message challenged as unconstitutionally imposed in Wooley v. Maynard (see p. 865), PruneYard was made “to participate in the dissemination of an ideological message by displaying it on its private property in a manner and for the express purpose that it be observed and read by the public.” The Court went on to point out several factors that distinguished this case from that case where the State of New Hampshire had the statutory authority to impose criminal sanctions on persons who covered the state motto “Live Free or Die” on their passenger car license plates. In the first place, noted the Court, the message in Wooley was displayed on appellant’s “personal property
that was used "as part of his daily life," while here "the shopping center by choice of its owner is not limited to personal use but is instead a business establishment that is open to the public to come and go as they please." Consequently, "[t]he view expressed by members of the public in passing out pamphlets or seeking signatures for a petition will not likely be identified with those of the owner." Second, unlike Wooley, "no specific message is dictated by the State to be displayed on appellants' property," so there is "no danger of governmental discrimination for or against a particular message." Finally, the owners of the Prune Yard "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand disclaim[ing] any sponsorship of the message" and indicating that these individuals are espousing their own messages as is their prerogative under state law.

In a concurring opinion, Justice Marshall reaffirmed his "belief" that Logan Valley was rightly decided, and that both Lloyd and Hudgens were incorrect interpretations of the First and Fourteenth Amendments. "State action," he reasoned, "was present in all three cases." Justice Marshall explained: "In all of them the shopping center owners had opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks. The State had in turn made its law of trespass available to shopping center owners, enabling them to exclude those who wished to engage in expressive activity on their premises. Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication." Alternatively, he "applau[ded] the [California] court's decision, which is part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution."

In another concurring opinion, in which he was joined by Justice White, Justice Powell emphasized that he joined parts of the Court's opinion "on the understanding that our decision is limited to the type of shopping center involved in this case." He thought that "[s]ignificantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." He added, "Nor does the decision today apply to all shopping centers." Justice Powell thought "some of the language in the Court's opinion was unnecessarily and confusingly broad." In his view, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." Said Justice Powell:

If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he had been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property cannot restore his "right to refrain from speaking at all." Wooley v. Maynard, supra, 430 U.S., at 714, 97 S.Ct., at 1435.

A property owner also may be faced with speakers who wish to use his premises as a platform for views that he finds morally repugnant. Numerous examples come to mind. A minority-owned business confronted with distributors from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak. The strong emotions evoked by speech in such situations may virtually compel the proprietor to respond.

The pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property. But an owner who strongly objects to some of the causes to which
The state-imposed right of access would extend may oppose ideological activities "of any sort" that are not related to the purposes for which he has invited the public onto his property. **To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his "freedom to maintain his own beliefs without public disclosure." **Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.

The shopping center owners in PruneYard could dissociate themselves from a message they didn't want to endorse by simply posting signs, but not all contexts afford this possibility of disengagement and avoidance. The South Boston Allied War Veterans Council, sponsor of Boston's annual St. Patrick's Day parade, excluded a contingent identified as the Irish-American Gay, Lesbian, and Bisexual Group (GLIB) because, as proponents of traditional family values, the council did not want to appear to endorse a lifestyle to which many of its members objected. After state courts held that the exclusion violated the state's antidiscrimination law and ordered the council to include GLIB among the marchers, the council appealed, arguing that this ruling violated the First Amendment since it forced the veterans to send a message implicitly endorsing GLIB's views. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 115 S.Ct. 2338 (1995), the Supreme Court unanimously upheld GLIB's exclusion. From the premise that parades are a form of expression, the Court concluded that the state's use of its statute to treat the parade as a kind of public accommodation open on a nondiscriminatory basis "violat[ed] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." As Justice Souter, speaking for the Court, explained:

"[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.

But the ruling in Hurley v. GLIB does not give a recipient of federal funds the right to exclude Uncle Sam. Congress enacted the Solomon Amendment in 1994 to ensure military recruiters access to campus when colleges and universities receive federal money. An association of law schools, whose policy excludes from recruiting opportunities any firm or organization that engages in discrimination, challenged the constitutionality of the Solomon Amendment on the grounds that the admission of military recruiters to campus made it appear that the law schools and faculty approved of the government's policy excluding homosexuals from military service. In Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S.Ct. 1297 (2006), the Court unanimously concluded that the admission of military recruiters was conduct, not speech. Writing for the Court, Chief Justice Roberts declared that the law schools' recruiting services were not expressive—as distinguished from admitting GLIB to the St. Patrick's Day parade—and nothing about allowing the armed forces to recruit suggested the law schools agreed with the recruiters. Military recruiters were clearly understood by all to be outsiders, not part of the school, and thus there was little likelihood that anyone would associate the law schools with the views of recruiters seeking to interest law school
students in career opportunities. In any event, the associational rights of the law schools and their faculty remained unimpaired; if they thought that interaction with the recruiters conveyed endorsement, the option of declining federal funds was readily available.

Whatever the right or the cost of excluding others, most of us take it for granted that we have the liberty of self-expression on our own property. At issue in *City of Ladue v. Gilleo*, which follows, is the extent to which a municipality can constitutionally restrict the right of a homeowner to put up a sign on her own property that expressed her view on a political controversy of the day. In the *Gilleo* case, the First Amendment rights of a property owner with strong need to vent her opinion clashed with the interest of others who may have regarded such signs as neighborhood eyesores.

**City of Ladue v. Gilleo**  
Supreme Court of the United States, 1994  
512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36

**BACKGROUND & FACTS**  
The City of Ladue, Missouri, is a suburb of St. Louis. To minimize visual clutter, a city ordinance banned all residential signs except those qualifying under 10 exemptions. Margaret Gilleo filed suit, alleging that the ordinance violated her right to free speech by preventing her from displaying a sign declaring “For Peace in the Gulf” on her front lawn during the Persian Gulf War. A federal district court found the residential sign ban to be unconstitutional, and that judgment was affirmed by a federal appeals court, which held the prohibition was a content-based regulation not supported by a compelling governmental interest. The Supreme Court subsequently granted the city’s petition for certiorari.

Justice STEVENS delivered the opinion of the Court.  
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While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.  

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The City argues that the Court of Appeals erred in demanding a “compelling” justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among the side effects of various kinds of signs. These differences are only adventitiously connected with content, and supply a sufficient justification, unrelated to the City’s approval or disapproval of specific messages, for carving out the specified categories from the general ban.  

[For example, according to the city, “for sale” and “for rent” signs—limited to one per marketed house—were infrequently displayed and thus did not appreciably contribute to visual clutter. Nor did on-site commercial and organizational signs, since the city had only a few churches, schools, and businesses. “Danger signs” were exempt from the ban in light of the pressing need to warn the public. By contrast, the city argued, signs falling under the prohibition threatened “unlimited proliferation” because they were not inherently limited in number.]  

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Gilleo is not primarily concerned with the scope of the exemptions available in other locations, such as commercial areas and on church property. She asserts a constitutional right to display an antiwar sign at her own home. Therefore, we first ask whether Ladue may properly prohibit Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to permit certain other signs. In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.

In Linmark v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614 (1977),] we held that the City's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in Linmark. Moreover, whereas the ordinance in Linmark applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in Linmark. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly.

Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of * * * handbills on the public streets, * * * [and] the door-to-door distribution of literature * * *. Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.

Ladue contends, however, that its ordinance is a mere regulation of the "time, place, or manner" of speech because residents remain free to convey their desired messages by other means, such as hand-held signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." We are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." The identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different
reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile. * * *

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. * * * Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one’s house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

A special respect for individual liberty in the home has long been part of our culture and our law * * *. That principle has special resonance when the government seeks to constrain a person’s ability to speak there. * * * Whereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, * * * its need to regulate temperate speech from the home is surely much less pressing * * *.

Our decision that Ladue’s ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs. It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent “visual clutter” in their own yards and neighborhoods—incidents markedly different from those of persons who erect signs on others’ land, in others’ neighborhoods, or on public property. Residents’ self-interest diminishes the danger of the “unlimited” proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue’s stated regulatory needs without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

Accordingly, the judgment of the Court of Appeals is

In Gilles, the Supreme Court upheld a citizen’s right to post a neighborhood sign critical of the government, but can government post a neighborhood sign critical of a citizen? To the considerable irritation of many slumlords, the answer apparently is “yes.” In Albiero v. City of Kankakee, 246 F.3d 927 (7th Cir. 2001), a federal appellate court upheld a city policy of dealing with recalcitrant slumlords, like Albiero, by posting the following 3 × 5 foot sign on the parkway between the street and the owner’s dilapidated property:

SLUM PROPERTY!
THE OWNER OF THIS PROPERTY
ERNEST ALBIERO
* * *
IS IN VIOLATION OF CITY CODE
AND CHOOSES NOT TO BRING
THIS PROPERTY INTO
COMPLIANCE THEREBY
SIGNIFICANTLY CONTRIBUTING
TO THE BLIGHT OF THIS
NEIGHBORHOOD

Albiero was one of more than 20 derelict property owners selected for such publicity after repeated notices from the city to fix up specific features of the building proved to be of no avail. In addition to notifying him of pages and pages of violations, the city put him on
notice that the property was “Unfit for Human Habitation.” Although Albiero argued that targeting him in this manner was defamatory, vindictive, and retaliatory, the appeals court awarded summary judgment to the city because he offered no evidence—apart from his own self-serving statements—to support his contention that he was singled out. The appeals court found no violation of the Equal Protection Clause, observing that Albiero was treated no differently from the other 20 neglectful landlords. As the appeals court explained it, “The policy provided that signs would be placed in those locations that (1) appeared dilapidated and not in compliance with applicable property maintenance codes based upon exterior appearance; (2) received repeated citations for failure to comply with the codes; (3) had been the subject of repeated complaints by neighbors; (4) had a clearly deleterious effect upon the neighborhood in which they were located.” When seven slumlords brought their property into compliance after signs were erected, the signs in front of their buildings were removed. The Supreme Court denied certiorari; see Pitts v. City of Kankakee, 267 F.3d 592 (7th Cir. 2001), cert. denied, 536 U.S. 922, 122 S.Ct. 2586 (2002).

Offensiveness

The “clear and present danger” and “public forum” rulings invariably reflected the collision of expressive freedom with the government’s interest in protecting public safety. Because “clear and present danger” focused exclusively on the minimum threat to public order that had to be present in order to justify governmental regulation, it conveyed the impression that the protection of public safety was the only legitimate governmental interest that mattered. In the cases that follow, however, the safety or security of the public is not the issue. In these cases, the speaker or broadcaster questions the permissibility of restricting expression in the name of enforcing some minimum standard of public decency. The governmental interest at issue is the prevention of offensiveness. In Cohen v. California, the principal case that follows, the subject of controversy was the message lettered on the back of Cohen’s jacket. Succeeding cases explore the offensiveness issue in a variety of contexts: nudity on a giant outdoor movie screen visible to passersby, the broadcast of an off-color monologue in the middle of the afternoon, and the display of the swastika as part of a Nazi march through a Jewish neighborhood. Speaking for the Court in Cohen, Justice Harlan rejected each of the state’s justifications for punishing Cohen and concluded that, when it comes to something offensive, “If you don’t like it, don’t look at it.” Is this position universally supportable, and has the Court been consistent in it? The problem, of course, is not so simple because—as the Court acknowledged in Pacifica (p. 855)—sometimes it is not possible to give advance warning to all those individuals who may be offended, so it may not be possible for them to “avert their eyes” or ears. On the other hand, if free speech is to depend on whether or not others find it offensive (and, as in the Skokie case (p. 856), threaten violence because of it), isn’t this just another form of the “heckler’s veto”? Is a minimal standard of public decency just another variety of “political correctness”? The chart at the conclusion of this section summarizes several other Court rulings dealing with time, place, and manner restrictions generally.

Cohen v. California
Supreme Court of the United States, 1971
403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284

Background & Facts Cohen was convicted in Los Angeles Municipal Court for violating a provision of the California Penal Code that made it a misdemeanor to “maliciously and willfully disturb the peace or quiet of any neighborhood or person ** by ** offensive conduct,” and he was sentenced to
30 days’ imprisonment. He had been arrested and charged with this offense for wearing a jacket with the words “Fuck the Draft” emblazoned on it in a corridor of the Los Angeles County Courthouse. Women and children were present in the corridor. A California appellate court noted, however, that Cohen “did not engage in nor threaten to engage in, or did anyone as the result of his conduct in fact commit or threaten to commit any act of violence.” Nor did Cohen make any “loud or unusual noise.” He testified that the words on his jacket were a straightforward expression of his strongly felt sentiments about the Vietnam War. The U.S. Supreme Court granted certiorari to review the conviction.

Mr. Justice HARLAN delivered the opinion of the Court.

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[Cohen’s] conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon “speech” * * * not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen’s ability to express himself. * * * Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. * * *

Appellant’s conviction, then, rests squarely upon his exercise of the “freedom of speech” protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would * * * not be tolerated in certain places. * * * No fair reading of the phrase “offensive conduct” can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. * * * It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up * * * [erotic] stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying
circumstances, of so-called “fighting words,” those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not “directed to the person of the hearer.” * * * No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction. * * *

Finally, in arguments before this Court much has been made of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant’s crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. * * * While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, * * * we have at the same time consistently stressed that "we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech." * * * The ability of government * * * to shut off discourse solely to protect others from hearing it is * * * dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen’s jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. * * * [Any] recognizable privacy interest when walking through a courthouse corridor * * * is nothing like the interest in being free from unwanted expression in the confines of one’s own home. * * *

* * *

We discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

* * *

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. * * *

Reversed.

Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE [BURGER] and Mr. Justice BLACK join.

I dissent, and I do so for two reasons:
1. Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech. * * * The California Court of Appeal appears so to have described it * * * and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942). * * * As a consequence, this Court’s agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal’s construction of [the statute] is now the authoritative California construction. * * * Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of [a] subsequently rendered decision by the State’s highest tribunal. * * * Mr. Justice WHITE concurs in Paragraph 2 of Mr. Justice BLACKMUN’S dissenting opinion.

NOTE—THE OUTDOOR MOVIE SCREEN

Richard Erznoznik, manager of a Jacksonville, Florida, drive-in, brought suit for a declaration as to the constitutionality of a city ordinance making it a public nuisance and a punishable offense to exhibit any motion picture containing nudity where the screen is visible from a public street. Erznoznik was alleged to have permitted the showing of Class of ’74, a movie in which “female buttocks and bare breasts were shown.” In Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268 (1975), the Supreme Court found the ordinance unconstitutional. Speaking for the Court, Justice Powell concluded that the ordinance, which “discriminates among movies solely on the basis of content” and sweeps broadly so as to ban the showing of “movies containing any nudity, however innocent or even educational,” was justified neither “as a means of preventing significant intrusions on privacy” nor “as an exercise of the city’s undoubted police power to protect children.” As to the first of these aims, the Court reasoned that the poor taste of otherwise protected expression was no justification for its suppression and that, at any rate, “the screen of a drive-in theater is not so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.” In terms of the second justification offered for the ordinance, the Court held that the ban on all nudity was overbroad. The Court observed that the ordinance “would bar a film containing a picture of a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous.” And it concluded, “Clearly all nudity cannot be deemed obscene even as to minors. * * * Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” “Moreover,” added Justice Powell, “the deterrent effect of this ordinance is both real and substantial,” for the owners and operators of drive-in theaters “are faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.” Although Justice Douglas in a concurring opinion pointed out that “under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences or to promote highway safety,” Justice Powell noted that “[n]othing in the record or in the text of the ordinance suggests it is aimed at traffic regulation.”

Chief Justice Burger dissented in an opinion in which Justice Rehnquist joined, explaining that whatever may be said of the leather jacket in Cohen v. California, “it distorts reality to apply that notion to the outside screen of a drive-in movie theater” that produces “giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.” Justice White, dissenting separately, observed that, applying the same logic as that found in the majority opinion, “the State may not forbid ‘expressive’ nudity on the public streets, in the public
parks or any other public place since other persons in those places at that time have a ‘limited privacy interest’ and may merely look the other way.” Said Justice White, “I am not ready to take this step with the Court.”

NOTE—THE “FILTHY WORDS” MONOLOGUE

About midafternoon one weekday, a New York radio station broadcast a 12-minute monologue entitled “Filthy Words” from an album of comedy routines by George Carlin. A listener, who was driving in his car with his young son, tuned in in the midst of the broadcast, became upset about the language used in the monologue, and filed a complaint with the FCC. The agency subsequently informed the station that it considered the words used to be “patently offensive” and, while not “obscene,” certainly “indecent” within the meaning of the federal statutes. Although it did not take immediate action against the station, the commission indicated that it would include the complaint in the station’s license file and, in the event further complaints were received, would consider whether to employ “any of the available sanctions * * * granted by Congress.” Clarifying its ruling on the matter, the FCC later indicated that it did not seek to place an “absolute prohibition on the broadcast of this type of language but rather sought to channel it to times of the day when children most likely would not be exposed to it.” A divided federal appellate court reversed the FCC’s ruling.

In Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026 (1978), the Supreme Court overturned the lower court’s judgment. Speaking in part for the Court and in part for a plurality composed of Chief Justice Burger, Justice Rehnquist, and himself, Justice Stevens concluded that the FCC had the power to proscribe a radio broadcast that was indecent, but not obscene. Directing its attention to several words—“the seven dirty words”—“that referred to excretory or sexual activities or organs,” the plurality observed that, if the offensiveness ruling could be traced to a monologue’s political content or to a satirization of four-letter words, “First Amendment protection might be required. But that is simply not this case.” As deliberately and repetitively used in Carlin’s comedy sketch, “[t]hese words offend for the same reasons that obscenity offends.” Asserting that the words had very “slight social value” and ranked near the bottom of priorities in First Amendment expression, the plurality looked to the context of their use in assessing their marginally protected use over the airwaves. The plurality then reasoned that two factors supported the FCC’s ruling in this case: First, “[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be alone plainly outweighs the First Amendment right of an intruder.” Even a prior warning, such as that given by the station in this instance, was insufficient to counteract this interest “[b]ecause the broadcast audience is constantly tuning in and out,” and, therefore, any warning “cannot completely protect the listener or viewer from unexpected program content.” And “[b]roadcasting is uniquely accessible to children * * *.” Justice Powell, joined by Justice Blackmun, referring to the repetitious use of the proscribed words “as a sort of verbal shock treatment,” concurred, concluding that the decisive issues were the privacy and child-protection interests already cited.

In a tart dissenting opinion in which Justice Marshall joined, Justice Brennan began by confessing that he “found the Court’s misapplication of First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.” In rejoinder to the weight to be accorded factors a majority of the Court thought to be decisive, Justice Brennan turned first to the asserted interest in privacy. Said Brennan:

* * * I believe that an individual’s actions in switching on and listening to communications transmitted over the public airways and directed to the public at-large * * * are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. * * *

Unlike other intrusive modes of communications, such as sound trucks, * * *[w]hatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive[,] * * * he can
simply extend his arm and switch stations or flick the “off” button. It is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to First Amendment protection. * * *

The Court’s balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. * * *

And, as to the child-protection argument, he responded that, in view of the Court’s own past rulings that prevent children only from gaining access to obscene materials, “[t]he Court’s refusal to follow its own pronouncements * * * has the * * * anomalous * * * effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not be kept even from children.” Drawing his attack on the First Amendment faults of the plurality and concurring opinions to a close, he observed “another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.”

In a second dissenting opinion, which addressed purely statutory issues, Justice Stewart, joined by Justices Brennan, White, and Marshall, concluded “that Congress intended, by using the word ‘indecent’ * * * to prohibit nothing more than obscene speech” and “[u]nder that reading of the statute” would have held that the commission’s order was not authorized.

Although the “dirty words” monologue was a well-thought-out commentary on the use of certain taboo expressions, most indecent broadcast language involves the spontaneous use of profanities. In Fox Television Stations, Inc. v. Federal Communications Commission, 489 F.3d 444 (2d Cir. 2007), a divided federal appellate court held that the FCC could not punish television and radio stations for broadcasting vulgarities that had also been blunted in public by President George W. Bush and Vice President Dick Cheney. The irony in this was that, under the Bush Administration, the FCC had made it a point to expand its indecency rules, taking a much harder line on obscenities uttered over the air waves. Reversing decades of more lenient policy, the commission had made the use of certain expressions—Carlin’s “filthy words”—punishable, not just a matter to be taken into account when a station applied for the renewal of a broadcast license. The appeals court rejected the commission’s view that profanities necessarily constituted indecency because their use implied that sexual or excretory acts were carried out. The court said that “fleeting expletives” just as often occurred out of frustration or excitement and were not intended to convey a broader obscene meaning. Under these circumstances, the court held that punishing the use of profanities was arbitrary and capricious. The appeals court remanded the rules for redrafting by the agency but indicated it was “doubtful” that any rewrite could pass constitutional muster.

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**Note—Nazis Marching Through Skokie**

Skokie, a suburb of Chicago, had a population at the time of the case of approximately 70,000; about 40,500 residents were Jewish and of those between 5,000 and 7,000 were survivors of the Nazi holocaust. The village sought an injunction to prevent a demonstration in Skokie by uniformed members of the American Nazi party. Various Jewish organizations, including the militant Jewish
Defense League, and other groups announced plans for a counterdemonstration. The prospect of demonstration and counterdemonstration precipitated forecasts of violence and bloodshed. After a Cook County circuit court enjoined the Nazi march, both an appellate court and the Illinois Supreme Court refused to stay the judgment pending an appeal. The U.S. Supreme Court reversed the state supreme court’s ruling and, in view of the important First Amendment issues at stake, ordered the higher state courts to proceed promptly to a consideration of the merits. On remand, the state appeals court reversed those portions of the circuit court order barring the Nazis from “marching, walking, or parading, from distributing pamphlets or displaying materials, and from wearing the uniform of the National Socialist Party of America.” The appellate court held, however, that the village had met “the heavy burden” of showing that, particularly in Skokie, wearing or displaying the swastika constituted the use of a symbol tantamount to “fighting words” and was, therefore, not protected by the First Amendment. Calling the display of that symbol “a personal affront to every member of the Jewish faith,” the court concluded that “Skokie’s Jewish residents must feel gross revulsion for the swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendants’ chosen symbol, the swastika.” The appeals court thus affirmed the remaining portion of the circuit court’s injunction prohibiting the Nazis from displaying that symbol during the demonstration.

In a per curiam opinion announcing its judgment in this controversy, Village of Skokie v. National Socialist Party, 69 Ill.2d 605, 14 Ill. Dec. 890, 373 N.E.2d 21 (1978), the Illinois Supreme Court, with one justice dissenting, concluded that “[h]e decisions of * * * [the United States Supreme Court], particularly Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971), in our opinion compel us to permit the demonstration as proposed, including display of the swastika.” After quoting at length from the decision in Cohen, the Illinois court explained its reversal of the appellate court judgment enjoining display of the swastika as follows:

The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of “fighting words,” and that doctrine cannot be used here to overcome the heavy presumption against the constitutional validity of a prior restraint.

Nor can we find that the swastika, while not representing fighting words, is nevertheless so offensive and peace threatening to the public that its display can be enjoined. We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants’ speech. * * *

In summary, as we read the controlling Supreme Court opinions, use of the swastika is a symbolic form of free speech entitled to first amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become, as the complaint alleges, “common knowledge” and those to whom sight of the swastika banner or uniforms would be offense are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen.

Subsequently, in connection with a parallel suit lodged in federal district court attacking the constitutionality of several Skokie ordinances precluding the Nazi march, the U.S. Supreme Court denied certiorari with respect to a federal appellate court judgment affirming the unconstitutionality of the ordinances. Smith v. Collin, 439 U.S. 916, 99 S.Ct. 291 (1978).
### Other Cases on Time, Place, and Manner Limitations Generally

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<th>Case</th>
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<td>Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286 (1980)</td>
<td>An Illinois statute that prohibited all residential picketing, but exempted from its prohibition “the peaceful picketing of a place of employment involved in a labor dispute,” denied equal protection by placing an unjustified premium on one kind of speech, namely, that related to labor disputes. The law was insufficiently tailored in its subject matter discrimination to support any valid interest, such as the protection of privacy.</td>
<td>6–3; Chief Justice Burger and Justices Blackmun and Rehnquist dissented.</td>
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<td>Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065 (1984)</td>
<td>National Park Service regulations prohibiting overnight sleeping as an aspect of forbidding camping on the Mall and across from the White House were constitutional. Although homeless demonstrators were permitted to lie down, close their eyes, and pretend to sleep, they were not allowed to actually sleep even as part of a wintertime demonstration that the homeless have to sleep somewhere in the cold weather. Despite the fact that the prohibition on actually sleeping interfered with the point demonstrators hoped to make to onlookers, the prohibition on overnight sleeping was content-neutral and directed not at expressive activity, but at the destructive effects camping would have on the Mall and Lafayette Park. Since actually sleeping was mainly relevant to attracting homeless demonstrators to participate in the protest and not to expressing a message and since other means were available to communicate the demonstrators’ message, the regulation was constitutional.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td>City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986)</td>
<td>A zoning ordinance that prohibited any adult movie theater from locating within 1,000 feet of any single- or multiple-family dwelling, residential zone, church, park, or school, but did not ban adult theaters completely, is properly viewed as a time, place, and manner regulation. The ordinance furthers the substantial interest in preserving the quality of urban life and is not invalid even though it relegates such theaters to a small area of land virtually all of which is presently occupied.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td>Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495 (1988)</td>
<td>A suburban ordinance that banned all residential picketing was constitutional when construed so as to only prohibit picketing directed at a single house because it protected the expectation of privacy that a homeowner had in his or her home. Marching generally through neighborhoods or walking past entire blocks of houses was not prohibited by the ordinance.</td>
<td>6–3; Justices Brennan, Marshall, and Stevens dissented.</td>
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<td>City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591 (1989)</td>
<td>A city ordinance that restricted admission to certain dance halls to persons between 14 and 18 years of age was constitutional. Dance hall patrons are not engaged in any form of intimate or expressive association, and there is no right of &quot;social association&quot; that includes chance encounters at dance halls. The ordinance is rationally related to the legitimate purpose of letting teenagers associate with persons their own age free of the potentially detrimental influences of older teens and young adults.</td>
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Continued
C. SYMBOLIC SPEECH

As with varieties of “speech plus,” such as picketing, demonstrating, and soliciting money, symbolic speech cases entwine elements of speech and action and, for that reason, present similarly complex questions. The perception that speech need not be oral was recognized at least as far back as the decision in Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), which held unconstitutional a California law prohibiting the display of a red flag as a symbol of opposition to established government. The Supreme Court in that case reversed the defendant’s conviction for having raised a red flag as part of the daily activities of a Communist youth camp. Writing for the Court, Chief Justice Hughes found the statute objectionable because its vagueness permitted punishment for the fair use of “the opportunity for free political discussion.”

Compelling the Flag Salute

A decade after the Stromberg decision, the Court reiterated its conclusion that speech could be nonverbal in its invalidation of West Virginia’s compulsory flag salute ritual in the state’s public schools. The decision in the following case, West Virginia State Board of Education v. Barnette, however, did more than merely affirm the possibility of nonverbal speech; it reversed the Court’s conclusion about the constitutionality of the compulsory flag salute after it had been sustained by the Court on five previous occasions. Handing down its decision ironically on Flag Day, June 14, 1943, the Court recognized for the first time that government could not coerce participation in a symbolic act. Although Walter Barnette’s objection to the compulsory flag salute was that it infringed upon the religious beliefs with which his children had been raised, the Supreme Court’s decision turned on freedom of speech, not the free exercise of religious belief. More accurately, as the Court addressed it, the question was whether there is a First Amendment right not to speak.

WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE
[THE FLAG SALUTE CASE]
Supreme Court of the United States, 1943
319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628

BACKGROUND & FACTS In Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940), the Supreme Court, per Justice Frankfurter, sustained the constitutionality of the directive by a local board of education in a small
Pennsylvania town to compel students and teachers in the public schools to salute the flag. Following that decision, the West Virginia legislature passed an act requiring all schools in the state to conduct classes in civics, history, and the federal and state constitutions "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism" and increasing knowledge of the structure and operations of government. Pursuant to this legislation the state board of education directed that all students and teachers in West Virginia's public schools salute the flag as part of regular school activities. The prescribed ritual entailed the recitation of the pledge of allegiance while maintaining the "stiff arm" salute. Failure to comply constituted insubordination for which a student was to be expelled and thereafter treated as a delinquent. Parents were liable to prosecution and a penalty of 30 days in jail and a $50 fine.

Walter Barnette, a Jehovah's Witness, brought suit to enjoin this compulsory flag salute on grounds that to have his children comply would violate a religious commandment not to worship any graven image. The state board of education moved to dismiss the complaint, but a federal district judge granted the injunction whereupon the Board appealed directly to the U.S. Supreme Court.

Mr. Justice JACKSON delivered the opinion of the Court.

***

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on the right of self-determination in matters that touch individual opinion and personal attitude.

As the present Chief Justice said in dissent in the Gobitis case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." * * * Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. * * *

There is no doubt that, in connection with the pledges, the 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 short-cut 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. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.
Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931). * * *

Here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. * * *

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

We * * * re-examine specific grounds assigned for the Gobitis decision.

(1) It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?' " and that the answer must be in favor of strength. * * *

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

(2) It was also considered in the Gobitis case that functions of educational officers in states, counties, and school districts were such that to interfere with their authority "would in effect make us the school board for the country." * * *

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

(3) The Gobitis opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free." * * *

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal
principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. * * *

(4) Lastly, and this is the very heart of the Gobitis opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. * * * Upon the verity of this assumption depends our answer in this case.

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.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. * * * To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. * * * [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. * * *

Affirmed.

* * *
[Justices ROBERTS and REED dissented and voted to reverse the district court's decision on the basis of Gobitis.]

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed
by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. * * *

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of “liberty” than with another. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court’s authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. * * *

* * *

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use. * * *

* * *

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the state’s requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to
require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation.

* * * If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. * * *

* * *

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

* * *

* * * Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest
curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. * * *

What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the “liberty” guaranteed by the Constitution. * * *

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. * * *

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

That the government may not force unwilling individuals to become couriers of an orthodoxy is a principle that was more recently affirmed by the Supreme Court in Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977). Relying substantially on its earlier holding in the Flag Salute Case, the Court answered in the negative the question “whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the [state] motto ‘Live Free or Die’ on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.” (The Maynards were Jehovah’s Witnesses.) The Court found insufficient the two interests advanced by New Hampshire—“that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes
appreciation of history, individualism and state pride." As to the first of these assertions by the state, the Court found the configurations of letters and numbers normally comprising passenger license plates sufficient to serve the purpose of distinguishing those vehicles and as such constituted a “less drastic means for achieving the same basic purpose.” And, with respect to the second aim, the Court, per Chief Justice Burger, concluded that, “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” Arguing that “[t]he logic of the Court’s opinion leads to startling, and I believe totally unacceptable, results,” namely, that the provision of the U.S. Code proscribing defacement of U.S. currency could not be enforced to prevent an atheist from obscuring the display of the mottos “In God We Trust” and “E pluribus unum” on American coins and paper money, Justice Rehnquist, joined by Justice Blackmun, dissented. In none of these contexts, he explained, was any affirmation of belief implicated. Justice White also dissented.

Protest in School

If the issue in the Barnette case was whether public schools could compel students to participate in displays of symbolic speech, the issue in Tinker v. Des Moines Independent Community School District was whether students could symbolically convey a message of their own in school. In upholding the students’ right to wear black armbands as a symbol of protest against the Vietnam War, the Court emphasized the lack of any disruption their display had on the maintenance of order in the school, a conclusion that did little to impress an aging and crotchety Justice Black in dissent.

TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

Supreme Court of the United States, 1969
393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731

BACKGROUND & FACTS This suit was brought to recover nominal damages and to obtain injunctive relief to prevent school officials from enforcing a regulation that barred the wearing of armbands in school by students. John Tinker, a high school student, and his sister Mary Beth, who was in junior high school, wore black armbands to school to protest the continuing hostilities in Vietnam. When they refused to remove the armbands, they were sent home under suspension until they decided to comply. A federal district court dismissed the Tinkers’ complaint, finding that the interest in preventing disturbances in school and distraction from academic work countervailed any asserted abridgment of First and Fourteenth Amendment rights. On appeal, the U.S. Court of Appeals, Eighth Circuit, sitting en banc, divided evenly. The Supreme Court subsequently granted certiorari.

Mr. Justice FORTAS delivered the opinion of the Court.

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The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931). *** [T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to “pure speech” which, we have repeatedly
held, is entitled to comprehensive protec-
tion under the First Amendment.  

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923), and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.  

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.  It does not concern aggressive, disruptive action or even group demonstrations.  Our problem involves direct, primary First Amendment rights akin to "pure speech."  

In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.  

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial
interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. * * *

*** The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. * * *

Reversed and remanded.

Mr. Justice BLACK dissenting.

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Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, * * * the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. * * *

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new

CHAPTER 11 FREEDOM OF SPEECH
revolutionary era of permissiveness in this country fostered by the judiciary. * * * * * Mr. Justice HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

Mary Beth Tinker's protest message was expressed passively, could not be said to be school-sponsored or school-affiliated, and—except to Justice Black—was not so disruptive that it threatened to disrupt the normal functioning of school activities. But when, on another occasion, a student delivered a sexually suggestive speech at a school assembly, the Court thought the line had been crossed. But as the Court subsequently pointed out in Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986), the maintenance of order is not the only factor school officials are entitled to take into account. They may legitimately censor or punish expression that is offensive or inappropriate, because elementary, junior high, and high school students are not adults and because school attendance is compulsory, thus creating a captive audience. In the course of nominating a classmate for a student government post before an audience of 600 students, Fraser said: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most * * * of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be." As the Supreme Court later described the scene, "Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in [the] speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson to discuss the speech with the class." Prior to delivering the speech, two teachers advised Fraser that it was inappropriate and that it should not be given. The day after the speech, Fraser was told by the assistant principal that the speech violated school policy against conduct "which materially and substantially interferes with the educational process * * * including the use of obscene, profane language or gestures" and was given a three-day suspension. In addition, his name was removed from the list of candidates to speak at graduation. Fraser, through his father, then sued the school district. A federal district court found that the school policy was vague and overbroad and that his First Amendment right had been violated. It awarded $278 in damages and the payment of over $12,000 to pay legal costs, and ruled that Fraser could not be barred from speaking at graduation. This judgment was affirmed on appeal. Ultimately, Fraser was selected as a speaker by a write-in vote of the students and spoke at graduation.
In Fraser, the Supreme Court reversed the appeals court’s judgment. Speaking for the Court, Chief Justice Burger observed that female students might well have found Fraser’s glorifying male sexuality * * * acutely insulting to teenage girl students and “seriously damaging to its less mature audience * * *.” Although a school district would be treading on constitutionally risky ground if it restricted political expression, the viewpoint discrimination it upheld in Fraser was altogether different. Burger continued, “The First Amendment does not prevent * * * school officials from determining that to permit a vulgar and lewd speech such as respondent’s * * * would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed toward an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct [are] wholly inconsistent with the ‘fundamental values’ of public school education.”

Justices Brennan concurred in the judgment and took exception to what he saw as Burger’s overreaction in characterizing Fraser’s speech as “offensively lewd” and “obscene.” Rather, it was enough to say that the speech “exceeded permissible limits” and that school authorities were entitled “to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities * * *.” Justice Marshall dissented on the grounds that the school district had failed to demonstrate that Fraser’s remarks were disruptive, and Justice Stevens faulted the district for punishing the use of offensive remarks under a policy stated in terms that failed to provide fair notice of what expressions were prohibited.

Subsequent rulings appeared to turn on still other factors that were thought to be relevant “in light of the special circumstances of the school environment.” Hazelwood School District v. Kuhlmeier (p. 955), decided two years after Fraser, involved the decision by a high-school principal to delete two pages from an issue of the school newspaper because of some controversial articles. The Court upheld the administrator’s action on grounds the expression was connected with a school-sponsored activity and its regulation was “reasonably related to legitimate pedagogical concerns.” In another case, Morse v. Frederick, 551 U.S. —, 127 S.Ct. 2618 (2007), a high-school principal confiscated a banner displayed by some students at a school-sanctioned event—cheering the televised Olympic torch relay as it passed directly in front of the Juneau, Alaska school en route to Salt Lake City, the site of the Olympic Games. The principal regarded the banner, which read “BONG HiTS 4 JESUS,” as endorsing the use of illegal drugs. After one of the students refused to comply with her order to take the banner down, she confiscated it and suspended the student for 10 days. Deterring young people from the use of drugs, the Court said, constituted an important, if not compelling, governmental interest. In this instance, the Court concluded, the principal took appropriate action to cut off student speech that could reasonably be understood as celebrating and promoting illegal drug use. Although the Opinion of the Court was subscribed to by five Justices, two of them—Alito and Kennedy—did so on two conditions: “that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on such issues as ‘the wisdom of the war on drugs or of legalizing marijuana for medical use.’” They also joined the three dissenters in reaffirming “the fundamental principle that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” The dissenters (Justices Stevens, Souter, and Ginsburg) agreed that speech advocating illegal or harmful conduct could be banned, but thought the banner contained “a nonsense message,
Draft Card Burning and the Beginning of Intermediate Scrutiny in the Regulation of “Speech Plus”

Without much doubt, the Court’s most important ruling on the regulation of symbolic speech was its opinion in United States v. O’Brien. Set in the context of the draft card burnings of the 1960s, the case forced the Court to grapple with the complex problem of what test to apply when speech and action become intertwined. The debate over the “clear and present danger” test had been predicated on the assumption that speech and action could be readily distinguished. O’Brien and other symbolic speech cases revealed how simplistic that dichotomy was. While it was agreed that governmental regulation of “pure speech” would be tested by applying strict scrutiny and its regulation of nonexpressive conduct would be evaluated according to its reasonableness, the Court in O’Brien devised a standard of intermediate scrutiny with which to appraise the regulation of conduct that had been engaged in with the goal of communicating a message. Applying a four-part test for situations of this sort, the Court sustained the constitutionality of the draft card destruction amendment challenged in O’Brien. Although there could be little question that the amendment was within the constitutional power of government to enact and that on its face it was a regulation unrelated to the suppression of free expression, how effectively do you think the case was made that the regulation furthered an important governmental interest or that the regulation reached no further than necessary to further the government’s interest? Does the government’s justification here appear to you to rise to the level of anything more than administrative convenience? In other words, do you think the applicable test was met in this case?

UNITED STATES v. O’BRIEN
Supreme Court of the United States, 1968
391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672

BACKGROUND & FACTS As part of a public demonstration against the war in Vietnam, O’Brien and three companions burned their draft cards one March morning in 1966 on the steps of the South Boston courthouse. O’Brien was arrested by FBI agents who were present and readily admitted to burning his Selective Service System registration certificate. He said he did it to publicly influence others to oppose the war. The indictment charged that he “willfully and knowingly did mutilate, destroy, and change by burning* * *[his] Registration Certificate * * * in violation of * * * [50 U.S.C.A. § 462 (b) (3), part of the Universal Military Training and Service Act of 1948].” In 1965, Congress had amended that part of the act under which O’Brien had been charged by adding the following italicized words. Section 462 (b) (3) punishes any person “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate * * *.” At trial, O’Brien argued that the 1965 amendment was unconstitutional because Congress’s purpose in enacting it was to punish the act of draft card burning and thereby curb that form of expression. Although the federal district judge hearing his case rejected this argument, a federal appeals court sided with O’Brien. It concluded that, since conduct under the amendment was covered under the existing statute, the amendment served no valid purpose and must have been “directed at public as distinguished from private not advocacy”; it was nothing more than an attention-getting ploy by some students who “just wanted to get on television.”
Thus, it reasoned, the amendment had been adopted to single out for special treatment men who publicly burned their draft cards. However, the appeals court held that O'Brien could be convicted of the lesser included offense of not having the certificate in his possession, which was punishable under another part of the law. The Supreme Court granted both the government’s and O’Brien’s petitions for certiorari to resolve a conflict in decisions among the circuits.

Mr. Chief Justice WARREN delivered the opinion of the Court.

* * *

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept 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. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. * * * The power of Congress to classify and conscript manpower for military service is "beyond question." * * * Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. * * *

[Chief Justice WARREN then reviewed extensively how particular items of information contained on the card, such as classification, address of the local board, and continual reminders about the necessity of notifying the local board of changes in circumstances that might alter the registrant's classification, contributed to the effective functioning of the draft system.]

* * *

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that
functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. * * * The 1965 Amendment prohibits such conduct and does nothing more. * * *

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. * * *

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444 (1936), and Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. * * * In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation" * * * —abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. * * * It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional "purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. * * * While both reports make clear a concern with the "defiant" destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

Since the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction.
entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.

* * *

Mr. Justice MARSHALL took no part in the consideration or decision of these cases.

Mr. Justice DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.' " This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. * * * [T]his Court has never ruled on the question. It is time that we made a ruling. This case should be put down for reargument and heard with Holmes v. United States and with Hart v. United States, 390 U.S. 956, 88 S.Ct. 1851 (1968), in which the Court today denies certiorari.

* * *

Flag Burning and Nude Dancing: Whether to Apply the O'Brien Test

Subsequent cases ask whether the O'Brien test should be applied and, if so, whether its elements have been satisfied. Since the O'Brien test is not applicable unless "'speech' and 'nonspeech' elements are combined in the same course of conduct," the Court has engaged in a prefatory inquiry to establish whether in a given case this is so. As established in Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727 (1974), two prerequisites must be satisfied—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." If this initial hurdle has been cleared, the Court goes on to apply the four-part O'Brien test; if not, the governmental regulation is tested by applying the standard of reasonableness.

In Texas v. Johnson, one of its most controversial symbolic speech cases ever, the Court—by a bare majority—struck down a state law punishing flag burning. Note that Justice Brennan, speaking for the Court in Johnson, did not apply O'Brien, but instead found Barnette to be the controlling precedent. Although the Court had little difficulty finding that the Spence pretest had been cleared, O'Brien's requirement that "the governmental interest [be] unrelated to the suppression of free expression" could not be satisfied. Since the only relevant ground upon which the Texas statute rested was the state's interest in furthering respect for the flag as a symbol, it not only implicated free expression, but also imposed an orthodoxy in that expression by punishing those who failed to show the respect commanded. Aside from efforts by the dissenter to inject patriotism into the discussion, what counterarguments do they have to offer? Is it sufficient to assert that the flag is simply "different" from other symbols?

* * *

TEXAS v. JOHNSON

Supreme Court of the United States, 1989

491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342

BACKGROUND & FACTS During the 1984 Republican National Convention in Dallas, Gregory Johnson participated in political demonstrations to
protest policies of the Reagan administration. After a march through city streets, he burned an American flag while the protesters chanted. No one was physically injured or threatened with injury, although several bystanders were quite offended by the flag burning. Johnson was subsequently convicted of intentionally desecrating a venerated object (defined by statute to include “a public monument,” “a place of worship or burial,” or “a national or state flag”), a misdemeanor under Texas law. An intermediate state appellate court affirmed the conviction, but this judgment was reversed by a divided vote of the Texas Court of Criminal Appeals, which held that flag burning was expressive behavior protected by the First Amendment. In response to the state’s petition, the U.S. Supreme Court granted certiorari.

Justice BRENNAN delivered the opinion of the Court.

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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, 418 U.S. 405, 409–411, 94 S.Ct. 2727, 2729–30 (1974). 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, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679 (1968) ***. 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. * * * 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. * * * 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. * * * ***

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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.” 418 U.S., at 410–411, 94 S.Ct., at 2730. Hence, we have recognized the expressive nature of students’ wearing of black armbands, * * * of a sit-in by blacks in a “whites only” area, * * * and of picketing * * *.

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, supra, at 409–410, 94 S.Ct., at 2729–30; saluting the flag, West Virginia State Board of Education v. Barnette, 319 U.S., at 632, 63 S.Ct., at 1182; and displaying a red flag, Stromberg v. California, 283 U.S. 359, 368–369, 51 S.Ct. 532, 535–36 (1931), we have held, all may find shelter under the First Amendment. * * *

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*** Johnson burned an American flag as part * * of a political demonstration * * *.

In these circumstances, Johnson’s burning of the flag was conduct “sufficiently imbued with elements of communication,” Spence, 418 U.S., at 409, 94 S.Ct., at 2730, to implicate the First Amendment.

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. * * * It may not, however, proscribe particular conduct because it has expressive elements. * * * A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.” * * * It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.
Although we have recognized that where "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms, we have limited the applicability of O'Brien's relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression.

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896 (1949).

Thus, 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, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829 (1969). 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." Chaplin v. New Hampshire, 315 U.S. 568, 574, 62 S.Ct. 766, 770 (1942). 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.

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. [In fact, Texas already has a statute specifically prohibiting breaches of the peace, which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.]

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

* * * Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. * * *
Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.” If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag “when it is in such condition that it is no longer a fitting emblem for display,” 36 U.S.C. § 176(k), and Texas has no quarrel with this means of disposal. * * * The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much * * *

Whether Johnson’s treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. * * *

* * * We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.” * * *

* * * The State’s claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. * * * According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag’s referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

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. * * *

* * * In Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. * * * Nor may the Government, as we held in Burstette, compel conduct that would evince respect for the flag. * * *

* * * 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—* * * [w]e 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.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. * * *

* * * To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. * * *

There is * * * 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 way to preserve the flag’s special role is not to punish those who feel differently
about these matters. It is to persuade them that they are wrong. * * * And, precisely because it is our flag that is involved, one's response to the flagburner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flagburner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by— as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

* * * The judgment of the Texas Court of Criminal Appeals is therefore Affirmed.

Justice KENNEDY, concurring.

* * * I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

* * * Chief Justice REHNQUIST, with whom Justice WHITE and Justice O'CONNOR join, dissenting.

* * * The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

* * * The Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. * * * In Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942), a unanimous Court * * * upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place.” * * * Chaplinsky had told a local Marshal, “You are a God damned racketeer” and a “damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.” * * *

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publically burn other symbols of the Government or effigies of political leaders. * * * Johnson's public burning of the flag[,] * * * like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. * * * * * * The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his
deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. * * * It was Johnson’s use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

* * * The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

Justice STEVENS, dissenting.

* * * Sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag* * *—be employed.

* * * The content of respondent’s message has no relevance whatsoever to the case. The concept of “desecration” does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. * * * The case has nothing to do with “disagreeable ideas” * * *. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

* * * Respondent was prosecuted because of the method he chose to express his dissatisfaction with * * * [the policies of this country]. Had he chosen to spray paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

In the face of the Court’s ruling in Texas v. Johnson, Congress replaced the existing federal flag-burning statute, 18 U.S.C.A. § 700(a), which prohibited anyone from “knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it,” with a new version, contained in the Flag Protection Act of 1989, 103 Stat. 777, which imposed a fine and/or up to a year’s imprisonment on anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States * * *.” In United States v. Eichman, 496 U.S. 310, 110 S.Ct. 2404 (1990), the Supreme Court declared the new federal flag-burning statute unconstitutional for the same reasons and with the same line-up as in Johnson.

In the years that have passed since then, votes on a proposed Flag Desecration Amendment have become a staple of symbolic politics in America. Typically, the resolution has read: “The Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States.” Between 1994 and 2005 the proposed amendment repeatedly passed the House but routinely failed in the Senate. On its last try (in June 2005), the measure passed the House by a vote of 286–130, but failed to secure the
required a two-thirds majority in the Senate by a single vote, 66–34. The change in party control of Congress as a result of the 2006 election would appear to make further action improbable, at least in the near future.

As critics of the proposed amendment have pointed out, neither the term “flag” nor the term “desecration” is defined. Aside from burning the flag in protest, it was not at all clear whether the flag would be considered desecrated if someone sewed an American flag to the seat of his pants or affixed a peace sign or other symbol to the flag with masking tape—circumstances actually presented in Smith v. Goguen and Spence v. Washington. In one of the House debates on the measure, Rep. Gary Ackerman (D-N.Y.) asked: “How about flag socks? Do you violate the flag when you make them? When you buy them? When you wear them? Does it matter if your feet are clean or dirty? And what happens if different states have different statutes?” New York Times, June 29, 1995, pp. A1, A9.

However, the Court did apply the O’Brien test in Barnes v. Glen Theatre, 501 U.S. 560, 111 S.Ct. 2456 (1991). In that case, the Glen Theatre and the Kitty Kat Lounge brought suit against the local prosecutor to enjoin the enforcement of an Indiana statute that prohibited public nudity. Both establishments featured live nude female dancing. In the case of the Glen Theatre, patrons could see the dancers through glass panels for a limited time after inserting coins into a timing mechanism; at the Kitty Kay Lounge, which also served alcoholic beverages, there was live nude go-go dancing. Both establishments argued that the effect of the statute, which was to ban nude dancing, violated the First Amendment. Speaking for a 5–4 majority, Chief Justice Rehnquist conceded that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though * * * only marginally so.” He reasoned that the statute at issue here survived analysis under the first two parts of the O’Brien test because its enactment stemmed from the traditional police power of the states (to protect the public health, safety, welfare, and morals), and the prohibition of “public indecency * * * furthers a substantial governmental interest in protecting order and morality.” Moreover, this interest was “unrelated to the suppression of free expression.” While it might be argued that almost any kind of conduct could be redefined as a form of expression, such a limitless view had already been rejected by the Court in O’Brien. Emphasizing the distinction between speech and conduct, Rehnquist explained that the statute punished being nude in public, not nude dancing. The proscription on nudity, therefore, was not aimed at suppressing communication but had only an incidental effect on expression. The difference was between “a scant amount of clothing” and none at all, not dancing versus no-dancing. Finally, with more than a little humor, the Chief Justice pointed out that the statute survived the fourth part of the O’Brien test because it was in the exact sense of the term “narrowly tailored”: “[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.” It was, he said, “the bare minimum necessary to achieve the state’s purpose.”

Justice Scalia, concurring in the judgment, was of view that the Indiana law should be upheld “not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all.” In that sense, he argued, it was no different than laws that prohibit, among other things, cockfighting, prostitution, suicide, bestiality, and drug use. Although there might be differences of opinion over whether any of these ought to be criminalized, he argued, “there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate ‘morality.’ ” Justice Souter, on the other hand, agreed with the outcome but rested his concurrence “not on the possible sufficiency of society’s moral views
* * * but on the State’s substantial interest in combating the secondary effects of adult entertainment establishments[—] * * * in preventing prostitution, sexual assault, and other criminal activities."

Writing in dissent, Justice White (who also spoke for Justices Marshall, Blackmun, and Stevens) began from the premise that application of the statute to nude dancing was not like “forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places” because “protect[ing] others from offense” is not the purpose being served where “the viewers are exclusively consenting adults who pay money to see these dances.” The purpose of applying the statute to ban nude dancing in theaters and barrooms was instead “to protect the viewers from what the State believes is the harmful message that nude dancing communicates.” The O’Brien test, Justice White reasoned, was therefore not the correct test to apply because the regulation was primarily aimed at content and its effect on expression could not be said to be incidental. The assertion that the state was regulating conduct, not speech, White found “transparently erroneous.” He wrote:

Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot be neatly pigeonholed as mere “conduct” independent of any expressive component of the dance.

“That fact,” he concluded, “dictates the level of First Amendment protection to be accorded the performances at issue here.” And that level was not the one in the O’Brien test—much less was it Justice Scalia’s rational basis test. It was strict scrutiny. For the dissenters, the controlling precedent was Texas v. Johnson because here, as there, “violate[on] * * * [of the] law depended on the likely communicative impact of his expressive conduct * * *.” There was, in the dissenters’ view, no way this statute could clear that high hurdle.

Cross Burning and Hate Speech

The cross burning in the following case, R.A.V. v. City of St. Paul, could have been prosecuted under other applicable state law, but the teenager was charged with delinquency and convicted under a municipal ordinance that specifically punished hate speech based on race, creed, religion, or gender. There is no question that burning a cross is symbolic speech, although the manner in which it was done by R.A.V. raises a concern about public safety in addition to the state’s interest in quashing expression offensive to minorities and women. Although the Court invalidated the ordinance by a unanimous vote, the case occasioned a provocative debate among Justices Scalia, White, and Stevens. Justice Scalia argued that the St. Paul ordinance constituted an effort by government to favor one side in debate and thus amounted to censorship based on a point of view. Although government unquestionably had the power to ban “fighting words,” he explained, government could not pick and choose among them based on their target. Justice White reasoned that, if government could ban an entire category of speech, such as “fighting words,” it could certainly impose additional punishment for the use of certain expressions falling within that category.

Justice Stevens, agreeing with Justice White that the problem with the St. Paul ordinance was its overbreadth, nevertheless disagreed that the creation of absolute categories in First Amendment law gets us very far at all. Indeed, whether something was a
“fighting word” would depend on how it was said and whether it was said with a smile. Arguing that context is everything in judging the constitutional permissibility of free speech, Stevens reasoned that the Court’s decisions simply alert the judge to various factors that ought to be taken into account: whether the expression occurs in a traditional public forum, a designated public forum, or a nonpublic forum; whether the expression is spoken, written, pictorial, or symbolic; whether it is political speech at the core of the First Amendment or something more like commercial advertising; and the like. Justice Stevens’s criticisms of rigidity in classifying speech are clear enough, but if everything is a matter of context—even if Court decisions have supplied a catalog of relevant factors to consider—would speakers be able to develop any settled expectations of their rights and obligations? If it is impossible to spell out clear rules in advance because everything is relative, wouldn’t judicial decisions based on a limitless variety of contexts necessarily be ex post facto?

R.A.V. v. City of St. Paul
Supreme Court of the United States, 1992
505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305

BACKGROUND & FACTS R.A.V. and several other teenagers constructed a cross out of broken chair legs and then burned it inside the fenced yard of an African-American family. Although this conduct was punishable under several state statutes, R.A.V. was charged with delinquency under a St. Paul city ordinance that punished hate crimes. According to the city’s Bias-Motivated Crime Ordinance: “Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

R.A.V. moved to dismiss the hate-crimes charge on grounds that the ordinance was substantially overbroad and content-based in violation of the First Amendment. The trial court granted the motion, but was reversed on appeal by the Minnesota Supreme Court. The state high court dealt with the overbreadth challenge by defining the ordinance to cover only expressive activity that amounts to “fighting words,” that is, “conduct that itself inflicts injury or tends to incite immediate violence * * *.” The state supreme court also concluded that the ordinance was not impermissibly content-based because it was “a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” R.A.V. then petitioned the U.S. Supreme Court to grant certiorari.

Justice SCALIA delivered the opinion of the Court.

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[The exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is * * * a mode of speech” * * *; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. * * * * * *]

***

When the basis for the content discrimination consists entirely of the very reason
the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. * * *

And the Federal Government can criminalize only those threats of violence that are directed against the President, * * * but the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. * * *

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. * * *

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." * * *

* * *

* * * St. Paul has not * * * selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort * * * [makes it a certainty] that the city is seeking to handicap the expression of particular ideas. * * *

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. * * *

* * *

* * * St. Paul and its amici * * * assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. * * * The dispositive question in this case * * * is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. * * *

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such
behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BLACKMUN and Justice O’CONNOR join, and with whom Justice STEVENS joins except as to Part I(A), concurring in the judgment.

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I

A

*** It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, * * * but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

*** Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. * * * Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. * * *

***

II

[However,] [t]he St. Paul ordinance is unconstitutional * * * on overbreadth grounds.

*** Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment.

***

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in Chaplinsky—words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” * * *

However, the Minnesota court was far from clear in identifying the “injur[ies]” inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized * * * that “the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.” * * * I therefore understand the court to have ruled that St. Paul may constitutionally prohibit expression that “by its very utterance” causes “anger, alarm or resentment.” * * *

*** Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. * * *

The ordinance is therefore fatally overbroad and invalid on its face.

*** Justice STEVENS, with whom Justice WHITE and Justice BLACKMUN join as to Part I, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.
The Court today * * * applies the prohibition on content-based regulation to speech that the Court had until today considered wholly "unprotected" by the First Amendment—namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and non-obscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the same sort of protection afforded core political speech. Yet in ruling that proscribable speech cannot be regulated based on subject matter, the Court does just that. Perversely, this gives fighting words greater protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender" while leaving unregulated fighting words based on "union membership or homosexuality."

* * * The Court today turns First Amendment law on its head * * *. * * *

* * * St. Paul has determined * * * that fighting-word injuries "based on race, color, creed, religion or gender" are qualitatively different and more severe than fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target ("certain persons or groups") or the basis of the harm (injuries "based on race, color, creed, religion or gender") makes no constitutional difference: what matters is whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction.

In sum, the central premise of the Court's ruling—that "[c]ontent-based regulations are presumptively invalid"—has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. * * *

II

Although I agree with much of Justice WHITE's analysis, I do not join Part I-A of his opinion because I have reservations about the "categorical approach" to the First Amendment. * * *

Admittedly, the categorical approach to the First Amendment has some appeal: either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unchanging, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of "obscenity," * * * and "public forum," * * * illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of context. The meaning of any expression and the legitimacy of its regulation can only be determined in context. Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and
its audience. * * * The categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment.

* * *

III

* * * Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice WHITE, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. * * *

* * *

* * * Whatever the allure of absolute doctrines, it is just too simple to declare expression “protected” or “unprotected” or to proclaim a regulation “content-based” or “content-neutral.”

In applying this analysis to the St. Paul ordinance, I assume arguendo—as the Court does—that the ordinance regulates only fighting words and therefore is not overbroad. Looking to the content and character of the regulated activity, two things are clear. First, by hypothesis the ordinance bars only low-value speech, namely, fighting words. * * * Second, the ordinance regulates “expressive conduct [rather] than * * * the written or spoken word.” * * *

Looking to the context of the regulated activity, it is again significant that the statute (by hypothesis) regulates only fighting words. Whether words are fighting words is determined in part by their context. Fighting words are not words that merely cause offense; fighting words must be directed at individuals so as to “by their very utterance inflict injury.” By hypothesis, then, the St. Paul ordinance restricts speech in confrontational and potentially violent situations. The case at hand is illustrative. The cross-burning in this case—directed as it was to a single African-American family trapped in their home—was nothing more than a crude form of physical intimidation. That this cross-burning sends a message of racial hostility does not automatically endow it with complete constitutional protection.

Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm the speech causes. In this regard, the Court fundamentally misreads the St. Paul ordinance. * * *

* * *

[It is noteworthy that the St. Paul ordinance is, as construed by the Court today, quite narrow. The St. Paul ordinance does not ban all “hate speech,” nor does it ban, say, all cross-burnings or all swastika displays. Rather it only bans a subcategory of the already narrow category of fighting words. Such a limited ordinance leaves open and protected a vast range of expression on the subjects of racial, religious, and gender equality. * * * Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to “by its very [execution] inflict injury.” Such a limited proscription scarcely offends the First Amendment.

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.
Although the Court in R.A.V. was deeply split over whether hate speech could be singled out for heavier punishment, it had no difficulty the following year concluding that there was no constitutional impediment to enhancing the punishment for hate crimes. In Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194 (1993), the Court unanimously upheld a state law that enhanced the punishment if the defendant convicted of an offense had selected the victim on the basis of race, religion, or other protected status. In the instant case, after a group of black men and boys had discussed a scene from the film Mississippi Burning, in which a white man beat a young black boy who was praying, the defendant asked if the members of the group “fe[l]t hyped up to move on some white people.” Shortly thereafter, they spotted a young white boy walking on the opposite side of the street. As the boy drew nearer, Mitchell said, “There goes a white boy; go get him.” The group ran toward the boy, beat him so severely he was in a coma for days, and stole his tennis shoes. Mitchell was convicted of aggravated battery, an offense that usually carried a maximum sentence of two years. Because the jury found that he had selected his victim on the basis of race, the maximum penalty was increased to seven years. The trial judge then sentenced Mitchell to four years.

The Supreme Court, speaking through Chief Justice Rehnquist, distinguished Mitchell from R.A.V. on the ground that, whereas the ordinance struck down in R.A.V. was explicitly directed at expression, the statute in Mitchell was aimed at conduct unprotected by the First Amendment. Although the Wisconsin statute enhanced the maximum penalty for conduct motivated by a discriminatory point of view, it did not do so because the defendant’s abstract beliefs were thought to be offensive; rather, it punished a criminal act specifically animated by minority- or gender-based hate because “bias-inspired conduct * * * is thought to inflict greater individual and social harm. For example, * * * bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”

To the majority in R.A.V., it was the “political correctness” of the ordinance that ran afoul of the First Amendment—the prohibition on certain forms of symbolic speech. To the four concurring Justices, it was the possibility of conviction because the speaker had used symbols that merely caused offense or resentment by women and particular minorities. But what if a law prohibited cross-burning because the speaker had the intent to intimidate and setting the cross afire put the victim in fear of bodily harm? Would this constitute conduct punishable under Brandenburg as “advocacy directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action”? Or would the fact that the law dealt only with cross-burning still render it constitutionally vulnerable, whatever the speaker’s intent?

In Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536 (2003), the Court held that government could specifically punish cross-burning with the intent to intimidate. Indeed, the state law in question would have been sustained, except that it contained a provision that the “burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” In other words, the statute provided that the burning of a cross itself was sufficient for conviction unless rebutted by other evidence.

25. Although Wisconsin v. Mitchell made it clear that enhancing the punishment of an offense because it was motivated by race hate did not infringe the First Amendment, the Court subsequently ruled that a statute simply allowing the judge to tack on additional jail time for an ordinary crime, if he found by the greater weight of the evidence that it was motivated by race hate, violated the defendant’s Sixth Amendment right to trial by jury, applicable to the states through the Due Process Clause of the Fourteenth Amendment. Speaking for a 5–4 majority in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), Justice Stevens concluded that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”
Speaking for Chief Justice Rehnquist and Justices Stevens and Breyer, Justice O’Connor explained: “[T]he prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. * * * [I]t permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.” Because of this, the statute had a chilling effect on core speech protected by the First Amendment. On the other hand, Justice Souter, speaking also for Justices Kennedy and Ginsburg, concluded (as had a bare majority of the Virginia Supreme Court) that this statute was indistinguishable from the ordinance invalidated in R.A.V.: both specifically singled out cross burning for punishment, censoring expression based on its content, and thus were unconstitutional.

D. CAMPAIGN FINANCE REFORM, CORPORATE SPEECH, AND PARTY PATRONAGE

Probably the most important constitutional legacy of the Warren Court was its acceptance of the preferred freedoms approach in cases where governmental action directly abridged fundamental rights. To this day, strict scrutiny of statutes facially abridging pure speech is still the norm, although, as the two preceding sections of this chapter have shown, reasonableness and intermediate scrutiny are postures the Court has struck in cases dealing with time, place, and manner limitations and symbolic speech, respectively.

Recall that strict scrutiny initially rested on the assumption that fundamental rights enjoyed that status because of their importance to the democratic process. In the beginning, to be sure, the Court’s interest in this approach lay in its appreciation of the value of such rights as free speech to politically powerless minorities. Beginning in the mid-1970s, however, this democratic-process justification was also invoked by the Burger Court to support several decisions that upheld expressive activities of corporations and the wealthy against government regulation.

Campaign Finance Reform

The Burger Court’s application of the rights of speech and association had a devastating impact on post-Watergate campaign finance reform. Despite the concern of governments at all levels over the influence of “big money” on the political process, the Court felt impelled to strictly scrutinize limitations on campaign contributions and expenditures. The Court’s disposition of Buckley v. Valeo, (p. 889), a complex case that consumed nearly 300 pages of the U.S. Reports and involved more than half a dozen different provisions of the Federal Election Campaign Act, stands as a prime example. On what basis does the majority sustain the law’s limitations on contributions, but declare unconstitutional various provisions regulating campaign spending? Are Buckley and Federal Election Commission v. National Conservative Political Action Committee (p. 896) really free speech cases? Would you agree that concerns about corruption or the appearance of corruption are the only valid interests government can take into account?
BACKGROUND & FACTS

Senator James Buckley, former Senator Eugene McCarthy, and others brought suit against Francis Valeo, the Secretary of the United States Senate, the Clerk of the House of Representatives, and others, challenging the constitutionality of the Federal Election Campaign Act of 1971, as amended. The Act, characterized by a federal appeals court as “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress,” contained the following provisions:

1. the Act limited political contributions by individuals and groups to $1,000 each and by political committees to $5,000 each for any single candidate in any one election, with an annual limit of $25,000 on any individual contributor;
2. the Act restricted independent spending by an individual or a group “relative to a clearly identified candidate” to $1,000 each per election;
3. the Act set limits, which vary with the office, on personal contributions by both the candidate himself and his family toward his campaign;
4. the Act established a ceiling on overall primary and general election expenditures by a candidate in any one election according to the office sought;
5. the Act required political committees to keep detailed contribution and expenditure records, publicly disclosing the identity of the contributors and the nature of the expenditures above a certain level;
6. the Act created an eight-member commission to oversee enforcement of the regulations: two to be appointed by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House, all to be confirmed by both Houses of Congress, and the Secretary of the Senate and Clerk of the House to be ex officio members; and
7. the Act amended the Internal Revenue Code to provide for some financing of primary and general election campaigns from public funds: Major party candidates were to receive “full” funding, and “minor” and “new” party candidates were to receive a reduced proportion of funding (the funding to be on a dollar-matching basis).

Buckley and the other plaintiffs sought declaratory and injunctive relief, alleging mostly that the Act violated the First Amendment, the Fifth Amendment, and Article II, section 2, clause 2, the constitutional provision governing appointment to federal office. The U.S. Court of Appeals for the District of Columbia Circuit upheld nearly all of the Act’s provisions, and the plaintiffs appealed.

PER CURIAM.

I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

B. Contribution Limitations

United States v. Heffernan

The primary First Amendment problem raised by the Act’s contribution limitations is their restriction of one aspect of the contributor’s freedom of political association. The Court’s decisions involving associational freedoms establish that the right of association is a “basic constitutional
freedom” that is “closely allied to freedom of free speech and a right which, like free speech, lies at the foundation of a free society.” * * * In view of the fundamental nature of the right to associate, governmental “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” * * * Yet, it is clear that “[n]either the right to associate nor the right to participate in political activities is absolute.” United States Civil Service Comm’n v. National Association of Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 2891 (1973). Even a “‘significant interference’ with protected rights of political association” may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. * * * Appellees argue that the Act’s restrictions on large campaign contributions are justified by three governmental interests. According to the parties and amici, the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office. Two “ancillary” interests underlying the Act are also allegedly furthered by the $1,000 limits on contributions. First, the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.

It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. * * *

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. * * * Congress could legitimately conclude that the avoidance of the appearance of improper influence “is also critical * * * if confidence in the system of representative Government is not to be eroded to a disastrous extent.” * * *

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly-drawn disclosure requirements constitute a less restrictive means of dealing with “proven and suspected quid pro quo arrangements.” But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.
The Act’s $1,000 contribution limitation focuses precisely on the problem of large campaign contributions * * * while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act’s contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

***

C. Expenditure Limitations

1. The $1,000 Limitation on Expenditures “Relative to a Clearly Identified Candidate.” Section 608(e)(1) provides that “[n]o person may make any expenditure * * * relative to a clearly identified candidate during a calendar year which, when added to all other expenditures * * * advocating the election or defeat of such candidate, exceeds $1,000.” The plain effect of § 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views “relative to a clearly identified candidate” through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement “relative to a clearly identified candidate” in a major metropolitan newspaper.

Before examining the interests advanced in support of § 608(e)(1)’s expenditure ceiling, consideration must be given to appellants’ contention that the provision is unconstitutionally vague. Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. * * * The test is whether the language of § 608(e)(1) affords the “precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.” NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 340.

The key operative language of the provision limits “any expenditure * * * relative to a clearly identified candidate.” Although “expenditure,” “clearly identified,” and “candidate” are defined in the Act, there is no definition clarifying what expenditures are “relative to” a candidate. The use of so indefinite a phrase as “relative to” a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation.

The section prohibits “any expenditure * * * relative to a clearly identified candidate during a calendar year which, when added to all other expenditures * * * advocating the election or defeat of such candidate, exceeds $1,000.” (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase “relative to” a candidate to be read to mean “advocating the election or defeat of” a candidate.

But while such a construction of § 608(e)(1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. * * * For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates...
campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. In an analogous context, this Court in *Thomas v. Collins* observed:

“Whether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

“Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.” 323 U.S. 516, 535, 65 S.Ct. 315, 325 (1945).

The constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of “clearly identified” in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication. **We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.**

**The markedly greater burden on basic freedoms caused by § 608(e)(1)** cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of § 608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)’s ceiling on independent expenditures. First, assuming *arguendo* that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations’ total ban on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation’s effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.

Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. **While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression.**
for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and "'to assure un­fettered interchange of ideas for the bringing about of political and social changes desired by the people.' "* * * The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.* * *

The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in § 608(e)(1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, no less than any other person has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. * * * Section 608(a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate's expenditure of his own personal funds.* * * Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for § 608(e)(1)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate* * * [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that* * restrictions on a candidate's personal expenditures is unconstitutional.* * *

In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate,* * * a $5,000 limitation on contributions by a political committee to a single candidate,* * * and a $25,000 limitation on total contributions by an individual during any calendar year* * * are constitutionally valid. These limitations along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus
serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.

CONCLUSION

We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm. Finally, we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by “Officer of the United States,” appointed in conformity with Art. II, § 2, cl. 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted.

Mr. Justice STEVENS took no part in the consideration or decision of these cases.

Mr. Chief Justice BURGER, concurring in part and dissenting in part.

I dissent from those parts of the Court’s holding sustaining the Act’s provisions (a) for disclosure of small contributions, (b) for limitations on contributions, and (c) for public financing of Presidential campaigns. In my view, the Act’s disclosure scheme is impermissibly broad and violative of the First Amendment as it relates to reporting $10 and $100 contributions. The contribution limitations infringe on First Amendment liberties and suffer from the same infirmities that the Court correctly sees in the expenditure ceilings. The Act’s system for public financing of Presidential campaigns is, in my judgment, an impermissible intrusion by the Government into the traditionally private political process.

More broadly, the Court’s result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts. Congress intended to regulate all aspects of federal campaign finances, but what remains after today’s holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

I doubt that the Court would tolerate for an instant a limitation on contributions to a church or other religious cause; however grave an “evil” Congress thought the limits would cure, limits on religious expenditures would most certainly fall as well. To limit either contributions or expenditures as to churches would plainly restrict “the free exercise” of religion. In my view Congress can no more ration political expression than it can ration religious expression; and limits on political or religious contributions and expenditures effectively curb expression in both areas. There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: freedom is hazardous, but some restraints are worse.

Mr. Justice WHITE, concurring in part and dissenting in part.

Since the contribution and expenditure limitations are neutral as to the content of speech and are not motivated by fear of the consequences of the political speech of particular candidates or of political speech in general, this case depends on whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters.

Despite its seeming struggle with the standard by which to judge this case, this is essentially the question the Court asks and answers in the affirmative with respect to the limitations on contributions which individuals and political committees are permitted to make to federal candidates. In the interest of preventing undue influence...
that large contributors would have or that the public might think they would have, the Court upholds the provision that an individual may not give to a candidate, or spend on his behalf if requested or authorized by the candidate to do so, more than $1,000 in any one election. This limitation is valid although it imposes a low ceiling on what individuals may deem to be their most effective means of supporting or speaking on behalf of the candidate—i.e., financial support given directly to the candidate. The Court thus accepts the congressional judgment that the evils of unlimited contributions are sufficiently threatening to warrant restriction regardless of the impact of the limits on the contributor’s opportunity for effective speech and in turn on the total volume of the candidate’s political communications by reason of his inability to accept large sums from those willing to give.

The congressional judgment, which I would also accept, was that other steps must be taken to counter the corrosive effects of money in federal election campaigns. One of these steps * * * limits what a contributor may independently spend in support or denigration of one running for federal office. Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this Bill and the President who signed it. Those supporting the Bill undeniably included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation. No more than $1,000 may be given to a candidate or spent at his request or with his approval or cooperation; but otherwise, apparently, a contributor is to be constitutionally protected in spending unlimited amounts of money in support of his chosen candidate or candidates.

Let us suppose that each of two brothers spends one million dollars on TV spot announcements that he has individually prepared and in which he appears, urging the election of the same named candidate in identical words. One brother has sought and obtained the approval of the candidate; the other has not. The former may validly be prosecuted under § 608(e); under the Court’s view, the latter may not, even though the candidate could scarcely help knowing about and appreciating the expensive favor. For constitutional purposes it is difficult to see the difference between the two situations. I would take the word of those who know—that limiting independent expenditures is essential to prevent transparent and widespread evasion of the contribution limits.

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Mr. Justice REHNQUIST, concurring in part and dissenting in part.

***

The limits imposed by the First and Fourteenth Amendments on governmental action may vary in their stringency depending on the capacity in which the Government is acting. The Government as proprietor, Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242 (1966), is, I believe, permitted to affect * * * protected interests in a manner * * * if it might not * * * [choose] if simply prescribing conduct across the board. Similarly, the Government as employer * * * may prescribe conditions of employment which might be constitutionally unacceptable if enacted into standards of conduct made applicable to the entire citizenry.

* * * I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the “general principle” of free speech * * *

Given this view, cases which deal with state restrictions on First Amendment freedoms are
not fungible with those which deal with restrictions imposed by the Federal Government, and cases which deal with the Government as employer or proprietor are not fungible with those which deal with the Government as a lawmaker enacting criminal statutes applying to the population generally. The statute before us was enacted by Congress, not with the aim of managing the Government’s property nor of regulating the conditions of Government employment, but rather with a view to the regulation of the citizenry as a whole. The case for me, then, presents the First Amendment interests of the appellants at their strongest, and the legislative authority of Congress in the position where it is most vulnerable to First Amendment attacks.

While this approach undoubtedly differs from some of the underlying assumptions in the opinion of the Court, opinions are written not to explore abstract propositions of law but to decide concrete cases. I therefore join in all of the Court’s opinion except [that part] which sustains * * * the disparities found in the congressional plan for financing general Presidential elections between the two major parties, on the one hand and minor parties and candidacies on the other.

* * *

[The opinions of Justices MARSHALL and BLACKMUN, concurring in part and dissenting in part, are omitted.]

NOTE—THE NCPAC CASE

In Federal Election Commission v. National Conservative Political Action Committee (NCPAC), 470 U.S. 480, 105 S.Ct. 1459 (1985), the Supreme Court addressed the constitutionality of that provision of the Presidential Election Campaign Fund Act, 26 U.S.C.A. § 9012(4), making it a criminal offense for an “independent political committee” to spend more than $1,000 to further the election of a presidential candidate receiving public financing. Speaking for the Court, Justice Rehnquist began by declaring that freedom of association was directly implicated and that “the expenditures at issue in this case produce speech at the core of the First Amendment.” Relying on the Court’s decisions in Buckley and Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 102 S.Ct. 434 (1981), he asserted that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” He went on to explain: “In Buckley we struck down the FECA’s [Federal Election Campaign Act’s] limitation on individuals’ independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find § 9012(4)’s limitation on independent expenditures by political committees to be constitutionally infirm.” If “dollars for political favors” is the problem, then § 9012(4) is fatally overbroad because what is prohibited here “is not contributions to the candidate, but independent expenditures in support of the candidate.” Since “the contributions are by definition not coordinated with the campaign of the candidate,” it would be difficult to understand what threat of “corruption” could be said to exist. Justice Rehnquist continued:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in Buckley, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in Buckley, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby
alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Nor, in the Court’s view, could the overbreadth of the statute be avoided by some limiting construction of the law because Congress expressly intended to prohibit political expenditures in excess of $1,000 by all PACs, whether large or small, and because any statutory construction distinguishing between large and small PACs essentially would be an arbitrary exercise.

Justice White entered a vigorous dissent in which he also spoke in part for Justices Brennan and Marshall. He began by reaffirming his view in Buckley that “[t]he First Amendment protects the right to speak, not the right to spend * * *.” Although he agreed “the expenditures in this case ‘produce’ core First Amendment speech,” he argued that “they are not speech itself.” Since he could “not accept the identification of speech with its antecedents,” Justice White believed that “[t]he burden on actual speech” imposed by spending limitations was “minimal and indirect.” Given that the restriction was viewpoint-neutral and not hostile to speech itself, Justice White argued that the legislative judgment as to how best to protect the integrity and fairness of the electoral process should not be second-guessed by the Court, and he itemized once again “the legitimate and substantial purposes served by such limitations on campaign finance: ‘eliminate the danger of corruption, maintain public confidence in the integrity of federal elections, equalize the resources available to the candidates, and hold the overall amount of money devoted to political campaigning down to a reasonable level.’” Moreover, Justice White was not persuaded by the majority’s characterization of PAC expenditures as independent and not coordinated with the candidate’s campaign. Observing that “PACs do not operate in an anonymous vacuum,” he asserted that such a portrayal “blinks political reality.” Said Justice White:

That the PACs’ expenditures are not formally “coordinated” is too slender a reed on which to distinguish them from actual contributions to the campaign. The candidate cannot help but know of the extensive efforts “independently” undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated.

But even if he could accept Buckley “as binding precedent,” Justice White maintained he could still distinguish the present case from it. Buckley drew a line between expenditures and contributions and held that limitations on expenditures were to be considered direct restraints on political advocacy. But, argued Justice White, this was not an expenditures case, as the Court asserted; it was a contributions case, and strict scrutiny was not appropriate. Furthermore, the present case was also made different by the presence of a program for the public financing of campaigns, and, thus, “§ 9012(f) is supported by governmental interests absent in Buckley.” In his view, the presence of a public financing scheme accentuated legitimate concern about “the danger of real or perceived corruption posed by independent expenditures” and the public interest “in holding down the overall cost of political campaigns.” Finally, Justice White lamented the result imposed on the political system by the Court’s decision:

By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork. As the Chief Justice pointed out with regard to the similar outcome in Buckley, “[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.” * * * Without § 9012(f), presidential candidates enjoy extensive public financing while those who would otherwise have worked for or contributed to a campaign had there been no such funding will pursue the same ends through “independent” expenditures. The result is that the same old system remains essentially intact, but that much more money is being spent. In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds. * * **
Buckley and succeeding cases have held unconstitutional provisions of the Federal Election Campaign Act of 1971 (FECA) that limited the right of individuals and political action committees (PACs) to make “independent” contributions not coordinated with a candidate or his or her campaign. However, FECA provisions have been upheld that imposed contribution limits both when an individual or PAC gave money directly to the candidate and when they contributed indirectly by making expenditures that they coordinated with the candidate.

In Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897 (2000), the Supreme Court declined to reexamine—much less overrule—Buckley. In Shrink Missouri Government PAC, a federal appellate court had struck down Missouri’s limits on contributions to state political campaigns that were virtually identical to those upheld in Buckley. The Supreme Court reaffirmed the application of heightened scrutiny to campaign contribution limits as well as expenditure limits, reiterating the expectation that “contribution limits would more readily clear the hurdles before them” because “restrictions on contributions require less compelling justification than restrictions on independent spending.” This was so because contribution limits impact speech and associational rights in a less direct and threatening way than expenditure limits do. The same interests—preventing both corruption and the appearance of corruption—underpinning the decision in Buckley, also justified limits on state campaign contributions, and the government would have to demonstrate a real risk of corruption, not merely offer conjecture. Finally, the Court held the state contribution limitations need not be pegged to the rate of inflation.

The following year, the Supreme Court took up the second round of the Colorado Republican Party’s constitutional attack on federal regulation of its spending in the election of the state’s U.S. senators. The Federal Election Campaign Act defines as a “contribution” to include “expenditures made * * * in cooperation * * * with * * * a candidate.” Originally, the Federal Election Commission (FEC) ruled that any expenditure by a political party was presumed to be coordinated with the party’s candidate. In Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 116 S.Ct. 2309 (1996), the Court struck down the FEC’s ruling with respect to party expenditures where the money had been spent before the nominee had been selected and therefore where the expenditures were not coordinated with the party’s candidate. The question remained, however, whether the spending limits imposed by the FEC were constitutional with respect to independent party expenditures after the party’s Senate candidate had been selected and where such expenditures were coordinated with the party candidate’s campaign. In Federal Election Commission v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 121 S.Ct. 2351 (2001), the Court upheld such regulation against First Amendment challenge, concluding that Congress was justified in treating coordinated expenditures as the equivalent of contributions. As gleaned from their dissents in these cases, the members of the Court most critical of the constitutionality of campaign finance reform were Chief Justice Rehnquist and Justices Scalia and Thomas.

Congress enacted the most far-reaching reform of federal campaign finance since the 1970s when it passed the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81, popularly known as the McCain-Feingold Act after its sponsors in the Senate. In McConnell v. Federal Election Commission, 540 U.S. 96, 124 S.Ct. 619 (2003), hailed by advocates of campaign-finance reform as “a landmark decision,” the Supreme Court upheld the most important provisions of the law against First Amendment challenge. Although the Justices’ votes varied somewhat with the particular provision at issue, the dominant 5–4 decision pattern pitted Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer against Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Because Justice O’Connor had agreed with the opponents of campaign finance regulation in several previous decisions, hers was regarded as the critical fifth vote in this case.
The heart of McCain-Feingold is the law’s ban on the solicitation, receipt, or expenditure of “soft money” by the national political parties. The statute also prohibits the transfer of any soft money by the national parties to state or local parties for use in the election of any federal officeholder. Previous campaign finance regulation that survived constitutional scrutiny limited only “hard money,” that is money used to specifically advocate the election or defeat of a named candidate, usually identified by key words such as “vote for,” “elect,” “defeat,” or “reject.” All else was regarded as “soft money.” This umbrella term included money for such things as get-out-the-vote drives and so-called “issue ads” (media messages, often simplistic and aggressively negative that did not name names but usually had the desired effect of helping or hindering a candidate by sharply contrasting positions on public policy). The law was aimed at keeping soft money out of party hands in federal elections. Interest groups were still free to acquire and spend funds on issue ads; but the Act required corporations, unions, and other advocacy groups to: (1) identify themselves in their advertisements, (2) register with broadcasters as the sponsors of the ads (and such records were to be publicly available), and (3) refrain from any collusion with the political parties in the production or airing of the ads. McCain-Feingold treated any expenditures of PACs which were coordinated with any candidate as the equivalent of “hard money,” and, therefore, subject to the existing limitations under federal election law. The provision of McCain-Feingold forbidding contributions by any individual under 18 (to guard against end-runs by adults who might try to channel money through their children) was struck down, while other provisions of the law, such as the “millionaires amendment” (which set higher limits for candidates facing wealthy opponents who were bankrolling their own campaigns) and the indexing of limitations on contributions according to inflation, were not addressed by the Court. McConnell had been watched as a possible occasion for overruling Buckley (and thus could have resulted in the complete deregulation of campaign finance) on First Amendment grounds. The deferential tone of the Stevens-O’Connor opinion was surprising; it tip-toed around the use of strict scrutiny and thus stood in sharp contrast to previous campaign finance decisions.

The effect of Justice O’Connor’s retirement from the Court in 2006 was clearly felt the following year when the Court, by a 5–4 vote, weakened the restrictions that § 203 of the McCain-Feingold Act placed on campaign spending just before an election by incorporated entities and unions. That provision of the BCRA makes it a federal crime for a corporation or union to use its funds to pay for any “electioneering communication,” that is any broadcast that refers to a candidate for federal office and is aired 60 days before a general election or 30 days prior to a primary in the jurisdiction in which the candidate is running. In McConnell, the Court upheld § 203 against the contention that, on its face, the provision violated the First Amendment. In Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL), 551 U.S. ——, 127 S.Ct. 2652 (2007), a five-Justice majority held that § 203 was overbroad as applied to the election communication at issue in this case. WRTL wanted to run ads just before the 2004 election declaring that a group of senators was filibustering to block the confirmation of President George W. Bush’s judicial nominees and telling voters to contact Wisconsin’s senators to urge them to oppose the filibuster. Running in that election was incumbent U.S. Senator Russell Feingold who opposed Bush’s nominees. WRTL sued the commission, attacking the blackout period imposed by the BCRA as a violation of the First Amendment. Whereas Justice O’Connor had voted in McConnell to uphold § 203 against a general attack on its constitutionality, Justice Alito (who was appointed to replace her) voted in Wisconsin Right to Life to hold that it was unconstitutionally applied.
Speaking for himself and Justice Alito, Chief Justice John Roberts (the other appointee of President George W. Bush) concluded that WRTL’s political ads did not constitute speech expressly advocating the election or defeat of a candidate or amounting to its functional equivalent within the meaning of § 203. Instead, the communications were “issue ads” that took a position on a public issue and exhorted the public to contact their senators. They did not constitute “express advocacy” because they did not mention an election, a candidate, a political party, or a challenger, and took no position on a candidate’s character, qualifications, or fitness to hold office. Moreover, while restrictions on political expenditures for “express advocacy” by corporations and unions were justified by the legitimate interest in preventing corruption or the appearance of corruption (the same reason as justified restrictions on large contributors), that interest was not compelling where the expression took the form of “issue ads.” The two Justices declined to revisit McConnell’s holding that a corporation could constitutionally be prohibited from expressly advocating a candidate’s election or defeat just before an election. The three other Justices comprising the majority in Wisconsin Right to Life—Scalia, Kennedy, and Thomas—voted to overrule McConnell.

Reminiscent of an earlier day when Justice White had decried the Court’s creation of a “nonsensical, loophole-ridden patchwork” where Congress had fashioned a coherent and effective system of campaign-finance regulation, Justice Souter wrote: “After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear. The ban on contributions will mean nothing much, now that companies and unions can save candidates the expense of advertising directly, simply by running ‘issue ads’ without express advocacy, or by funneling the money through an independent corporation like WRTL.”

Corporate Speech

Unlike the hostility it showed to Warren Court rulings on criminal procedure, for example, the Burger Court, generally speaking, did not overrule or severely modify existing Warren Court rulings on the First Amendment. Indeed, the Burger Court created some new areas of free speech protection. But whether it overruled a Warren Court decision or created a new area of First Amendment protection, much of the Burger Court’s interpretation of the First Amendment can be characterized by a persistent theme—a sensitivity to protecting the property rights and promoting the interests of profit-making corporations and the wealthy.26 This is well illustrated in the Court’s protection of corporate speech in the political process. In First National Bank of Boston v. Bellotti, which follows, the Court struck down a Massachusetts law that severely restricted political expenditures by corporations. Justice Powell’s opinion for the Court artfully reformulated the constitutional question before the Court in such a way that the social-function rationale of free speech becomes a powerful weapon for invalidating the state law, notwithstanding the fact that proponents of this communitarian theory of free speech doubtless appreciate the influential impact corporate contributions can have on the deliberative democratic process. Those who seek to level the playing field in debate and those who recognize that the state may limit the privileges of a corporation (including, interestingly enough, Justice Rehnquist) took pains to point out that individual speech and corporate speech are entirely different and that the latter, therefore, can justifiably be regulated. As the note (p. 905) following First National Bank of Boston shows, subsequent decisions by the Court have also sustained the right of public utilities to flood utility customers with propaganda on a

range of public issues, free from any obligation to afford equal time to environmental and consumer advocates. Does the First Amendment require that the democratic process be left to the tender mercies of “big money”?

**FIRST NATIONAL BANK OF BOSTON V. BELLOTTI**

Supreme Court of the United States, 1978

435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707

**BACKGROUND & FACTS**

A Massachusetts statute imposed stiff criminal penalties on business corporations and management that spend corporate funds "for the purpose of * * * influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." Additionally, the law specified that "[n]o question submitted to the voters solely concerning the taxation of income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."

The First National Bank of Boston and other financial institutions and corporations wished to disseminate their views in opposition to a proposed amendment to the Commonwealth’s constitution to be voted on at the November 1976 general election, authorizing the levy of a graduated personal income tax. The plaintiff corporations brought suit against the Attorney General of Massachusetts, alleging that the law violated the First Amendment and seeking a judgment declaring the statute unconstitutional. The Massachusetts Supreme Judicial Court upheld the statute, and the plaintiffs appealed to the U.S. Supreme Court.

Mr. Justice POWELL delivered the opinion of the Court.

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The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 [of the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

The speech proposed by appellants is at the heart of the First Amendment’s protection.

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We *** find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove *** a material effect on its business or property. The “materially affecting” requirement *** amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Section 8 permits a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also singles out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public. The legislature has drawn the line between permissible and impermissible speech according to whether there is a sufficient nexus, as defined by the
legislature, between the issue presented to the voters and the business interests of the speaker.

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. ** If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. **

The constitutionality of § 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling." ** Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322 (1945), "and the burden is on the Government to show the existence of such an interest." ** Even then, the State must employ means "closely drawn to avoid unnecessary abridgment." **

Preserving the integrity of the electoral process, preventing corruption, and "sustaining[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. ** Preservation of the individual citizen's confidence in government is equally important. **

Appellee ** assumed[ed] ** [corporate speech] would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. ** But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. **

Not are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, ** simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote **. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it **. We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." ** Buckley, supra, 424 U.S., at 48–49, 96 S.Ct., at 649. Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. ** In sum, "[a] restriction so destructive of the right of public discussion [as § 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment."

Finally, the State argues that § 8 protects corporate shareholders ** by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both under- and over-inclusive.
The under-inclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, * * * even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State’s purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8.

The over-inclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders normally are presumed competent to protect their own interests. * * *

Because § 8 prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated. The judgment of the Supreme Judicial Court is Reversed.

* * *

Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

* * *

* * * Shareholders in * * * [profit-making corporations] do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. In fact, * * * the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.

It may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation’s business may be viewed as a means of furthering the desires of individual shareholders. This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations’ economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations
other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where the issue involved has [no material connection with the corporate business. Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.

* * * Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. * * * These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed, such individuals could even form associations for the very purpose of promoting political or ideological causes.

* * * Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. * * * [The interest of Massachusetts and the many other States which have restricted corporate political activity * * * is * * * that] of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it. * * *

Such [corporate] expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas. * * * * * * In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax on both individuals and corporations was put to the voters. The Committee for Jobs and Government Economy, an organized political committee, raised and expended approximately $120,000 to oppose the proposed amendment, the bulk of it raised through large corporate contributions. Three of the present appellant corporations each contributed $3,000 to this committee. In contrast, the Coalition for Tax Reform, Inc., the only political committee organized to support the 1972 amendment, was able to raise and expend only approximately $7,000. * * * Perhaps these figures reflect the Court’s view of the appropriate role which corporations should play in the Massachusetts electoral process, but it nowhere explains why it is entitled to substitute its judgment for that of Massachusetts and other States, as well as the United States, which have acted to correct or prevent similar domination of the electoral process by corporate wealth.

* * *

Restrictions upon corporate contributions * * * [also] assure[e] that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved
does not materially affect the business, property, or other affairs of the corporation. * * * In short, corporate management may not use corporate monies to promote what * * * in the last analysis are the purely personal views of the management, individually or as a group. * * *

I would affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Mr. Justice REHNQUIST, dissenting. * * *

The General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic * * * have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. * * *

* * * A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere: Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation’s interest in its property, it has no need * * * to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed. I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation. * * *

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NOTE—THE CONTROVERSY OVER ADVOCACY BY PUBLIC UTILITIES USING BILL INSERTS

The use of bill inserts by public utilities discussing controversial matters of public policy was upheld over claims of equal access by environmental and consumer advocate groups in two rulings that followed First National Bank of Boston v. Bellotti. At issue in Consolidated Edison Co. v. Public Service Commission of the State of New York, 447 U.S. 530, 100 S.Ct. 2326 (1980), was an order by a state agency that prohibited public utilities from enclosing inserts that "discussed controversial matters of public policy" along with monthly bills mailed to customers. The commission’s order was the result of an ongoing dispute between Consolidated Edison and the Natural Resources Defense Council (NRDC), an environmental protection group. The controversy began when along with one of its monthly billings the utility enclosed a statement arguing that nuclear power was essential to the goal of national energy independence; that it was safe, clean, and economical; and that its benefits far outweighed any risks. The NRDC demanded access to the utility’s bill envelopes to enclose its own statement criticizing reliance upon nuclear energy and emphasizing its risks. Rather than order Consolidated Edison to give NRDC access to the bill envelopes, the commission banned all billing inserts discussing public policy questions. The Supreme Court declared the agency order unconstitutional because it was not justified by any compelling governmental interest.

Speaking for the Court, Justice Powell rejected the agency’s characterization of its order as a reasonable time, place, or manner restriction because "the regulation [was] based on the content of speech * * *." Although the agency argued that the prohibition did not amount to viewpoint discrimination, Justice
Dissenting, Justices Blackmun and Rehnquist voted to uphold the commission's order, reasoning that the utility's use of bill inserts amounted to an abuse of monopoly power.

Six years later, the bill-insert controversy surfaced once again in Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 106 S.Ct. 903 (1986). In that case, the Supreme Court ruled that a state agency could not require the utility to insert in its billing envelopes a statement from a consumer advocacy group responding to statements the utility company had made in its previous bill inserts. The commission's order directed that the extra space in the bill envelope be apportioned on an alternating basis each month between the utility's own insert and that of the consumer group.

In a plurality opinion that also spoke for Chief Justice Burger and Justices Brennan and O'Connor, Justice Powell cited Consolidated Edison as authority for the proposition that the utility's newsletter in this case received the full protection of the First Amendment. In the plurality's view, the billing envelope was simply not a public forum, and state action compelling the owner of a private forum to afford opposition advocates a right to reply impermissibly infringed the free speech rights of the owner in two senses: (a) It deterred the forum owner from speaking freely in the future because it triggered the obligation to carry the views of opposition spokesmen, and (b) it forced the forum owner to tailor his speech to an opponent's agenda and to respond to arguments when the forum owner might prefer to remain silent. The commission's order, in the plurality's view, "clearly requires appellant to use its property as a vehicle for spreading a message with which it disagrees," and the plurality cited Wooley v. Maynard as authority for the unconstitutionality of this result.

Moreover, the commission's order did "not simply award access to the public at large, it discriminate[d] on the basis of the viewpoints of the selected speakers." Only speech in opposition to the company's viewpoint was allowed; thus, "[a]ccess to the envelopes * * * [was] not content-neutral." Finally, Justice Powell concluded, even if the state's interest in fair and effective utility regulation were viewed as
compelling, more narrowly tailored means for achieving that interest were available that did not burden First Amendment rights. Justice Marshall concurred in the judgment because of the degree of intrusiveness of the commission’s order and the fact that granting access to the consumer advocacy group directly limited the utility’s opportunity to speak.

Justice Rehnquist dissented in an opinion in which Justices White and Stevens joined. In his view, individual free speech rights had unjustifiably been extended to corporations. Justice Rehnquist wrote:

Extension of the individual freedom of conscience decisions [e.g., West Virginia State Board of Education v. Barnette and Wooley v. Maynard] to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an “intellect” or “mind” for freedom of conscience purposes is to confuse metaphor with reality. Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion. In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 776, 98 S.Ct. 1407, 1415 (1978); Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 534–535, 100 S.Ct. 2326, 2331–2332 (1980). It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression. * * * It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government. * * *

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this “broad public forum” purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. * * * Because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is de minimis. This is especially true in the case of PG & E, which is after all a regulated public utility. Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.

This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status. * * *

### More Cases on the First Amendment and Legislation Aimed at Preserving the Integrity of the Electoral and Governmental Processes

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<th>Case</th>
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<td>Burson v. Freeman, 504 U.S., 191, 112 S.Ct. 1846 (1992)</td>
<td>Tennessee statute that prohibited the display of campaign posters, the distribution of campaign literature, and the solicitation of votes within 100 feet of the entrance to any building in which a polling place was located, served compelling governmental interests of preventing voter intimidation and election fraud, despite the fact that it was content based and implicated free speech rights on sidewalks and in streets.</td>
<td>5–3; Justices Stevens, O’Connor, and Souter dissented; Justice Thomas did not participate.</td>
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Continued
In contrast to the serious obstacles presented for reforming political spending and for capping the influence of corporations and the wealthy in the political process, the Supreme Court’s decision in *Branti v. Finkel*, which follows, seemed to sound the death knell for many state and local systems of party patronage. In contrast to previous decisions, such as *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976), which had simply announced the Court’s judgment in a plurality opinion, Justice Stevens, this time speaking for a majority of the Court, sought both to explain why firing opposition party members from government positions violates the First Amendment and to identify those circumstances in which political party affiliation might be a relevant condition of employment. Although the dissenters’ critique of the decision in *Branti* reads more like a political scientist’s treatise on
the decline of the party system than a judicial opinion, the increasing gridlock and ungovernability of the American political system suffuse their observations with a certain timeliness. As you weigh the Court’s opinion against that of the dissenters, has the Court struck the right balance between individual rights and political consequences?

BRANTI V. FINKEL
Supreme Court of the United States, 1980
445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574

BACKGROUND & FACTS Finkel and Tabakman, two assistant public defenders, brought suit against Branti, the newly appointed public defender of Rockland County, New York, who was her superior, for firing them because of their political party affiliation. Branti, a Democrat, was appointed to office by the county legislature, which had recently passed from Republican to Democratic control. Finkel and Tabakman were appointees of Branti’s predecessor, a Republican. A federal district court found that the plaintiffs were competent lawyers whose employment had been terminated solely because of their party affiliation and rendered judgment for them. A federal appellate court subsequently affirmed this judgment, and Branti petitioned the U.S. Supreme Court for certiorari.

Mr. Justice STEVENS delivered the opinion of the Court.

The question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

*** In Elrod v. Burns the Court held that the newly elected Democratic Sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them “because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.” 427 U.S., at 351, 96 S.Ct., at 2679. That holding was supported by two separate opinions.

Writing for the plurality, Mr. Justice BRENNAN identified two separate but interrelated reasons supporting the conclusion that the discharges were prohibited by the First and Fourteenth Amendments. First, he analyzed the impact of a political patronage system on freedom of belief and association. Noting that in order to retain their jobs, the Sheriff’s employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party’s candidates, or obtain a Democratic sponsor, he concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs. That conclusion, in his opinion, brought the practice within the rule of cases like Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943) condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion.

Second, apart from the potential impact of patronage dismissals on the formation and expression of opinion, Mr. Justice BRENNAN also stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972). In support of the holding in Perry that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech, the Court * * * stated:

"[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a
person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate “an overriding interest,” requiring that a person’s private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

Mr. Justice STEWART’s opinion concurring in the judgment expressly relied on Perry v. Sindermann.

Petitioner argues that, so long as an employee is not asked to change his political affiliation or to contribute to or work for the party’s candidates, he may be dismissed with impunity—even though he would not have been dismissed if he had had the proper political sponsorship and even though the sole reason for dismissing him was to replace him with a person who did have such sponsorship. Such an interpretation would surely emasculate the principles set forth in Elrod. While it would perhaps eliminate the more blatant forms of coercion described in Elrod, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one’s job. More importantly, petitioner’s interpretation would require the Court to repudiate entirely the conclusion of both Mr. Justice BRENNAN and Mr. Justice STEWART that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs.

In sum, there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. To prevail in this type of an action, it was sufficient, as Elrod holds, for respondents to prove that they were discharged “solely for the reason that they were not affiliated with or sponsored by the Democratic Party.” 427 U.S., at 350, 96 S.Ct., at 2678.

Both opinions in Elrod recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency. In Elrod, it was clear that the duties of the employees—the chief deputy of the process division of the sheriff’s office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County—were not of that character, for they were, as Mr. Justice STEWART stated, “nonpolicymaking, nonconfidential” employees.

As Mr. Justice BRENNAN noted in Elrod, it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policy-making in character. [For example, if a State’s election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee’s governmental responsibilities.

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach...
of a state university’s football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label “policymaker” or “confidential” fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

It is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. * * *

Whatever policymaking occurs in the public defender’s office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender’s office to make his tenure dependent on his allegiance to the dominant political party.

Accordingly, the entry of an injunction against termination of respondents’ employment on purely political grounds was appropriate and the judgment of the Court of Appeals is Affirmed.

Mr. Justice STEWART, dissenting.

The judgment of the Court in Elrod v. Burns does not control the present case for the simple reason that the respondents here clearly are not “nonconfidential” employees.

The respondents in the present case are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association.

Mr. Justice POWELL with whom Mr. Justice REHNQUIST joins, and with whom Mr. Justice STEWART joins as to [], dissenting.

The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position.

A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials.

The constitutionality of appointing or dismissing public employees on the basis of political affiliation depends upon the governmental interests served by patronage. No
constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights. This inquiry cannot be resolved by reference to First Amendment cases in which patronage was neither involved nor discussed. Nor can the question in this case be answered in a principled manner without identifying and weighing the governmental interest served by patronage.

Patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations. The benefits of patronage to a political organization do not derive merely from filling policymaking positions on the basis of political affiliation. Many, if not most, of the jobs filled by patronage at the local level may not involve policymaking functions. The use of patronage to fill such positions builds party loyalty and avoids “splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.” Storer v. Brown, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282 (1974).

Until today, I would have believed that the importance of political parties was self-evident. Political parties, dependent in many ways upon patronage, serve a variety of substantial governmental interests. A party organization allows political candidates to muster donations of time and money necessary to capture the attention of the electorate. Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters. In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court’s decision today limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.

Strong political parties also aid effective governance after election campaigns end. Elected officials depend upon appointees who hold similar views to carry out their policies and administer their programs. Patronage—the right to select key personnel and to reward the party “faithful”—serves the public interest by facilitating the implementation of policies endorsed by the electorate. The Court’s opinion casts a shadow over this time-honored element of our system. It appears to recognize that the implementation of policy is a legitimate goal of the patronage system and that some, but not all, policymaking employees may be replaced on the basis of their political affiliation. But the Court does not recognize that the implementation of policy often depends upon the cooperation of public employees who do not hold policymaking posts. The growth of the civil service system already has limited the ability of elected politicians to effect political change. Public employees immune to public pressure “can resist changes in policy without suffering either the loss of their jobs or a cut in their salary.” Such effects are proper when they follow from legislative or executive decisions to withhold some jobs from the patronage system. But the Court tips the balance between patronage and nonpatronage positions, and, in my view, imposes unnecessary constraints upon the ability of responsible officials to govern effectively and to carry out new policies.

Although the Executive and Legislative Branches of Government are independent as a matter of constitutional law, effective government is impossible unless the two Branches cooperate to make and enforce laws. A strong party allows an elected executive to implement his programs and policies by working with legislators of the same political organization. But legislators who owe little to their party tend to act independently of its leadership. The result is a dispersion of political influence that may
inhibit a political party from enacting its programs into law. The failure to sustain party discipline, at least at the national level, has been traced to the inability of successful political parties to offer patronage positions to their members or to the supporters of elected officials.

The breakdown of party discipline that handicaps elected officials also limits the ability of the electorate to choose wisely among candidates. Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates. With the decline in party stability, voters are less able to blame or credit a party for the performance of its elected officials. Our national party system is predicated upon the assumption that political parties sponsor, and are responsible for, the performance of the persons they nominate for office.

In sum, the effect of the Court’s decision will be to decrease the accountability and denigrate the role of our national political parties. This decision comes at a time when an increasing number of observers question whether our national political parties can continue to operate effectively. Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interest that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy. The Court ignores the substantial governmental interests served by reasonable patronage. In my view, its decision will seriously hamper the functioning of stable political parties.

***

* * * The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people. But the Court’s constitutional holding today displaces political responsibility with judicial fiat. In my view, the First Amendment does not incorporate a national civil service system. I would reverse the judgment of the Court of Appeals.

Dealing a further blow to political patronage practices in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729 (1990), the Supreme Court, per Justice Brennan, held that “the rule of Elrod and Branti extends to promotion, transfer, recall, and hiring decisions *** .” Where these procedures involve low-level public employees, such decisions may not be based on political party affiliation or loyalty. Reasoning from the premise that “[t]o the victor belong only those spoils that may be constitutionally obtained,” the five-Judge majority concluded that promotions, transfers, recalls, and hiring based on party affiliation infringed public employees’ fundamental rights of speech and association and failed to serve any compelling governmental interest.

In a dissent that also spoke for Chief Justice Rehnquist and Justices O’Connor and Kennedy, Justice Scalia argued that “the desirability of patronage is a policy question to be decided by the people’s representatives.” Arguing that “a legislature could reasonably determine that its benefits outweigh its ‘coercive’ effects,” he reviewed the interests served by patronage practices inventoried by Justice Powell in his Elrod dissent. Said Justice Scalia, “The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success.” In short, he concluded, the majority underestimated both the importance of patronage to the existence of strong and responsible political parties, and their contribution, in turn, to the vitality of the democratic system.
The principle applied in *Elrod, Branti, and Rutan*—that “absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression”—was extended to cover the letting of government contracts in *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353 (1996). With only Justices Scalia and Thomas dissenting, the Court held that an independent contractor could not be disqualified from the awarding of a government contract simply because he failed to support the winning candidate in the last mayoral election. Neither, as the Court held in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342 (1996), could an otherwise automatically renewable contract be terminated solely as political retaliation. Although government remains free to terminate both employees and contractors for poor performance, to improve efficiency, efficacy, and responsiveness in providing service to the public, and to prevent the appearance of corruption, the First Amendment protects independent contractors from the termination of at-will contracts just as it protects government employees from employment termination because they exercise free speech rights on matters of public concern.

Although *Branti* and subsequent cases stand for the proposition that applicants affected by government hiring and contracting decisions enjoy substantial First Amendment protection, especially the right of freedom of association, the Court has nonetheless held that, once hired, government personnel do not necessarily enjoy the sort of unfettered freedom of expression possessed by citizens who do not collect a paycheck from the government. As with First Amendment problems generally, drawing a line between a government employee’s rights and obligations requires that competing interests be balanced. On the one hand, by becoming a government employee an individual does not surrender rights basic to American citizenship and there is the public’s interest in having someone knowledgeable blow the whistle on government malfeasance and nonperformance, as well. On the other hand, an undisciplined public service in which subordinates are perfectly free to criticize every time they disagree with a decision made by the boss invites confusion, inefficiency, and ineffectiveness in the delivery of services on which the public-at-large relies.

In *Garcetti v. Ceballos*, 547 U.S. —, 126 S.Ct. 1951 (2006), the Supreme Court, in a 5–4 decision, upheld disciplinary action taken against a deputy district attorney who, at the request of a defense attorney, reviewed a pending case, concluded on his own that the affidavit for a search warrant contained serious misrepresentations, relayed these findings to his superiors, and followed up with a memorandum recommending dismissal of the charges. After his supervisors went ahead with the prosecution, the deputy testified about his misgivings with respect to statements made in the affidavit at a hearing on defense counsel’s motion to have the charges dismissed.

The Court in *Ceballos* held that previous decisions established a two-part test to be applied in instances where an employee claimed disciplinary action by the government as employer violated his free speech rights: “The first requires determining whether the employee spoke as a citizen on a matter of public concern. * * * If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises, and the second question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. * * * A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”
The critical factor in this case, the Court emphasized, was “the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case * * *. When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Of course, on-the-job whistle-blowing might be protected by a statute, but no constitutional guarantee was implicated. By contrast, the First Amendment did afford protection, as the Court previously held in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968), where a teacher, critical of a policy adopted by the school board, wrote a letter to the local newspaper where it appeared with letters from other members of the community. The teacher’s expression, said the Court in Pickering, “neither [was] shown nor [could] be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.” Thus, concluded the Court, “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”

E. COMMERCIAL SPEECH

It is not surprising that a Court that operated from the premise that political expenditures were a form of speech reached a similar conclusion about advertising. The Burger Court reached this conclusion gradually, however. The Court’s commercial speech doctrine began with its decision in Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222 (1975). In that case, the Court was confronted by the defendant’s conviction for publication of a newspaper advertisement that announced the availability of abortion services at a New York clinic in violation of a Virginia law that made it a misdemeanor to circulate any publication encouraging or prompting the procuring of an abortion. Declaring the Virginia statute unconstitutional, a seven-Justice majority observed that the service offered for sale was not something that could any longer be entirely prohibited in light of the Court’s previous decision in Roe v. Wade (p. 722). Moreover, the advertisement in this instance did more than merely propose a commercial transaction; it communicated certain information of general interest, namely, that abortions were now legal in New York.

The next year, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 (1976), the Court rejected the proposition that to merit constitutional protection a commercial message had to contain “material of clear ‘public interest.’ ” Observing that “speech does not lose its First Amendment protection because money is spent to project it,” the Court saw both little to be gained in requiring commercial messages to contain a “public interest element” and the potential for serious difficulty if it were required to draw a line between “publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind * * *.” Thus, in Virginia Board of Pharmacy, the Court struck down a state law that prohibited pharmacists from advertising to consumers the prices they charged on prescription drugs. Although the Court did not devise a framework to evaluate state regulation of commercial speech, the Court did make it clear that its commercial speech doctrine did not extend to misleading, deceptive, or false messages or to illegal transactions or commodities. Where the good or service offered for sale was neither illegal nor advertised in a misleading or deceptive manner, the permissibility of state regulation would depend upon the interests it advanced. In Virginia Board of Pharmacy, the Court discounted as insubstantial the argument that the ban on advertising the price of prescription drugs to consumers was necessary to sustain a high level
of professional performance by pharmacists. And the Court rejected as “highly paternalistic” legislation based on the following supposed parade of horribles:

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the “professional” pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

In sum, the Court held that, where it had legitimate objectives, those interests could be advanced in other ways that did not depend on “keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.”

The framework the Court has constructed, based on its rulings in these earlier cases, is set out in Central Hudson Gas & Electric v. Public Service Commission, which follows. As is apparent from the Court’s exposition and application of it in that case, regulation of commercial speech triggers basically the same level of scrutiny as does symbolic speech. This aspect of the Court’s commercial speech doctrine has provoked two rather different criticisms. Justice Stevens asserted that intermediate scrutiny in such cases posed a substantial risk of subtly denying constitutional rights, which he saw illustrated in the instant case. Unless the Court were very careful in the bright line it drew between pure speech and commercial speech, advertisements that contained elements of pure speech would be judged by a lesser constitutional standard than that to which they were entitled. But doesn’t this risk dragging the Court into the very quagmire of assessing a “public interest component” in advertisements that the Court so cleverly avoided in Virginia Board of Pharmacy? Justice Rehnquist’s criticism runs deeper. To him, the Court’s commercial speech doctrine is simply a pale version of the sort of constitutionalized deregulation of the marketplace that got the Justices into so much political hot water during the 1930s. Are the doctrines of commercial speech and liberty of contract (see Chapter 7, section B) sisters under the skin?

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York

Supreme Court of the United States, 1980
447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341

**BACKGROUND & FACTS** Amid the energy crisis of the early 1970s, the New York State Public Service Commission banned all promotional advertising by any electrical utility in the state. The commission acted because of its desire to promote energy conservation and its concern that energy sources might not be able to provide sufficient supply to meet customer demand during the 1973–74 winter. Central Hudson Gas & Electric challenged the ban in state court, and the commission’s order was upheld. After the New York Court of Appeals affirmed judgment for the commission, the company appealed to the U.S. Supreme Court.

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

* * *
The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825 (1976). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and... the best means to that end is to open the channels of communication rather than to close them." 425 U.S., at 770, 96 S.Ct., at 1829. Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

But the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.

For commercial speech to come within [the protection of the First Amendment] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

A consumer may need information to aid his decision whether or not to use the
monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant’s monopoly position does not alter the First Amendment’s protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State’s interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country’s dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

***

[The Commission also argued that promotional advertising would aggravate inequities caused by the failure to base utility rates on marginal cost. Although the company claimed that advertising could promote electricity use in periods of low demand, the Commission responded that it also would increase electricity consumption during periods of high use and, since higher rates were charged for peak periods, extra costs would be borne by all consumers through higher overall rates. The Court concluded that the State’s concern on this ground also amounted to a “clear and substantial governmental interest.”]

C

Next, we focus on the relationship between the State’s interests and the advertising ban.

* * * [The Court concluded that the link between the advertising ban and the company’s rate structure was tenuous at best. For the link to be borne out, advertising to increase off-peak usage would also have to increase peak usage, while other factors directly affecting the fairness and efficiency of the utility rates remained constant. This development, the Court thought, was highly speculative.]

In contrast, the State’s interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission’s order.

D

We come finally to the critical inquiry in this case: whether the Commission’s complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State’s interest in energy conservation. The Commission’s order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State’s interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the “heat pump,” which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a “backup” to solar and other heat sources. * * *

The Commission’s order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that
would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility’s advertising endanger conservation or mislead the public. To the extent that the Commission’s order suppresses speech that in no way impairs the State’s interest in energy conservation, the Commission’s order violates the First and Fourteenth Amendments and must be invalidated. **

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant’s commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson’s advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. ** In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson’s advertising.

**

The record before us fails to show that the total ban on promotional advertising ** is no more extensive than necessary. Accordingly, the judgment of the New York Court of Appeals is reversed.

**

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN joins, concurring in the judgment.

**

Since the Court ** leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity[,] ** I disagree ** that suppression of speech may be a permissible means to achieve that goal. **

The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State’s interest in discouraging purchases of the underlying product that is advertised. **

Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.27

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to “dampen demand for or use of the product. Even though “commercial” speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State’s policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. **

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. **

Our cases indicate that this guarantee applies even to commercial speech. **

**

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support

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[Footnote by Justice Blackmun.]
Mr. Justice STEVENS, with whom Mr. Justice BRENNAN joins, concurring in the judgment.

Because “commercial speech” is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York’s prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as “expression related solely to the economic interests of the speaker and its audience.” Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader’s exhortation to strike, nor an economist’s dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court’s first definition of commercial speech is unquestionably too broad.

The Court’s second definition refers to “speech proposing a commercial transaction.” A salesman’s solicitation, a broker’s offer, and a manufacturer’s publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, I am persuaded that it should not include the entire range of communication that is embraced within the term “promotional advertising.”

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. For example, an electric company’s advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York’s promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.

The justification for the regulation is nothing more than the expressed fear that the audience may find the utility’s message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm
associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

***

Because I do not consider this to be a "commercial speech" case[,] * * * I see no need to decide whether the Court's four-part analysis * * * adequately protects commercial speech—as properly defined—in the face of a blanket ban of the sort involved in this case.

Mr. Justice REHNQUIST, dissenting.

***

I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

***

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. * * * The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in Ohralik. I think it has also, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905) and Tyson & Brother v. Banton, 273 U.S. 418, 47 S.Ct. 426 (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

***

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since Virginia Board. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.
The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim “caveat emptor” (“Let the buyer beware”). * * * I declined to join in the Virginia Pharmacy Board, and regret now to see the Court reaping the seeds that it there sowed. * * *

Although Virginia Board of Pharmacy drew the distinction between commodities and services that are illegal and those that are not, neither that case nor any other addressed the question whether government could constitutionally discourage or prohibit advertising for a product or service that is lawfully offered for sale. The Court may have implied that suppression of such advertising would be inconsistent with its rulings, but it never held as much.

In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996), the Court took up the question in a challenge to a state law that prohibited the advertisement of liquor prices except at the place of sale. In that case, a liquor store had placed an ad in a newspaper that announced low prices for its peanuts, potato chips, and Schweppes mixers, and then identified various brands of packaged liquors with the word “WOW” next to pictures of vodka and rum bottles, implying that they, too, were available at low prices. The state defended its advertising restriction on the grounds it promoted temperance and because information about competitive pricing would spur liquor sales.

The Supreme Court unanimously struck down the Rhode Island law. Writing for the Court, Justice Stevens determined that elevated scrutiny was justified because bans that target truthful, nonmisleading commercial messages rarely protect consumers from commercial harms. Instead, such bans often serve only to obscure an underlying governmental policy that could be implemented without regulating speech. [C]ommercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond “irrationally” to the truth. * * * The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. * * *

The suppression of liquor price advertising here could not survive rigorous review because there was no evidence that the ban would significantly reduce alcohol consumption. Although the regulation might have some impact on “the purchasing patterns of temperate drinkers of modest means[,]” the abusive drinker will probably not be deterred by a marginal price increase, and the true alcoholic may simply reduce his purchases of other necessities. Nor had the state “identified what price level would lead to a significant reduction in alcohol consumption.” Any change in liquor consumption therefore would appear to be “fortuitous.” Under these circumstances, blanket suppression of liquor price advertising clearly failed the test of being “no more extensive than necessary.” If the regulation could not even survive intermediate scrutiny, it could not possibly survive more rigorous constitutional examination. Although the state sought to defend its regulation on authority afforded by the Twenty-first Amendment, the Court dispatched that argument by quoting its conclusion on a previous occasion, that “the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.”

In January 1999, the Massachusetts attorney general promulgated a series of regulations designed to “close holes” in the agreement under his authority to prevent unfair or deceptive business practices. Manufacturers of cigarettes and chewing tobacco then brought suit challenging the regulations on the grounds that they were preempted by provisions of the Federal Cigarette Labeling and Advertising Act. The Court’s resolution of that controversy is summarized in the following note.

### NOTE—STATE AND LOCAL REGULATION OF TOBACCO ADVERTISING

In accordance with state law, the Massachusetts attorney general formulated comprehensive regulations governing the advertising of cigarettes, chewing tobacco, and cigars. Although the Justices agreed that smoking by minors was a serious public health problem that state and local authorities could take action against, the Supreme Court, in *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404 (2001), struck down much of the challenged regulatory scheme.

Massachusetts law forbade all advertising of tobacco products, including ads in shop windows, within 1,000 feet of a school or playground and in enclosed stadiums. The regulations also prohibited self-service displays of tobacco products in stores and required that tobacco products be accessible only to store employees. The state required, too, that, at locations where tobacco products were sold, advertising for such products must be placed no lower than five feet above the floor. Tobacco manufacturers and advertisers challenged the regulations on Supremacy Clause and First Amendment grounds.

As to the Supremacy Clause, the tobacco manufacturers argued that state regulation of cigarette advertising was preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The Court, speaking through Justice O’Connor, held that the FCLAA “prohibited state cigarette advertising regulations motivated by concerns about smoking and health.” Massachusetts’ regulations were not simply an exercise of its zoning authority under the state police power; according to Justice O’Connor, the regulation of cigarette advertising constituted “an attempt to address the incidence of underage cigarette smoking by regulating advertising” and that could “not be squared with the language of the pre-emption provision which reaches all ‘requirements’ and ‘prohibitions’ ‘imposed under state law.’” Painting the restriction as a location-based regulation simply wouldn’t fly, said the Court, because Congress in the FCLAA explicitly banned cigarette advertising through the electronic media and that meant it did not intend to leave health-motivated, location-based restrictions to the states and their political subdivisions. However, Justice O’Connor added, “[T]here is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of
advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not ‘based on smoking and health.’ Nor did ‘[the FCLAA] * * * foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA’s pre-emption provision explicitly governs state regulations of ‘advertising or promotion.’ Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors. To the contrary, there is an established congressional policy that supports such laws; Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities.’

Justices Stevens, Souter, Ginsburg, and Breyer disagreed with the majority’s finding of preemption. They took strong exception to the majority’s conclusion that the states were preempted from using their traditional police power to regulate the location of cigarette advertising. They concluded that Congress intended to prohibit only a “narrow set of content regulations”—such as the warnings appearing on cigarette packs—and not state and municipal advertising restrictions in general.

The Court’s conclusion with respect to the preemption issue was not sufficient to dispose of the case, however, because the FCLAA dealt only with cigarettes. The Massachusetts regulations also applied to smokeless tobacco and cigars and here commercial speech analysis was necessary.

The Court was unanimous in its conclusion that the outdoor advertising regulations violated the manufacturers’ and advertisers’ right to commercial speech. The ban, the Justices all agreed, was simply so broad that it unduly interfered with the right of the manufacturers and advertisers to communicate their message about a lawful product to adults. Indeed, in certain geographical areas, the effect of the outdoor advertising ban would be such as to blot out such communication entirely. Although the prevention of underage tobacco use might be an important interest—even a compelling one—the Massachusetts regulation was “poorly tailored.” But as to what action the Court should take as a consequence, the Justices divided 5–4. The majority voted to strike down the outdoor advertising ban on chewing tobacco and cigar advertising as well. The four dissenters, noted previously, voted to remand the case to the appeals court for determination as to whether the regulation still left open “sufficient alternative avenues of communication.”

All of the Justices voted to sustain the state ban on self-service displays, promotional give-aways and the requirement that tobacco products be accessible only to store employees. These provisions were narrowly tailored to prevent minors’ access to tobacco products, were unrelated to expression, and left open alternative means by which vendors could convey information about tobacco products and for would-be purchasers to see the products before buying them. But the Justices divided 6–3 on the five-foot rule. Justice O’Connor reasoned that it flunked both the third and fourth prongs of the Central Hudson test, because, if the state’s aim was to prevent minors from using tobacco products by curbing the demand for them, the five-foot rule didn’t seem to advance that goal very well. After all, she wrote, “Not all children are less than five feet tall and those who are certainly have the ability to look up and take in their surroundings.” Justices Stevens, Ginsburg, and Breyer thought the question presented by the five-foot rule was a close one and voted to uphold it because it “can have only the slightest impact on the ability of adults to purchase a poisonous product and may save some children from taking the first step on the road to addiction.”

The Court broke no new constitutional ground in the case, although Justice Thomas, in a concurring opinion, urged the Court to ditch its commercial speech doctrine and apply strict scrutiny in advertising cases.

At the forefront of challenges to government-sanctioned prohibitions on advertising have been the strictures against solicitation of business by professionals, such as doctors, chiropractors, accountants, and, perhaps most notably, lawyers. Close on the heels of its decision in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004 (1975), which
brought the minimum fee schedules enforced by the state bars under the control of federal antitrust law (and thus ended official price-fixing in the legal profession), the Court in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977), upheld the constitutionality of advertising the prices charged for routine legal services printed in a newspaper. Bates and O'Steen, two Phoenix lawyers, opened a legal aid clinic aimed at providing high-volume legal services at modest fees to middle-income clients who did not qualify for legal aid furnished by the government. After a couple years of sluggish business, they advertised set rates for certain routine legal services in a local newspaper and subsequently faced disciplinary proceedings because a rule of practice adopted by the state supreme court inveighed against any advertising by attorneys. Bates and O'Steen argued that the rule was unconstitutional on First Amendment grounds, and the U.S. Supreme Court agreed. The Court held that, at least in the context of in-print advertising, none of the justifications offered to justify the ban "rose to the level of an acceptable reason for the

### OTHER CASES ON COMMERCIAL SPEECH

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<td>Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981)</td>
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<td>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186 (1982)</td>
<td>A village ordinance licensing &quot;head shops&quot;; forbidding sales of &quot;touch clips,&quot; &quot;pipes,&quot; and other marijuana or drug paraphernalia to minors; and requiring records to be kept of all sales of restricted items was unconstitutional.</td>
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<td>Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983)</td>
<td>A federal statute that prohibited the mailing of unsolicited advertisements for contraceptives was unconstitutional.</td>
<td>8-0; Justice Brennan did not participate.</td>
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<td>City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505 (1993)</td>
<td>A city ordinance that banned from public property free-standing newsracks distributing free magazines, which consisted mostly of commercial advertisements, failed to demonstrate a &quot;reasonable fit&quot; between the city's legitimate interests in promoting esthetics and safety and its choice of a limited and selective ban on newsracks containing commercial advertisements, especially since there was no comparable prohibition on newsracks vending newspapers.</td>
<td>6-3; Chief Justice Rehnquist and Justices White and Thomas dissented.</td>
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suppression of all advertising by attorneys." The state bar defended the ban on lawyer advertising because such advertising, it asserted, would have adverse effects on professionalism, on the administration of justice, and on the quality of service, as well as undesirable economic effects, and because a less-than-total ban, it argued, would be hard to enforce. The Court observed that the state bar could still prohibit false, deceptive, or misleading advertising by lawyers; it could establish time, place, and manner regulations for such advertising; and it could unquestionably forbid advertising transactions that were illegal. Chief Justice Burger, Justice Powell (a former president of the American Bar Association), and Justice Rehnquist dissented.

The Court’s ruling in Bates turned largely on the fact that business had been solicited by a newspaper advertisement. But what about other forms of solicitation? In two subsequent cases, Ohralik v. Ohio State Bar Association and In re Primus, which follow, the Court turned its attention to the constitutionality of sanctions levied against one lawyer who engaged in face-to-face solicitation and another who wrote a letter to a prospective client. These situations move us much closer to the perils of "ambulance chasing" that all along was the matter of greatest concern to the state bars. The Court saw a difference in these two contexts. Justice Marshall argued that behind the constitutional question of commercial speech lurked major issues in the availability of legal services to those individuals less well-off in society. Justice Rehnquist, on the other hand, was unimpressed by this "tale of two lawyers."

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**NOTE—THE OHRALIK AND PRIMUS CASES**

In a pair of cases from its October 1977 Term, the Court confronted the potential for conflict between state efforts to regulate in-person solicitation of business by lawyers and the free speech and association guarantees of the First Amendment. At the beginning of his opinion for the Court in Ohralik v. Ohio State Bar, 436 U.S. 447, 98 S.Ct. 1912 (1978), Justice Powell observed, "The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years." In the Ohralik case, which presented two instances of what Justice Marshall in a concurring opinion called "classic examples of 'ambulance chasing,'" an attorney was indefinitely suspended from practice after following two auto accident victims to the hospital and offering his services on a contingent basis, i.e., for one-third of the award or settlement for damages. The lawyer was soon discharged by his two clients after they had second thoughts about his eagerness to have them sue. After he subsequently demanded one-third of their recovery from the insurance company, alleging that they had breached their oral contracts with him, the two accident victims filed a complaint with the state bar. The Court rejected the attorney’s contention that such disciplinary action infringed his First Amendment rights. Upholding the power of the bar association to impose sanctions for in-person solicitation of business, Justice Powell explained that this form of commercial speech posed special problems beyond those of the straightforward newspaper advertisement allowed in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977): (1) "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection"; and (2) "[I]n-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services * * * [and] it actually may disserve the individual and societal interest * * * in facilitating 'informed and reliable decisionmaking.'" Observing that "state interests implicated in this case are particularly strong," the Court went on to point out:
The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, underrepresentation, and misrepresentation. The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in Disciplinary Rules 2–103(A) and 2–104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons; to protect the privacy of individuals; and to avoid situations where the lawyer’s exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.

We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed “compelling” interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of “vexatious conduct.” We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Conceding that the dangers of in-person solicitation “are amply present in the Ohralik case,” Justice Marshall, who concurred in part in the Court’s opinion and in its judgment, found “somewhat disturbing the Court’s suggestion * * * that in-person solicitation of business, though entitled to some degree of constitutional protection as ‘commercial speech,’ is entitled to less protection under the First Amendment than is ‘the kind of advertising approved in Bates.’ ” He continued, “The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in Bates.” Justice Marshall explained:

Not only do prohibitions on solicitation interfere with the free flow of information protected by the First Amendment, but by origin and in practice they operate in a discriminatory manner. * * * [T]hese constraints developed as rules of “etiquette” and came to rest on the notion that a lawyer’s reputation in his community would spread by word-of-mouth and bring business to the worthy lawyer. * * * The social model on which this conception depends is that of the small cohesive and homogeneous community; the anachronistic nature of this model has long been recognized. * * * If ever this conception were more generally true, it is now valid only with respect to those persons who move in the relatively elite social and educational circles in which knowledge about legal problems, legal remedies and lawyers is widely shared. * * *

The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers’ availability belong to the less privileged classes of society, * * * so the disciplinary rules against solicitation fall most heavily on those attorneys engaged in a single practitioner or small partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms. * * * Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession. * * * In light of this history, I am less inclined than the majority appears to be * * * to weigh favorably in the balance of the State’s interests here the longevity of the ban on attorney solicitation.

Concluded Marshall, “While the State’s interest in regulating in-person solicitation may * * * be somewhat greater than its interest in regulating print advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation” (for example, permitting * * ‘all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous’ * * ).

In the second case, In re Primus, 436 U.S. 412, 98 S.Ct. 1893 (1978), the Court found the South Carolina Bar’s sanction of a public reprimand for an alleged violation of the ban on solicitation of business to be an infringement of the attorney’s First Amendment rights. In this case, an attorney
who was cooperating with the ACLU and working free of charge in that capacity, but who was otherwise paid by a nonprofit civil rights group, contacted by mail a woman who had been induced to undergo sterilization as the price of receiving continued Medicaid benefits for pregnant women on public assistance. The attorney's letter inquired whether the woman would like the ACLU to file a suit for damages on her behalf against the doctor and thus join the organization's efforts in the interest of others similarly situated to recover for the injury done to them and to bring the state's policy to a halt. At the outset, the Court noted three features that distinguished the attorney's conduct in Primus from that of the attorney in Ohralik: (1) The solicitation took the form of a letter; (2) the lawyer did not make the inquiry for financial gain; and (3) the lawyer's efforts "were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU * * *." Relying on its decision in NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) (where the Court sustained, as an exercise of freedom of speech and association, efforts of that group to aid blacks by facilitating suits challenging segregation), and its progeny, which "established the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment,'" the Court concluded that South Carolina's disciplinary rules, as employed in this case, swept too broadly and thus infringed constitutional rights. Quoting Button, Justice Powell, speaking for the Court, pointed out that "[b]road prophylactic rules in the area of free speech are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." The disciplinary rules also failed to survive "exact[ing] scrutiny" in this case because of the absence of any "compelling" state interest. Justice Powell wrote, "The record does not support * * * [the Bar's] contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case." Likewise, "[t]he State's interests in preventing the 'stirring up' of frivolous or vexatious litigation and minimizing commercialization of the legal profession offer no further justification for the discipline administered in this case." In short, concluded the Court:

Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopt today in Ohralik, * * * that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

Although concurring in Ohralik, Justice Rehnquist dissented from the Court's decision in Primus. He observed that the Court's decisions in these two cases seemed more concerned with identifying good guys and bad guys, and he lamented the "development of a jurisprudence of epithets and slogans in this area, in which 'ambulance chasers' suffer one fate and 'civil liberties lawyers' another." The Court's "tale of two lawyers " was visibly marred, in Rehnquist's view, by the "absence of any principled distinction between the two cases * * *." The effects of the decisions were especially disturbing, he believed, because of "the radical difference in scrutiny brought to bear upon state regulation in each area." He expressed reservation that any State will be able to determine with confidence the area in which it may regulate prophylactically and the area in which it may regulate only upon a specific showing of harm. Despite the Court's assertion to the contrary, * * * the difficulty of drawing distinctions on the basis of the content of the speech or the motive of the speaker is a valid reason for avoiding the undertaking where a more objective standard is readily available. I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved. The State is empowered to discipline for conduct which it deems detrimental to the public interest unless foreclosed from doing so by our cases construing the First and Fourteenth Amendments.
And he concluded:

As the Court understands the disciplinary rule enforced by South Carolina, “a lawyer employed by the ACLU or a similar organization may never give unsolicited advice to a lay person that he or she retain the organization’s free services.” * * * That prohibition seems to me entirely reasonable. A State may rightly fear that members of its Bar have powers of persuasion not possessed by laymen * * * and it may also fear that such persuasion may be as potent in writing as it is in person. Such persuasion may draw an unsophisticated layman into litigation contrary to his own best interests * * * and it may force other citizens of South Carolina to defend against baseless litigation which would not otherwise have been brought. I cannot agree that a State must prove such harmful consequences in each case simply because an organization such as the ACLU or the NAACP is involved.

I cannot share the Court’s confidence that the danger of such consequences is minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain. A State may reasonably fear that a lawyer’s desire to resolve “substantial civil liberties questions,” * * * may occasionally take precedence over his duty to advance the interests of his client. It is even more reasonable to fear that a lawyer in such circumstances will be inclined to pursue both culpable and blameless defendants to the last ditch in order to achieve his ideological goals. Although individual litigants, including the ACLU, may be free to use the courts for such purposes, South Carolina is likewise free to restrict the activities of the members of its Bar who attempt to persuade them to do so.

* * *

The Supreme Court’s decisions reflect a difference of constitutional significance between appeals to the general public and direct, personalized communication, especially when conducted in a coercive setting. In Florida Bar v. Went For It, Inc. 515 U.S. 618, 115 S.Ct. 2371 (1995), for example, a bare majority of the Justices upheld a state bar regulation that forbade personal injury lawyers from sending targeted direct-mail solicitations to accident victims and their relatives within 30 days of an accident or injury. Speaking for the Court, Justice O’Connor explained that the rule adopted by the state bar advanced significant interests: protecting the privacy of accident victims and their relatives against intrusive, unsought solicitations, and preventing opportunist behavior that might erode public confidence in the legal profession. The Court concluded that the moratorium directly advanced those interests and its 30-day duration was reasonably well-tailored to achieve them. The Court also noted the ready availability of other sources of information about legal representation, such as the yellow pages of the telephone book. Speaking for the dissenters (who also included Justices Stevens, Souter, and Ginsburg), Justice Kennedy chided the majority for sustaining the moratorium on the tacit assumption that the state “knows what is best for the Bar and its clients.” He argued that “the problem is self-policing” because “[p]otential clients will not hire lawyers who offend them.” Reminiscent of Justice Marshall’s concurrence in Ohralik, Justice Kennedy worried that “the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill-informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties.”

In another case, one involving direct solicitation by a football coach, the Court upheld a rule adopted by a state interscholastic sports association that banned high-school coaches from using “undue influence” in recruiting middle-school students for their sports programs. In Tennessee Secondary School Athletic Association v. Brentwood Academy, 551 U.S. —, 127 S.Ct. 2489 (2007), the Court upheld the association’s imposition of sanctions after the coach sent a letter to a group of eighth-grade boys before they had actually enrolled in the school. The premature letter “invit[ed] them to attend spring practice sessions” and said
that “football equipment would be distributed” and that “getting involved as soon as possible would definitely be to your advantage.” The letter was signed “Your Coach.” Speaking for the Court, Justice Stevens wrote: “[I]t is a heady thing for an eighth-grade student to be contacted directly by a coach—here, ‘Your Coach’—and invited to join a high school sports team. In too many cases, the invitation will come accompanied with a suggestion, subtle or otherwise, that failure to accept will hurt the student’s chances to play high school sports and diminish the odds that [he or] she could continue on to college or (dream of dreams) professional sports.” The Court continued, “We need no empirical data to credit TSSAA’s common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics.”

Even when drumming up business doesn’t implicate the weighty interests identified in these direct solicitation cases, it can be both annoying and intrusive. The maxim “A man’s home is his castle” readily embodies the liberty characterized by Justice Brandeis in his Olmstead dissent (p. 691) as “the right most valued by civilized men”—“the right to be let alone.” Door-to-door solicitation by salespersons has long been an irritant to many households. When the salesman rings, the resident has to drop whatever he or she is doing and answer. Nor may a bothersome intrusion be the worst of it. Purported sales calls can mask the efforts of thieves to discover whether someone is at home. However, over a half century ago, in Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943), the Court, by a 6–3 vote, struck down a municipal ordinance that made it unlawful “for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.” Conceding that “door to door distributors may be either a nuisance or a blind for criminal activities,” Justice Black, speaking for the Court, noted “they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.” The Court held the ordinance to be overbroad since the objective of protecting the householder’s privacy could have been just as effectively protected by punishing ringing the bell or knocking on the door where the occupant displayed a no-soliciting or do-not-disturb sign. Although the Martin case involved the canvassing activities of Jehovah’s Witnesses, the Court’s holding was equally applicable to home visits by individuals selling products or services.

Door-to-door selling has long since been replaced by telemarketing and a “No Soliciting” sign on the front lawn has been replaced by the national “do-not-call” registry. After the Federal Trade Commission and the Federal Communications Commission together adopted

28. Although Martin settled the unconstitutionality of banning all door-to-door solicitation, the Court, nearly 60 years later, addressed the narrower requirement that all door-to-door canvassers first obtain a permit. In Watchtower Bible and Tract Society of New York v. Village of Stratton, Ohio, 536 U.S. 150, 122 S.Ct. 2080 (2002), the Court by an 8–1 vote held that an across-the-board registration requirement violated the First Amendment. Government’s interest in preventing consumer fraud was held insufficient to justify requiring every canvasser to register and obtain a permit. The Court held that three arguments weighed heavily against the ordinance: revealing the identity of individuals soliciting for unpopular causes might leave them open to retaliation and ostracism; registering was burdensome (especially since canvassers had to identify by number and street each house where they intended to visit); and securing a permit in advance substantially hindered spontaneous speech. The permit requirement was thought generally unrelated to advancing residential privacy (the village had another ordinance making it an offense to disturb a homeowner who had both registered his wish not to be bothered and posted a sign to that effect) and largely ineffective in preventing crime (since criminals frequently have been known to lie or to evade legal requirements). The Court did not identify what specific standard should be applied in assessing the ordinance’s constitutionality because the breadth of the speech affected and the sweep and burden of the enactment doomed it in any event.
rules in 2003 setting up the do-not-call list, pursuant to the Telephone Consumer Protection Act of 1991 and the Telemarketing and Consumer Fraud and Abuse Act of 1994, telemarketers challenged the agencies’ statutory authority to do so and also argued that it violated of the First Amendment. After an initial adverse district court decision, establishment of the do-not-call list was upheld on appeal. See US Security v. Federal Trade Commission, 282 F.Supp.2d 1285 (W.D.Okla. 2003), reversed by Mainstream Marketing Services, Inc. v. Federal Trade Commission, 358 F.3d 1228 (10th Cir. 2004), cert. denied, 543 U.S. 812, 125 S.Ct. 47 (2004). The court upheld FTC and FCC authority under existing law to put the system in place and concluded the scheme was consistent with the First Amendment because: (1) it restricted only “core commercial speech” (commercial sales calls); (2) it targeted only speech that “invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence”; (3) it put “the choice of whether or not to restrict commercial calls entirely in the hands of consumers”; and (4) it “materially furthered” the government’s important interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of calls that cause these problems.” Notwithstanding the appellate court’s ruling upholding the agencies’ existing authority to establish the registry, Congress (by a vote of 412–8 in the House and unanimously in the Senate) passed legislation explicitly empowering the creation of the do-not-call list.

The ban on phone solicitations to residences on the national do-not-call list, however, applies only to those from for-profit enterprises and not to fund-raising calls from charities and political organizations. A nettlesome problem with charitable fundraising is high overhead costs, with the consequence that often comparatively little money goes to the cause in whose name the money is solicited. This is particularly true when fundraising is done by telemarketing companies operating under contract with the charity. Many members of the public regard high overhead costs as a form of theft, and in response to the clamor that a lid be put on fundraising expenses, governments set a maximum percentage of the money raised that can go to defray overhead costs. Some jurisdictions identified excessive overhead costs as a type of fraud.

In a series of cases decided during the 1980s, the Supreme Court held that state and local governments could not impose a ceiling on fundraising costs since costs might legitimately vary from case to case. The Court ruled that laws “barring fees in excess of a prescribed level effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment.”

In Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S.Ct. 1829 (2003), the Court addressed the question of fraud. In that case, a telemarketing outfit had contracted with a Vietnam veterans organization to raise money with the result that 13% or less of the proceeds went to the charity. The state attorney general charged the telemarketing firm with violating Illinois’ fraud statute, not because it kept 85% of the money raised, but because it deliberately misled the public. Telemarketing Associates informed the people it called that “a significant amount of each dollar donated would be paid to [the veterans organization] for its [charitable] purposes while in fact the [fundraisers] knew that * * * 15 cents or less of each dollar” would actually go to the charity. Writing for a unanimous Court, Justice Ginsburg said, “While bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.” Constitutionally speaking, then, liability for fraud could be established if the complaining party proved that the representation of fact made by the defendant was false, that the defendant made the representation with the intent to deceive, and that it succeeded in doing so.
CHAPTER SUMMARY

The topography of the Supreme Court’s free speech rulings can present a confusing and intimidating landscape. Slices of the Court’s doctrine that may seem understandable in isolation, may appear disjointed and case-specific when taken collectively. Much of the Court’s approach should be familiar, especially its use of strict scrutiny or reasonableness, but its treatment of symbolic speech and commercial speech seems cut from new cloth.

Exhibit 11.1 (p. 933) presents “the big picture” of the Court’s free speech jurisprudence. The framework it presents should not be seen as a hierarchy of rigid categories that trigger the mechanical application of rules, but as a general constitutional guide that identifies different factual circumstances and corresponding constitutional standards that the Court uses to evaluate government regulation.

That there are several levels of constitutional analysis, each with its own distinctive test, makes the study of the Court’s free speech rulings complex, but the chart presents them as an integrated whole. It is often possible to approach a case from different vantage points, depending on which facts are thought to be critical. The difficulty increases when several key facts pull in different directions, and the Justices themselves frequently disagree in their perceptions and conclusions about how much weight to give particular facts in a controversy. Probably the Court’s greatest challenge lies in trying to ensure that, by whichever route one tackles a case, there is agreement on the level of scrutiny to be applied. To some extent this difficulty is mitigated by the recognition of only three tiers of scrutiny, a development made necessary because the Court’s initial attempt to simply distinguish between speech and action (or conduct) simply proved to be too blunt an instrument for analyzing real-world facts—as the symbolic speech cases demonstrate.

Perhaps the most helpful way to visualize the big picture is the way Justice Stevens presents it (see p. 885); in terms of a combination of factors that move the pointer of constitutional scrutiny up or down, heightening or loosening the rigor of the Court’s analysis.

Constitutional scrutiny is applied at its most intense when government requires the citizen to speak (probably best exemplified by the compulsory flag salute), or where government enforces an orthodoxy or compels an individual to take a position on an issue. A fact of this sort would itself certainly be sufficient to trigger strict scrutiny, as in Texas v. Johnson, if it does not in fact constitute an absolute violation of the First Amendment, as the Barnette case suggests. Other factors, however, are often less clear, especially in combination.

The most elevated scrutiny is also triggered by a direct infringement of an individual’s right to give a speech. Use of signs, placards, parades, and sit-ins muddy the picture. Free speech is at its strongest when it is oral—when it is “pure” speech. The right to speak is less strong when it involves “speech-plus,” as in picketing and marching. Where the speech activity occurs also makes a difference: First Amendment claims are strongest in a public forum (such as a sidewalk or park) and weakest (even nonexistent) in a nonpublic forum (such as a privately owned shopping center or on someone else’s front lawn).

It matters, too, what the purpose of the regulation is. Where government aims at the suppression of speech, where it regulates speech according to its viewpoint, or where it discriminates among speakers on the basis of content, scrutiny will be strict. But if the regulation is content-neutral, the regulation aims at advancing interests that are not related to expression, and the impact on speech is incidental, then intermediate scrutiny is constitutionally appropriate.
### Exhibit 11.1 The Three Tiers of Constitutional Scrutiny in Free Speech Cases

<table>
<thead>
<tr>
<th>Tier/Level of Scrutiny</th>
<th>Factual Circumstances</th>
<th>Constitutional Test</th>
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<tbody>
<tr>
<td><strong>Upper Tier—Strict Scrutiny</strong></td>
<td>Any of the following: “pure speech”; forcing an individual to articulate or disseminate the government’s message; compelling an individual to disclose his or her position on an issue; viewpoint or content-based discrimination; regulation aimed at the suppression of expression; or regulation of expression in a public forum on other than a content-neutral time, place, and manner basis.</td>
<td>(1) The regulation is presumed to be unconstitutional, and the burden of proof is on the government to establish the constitutionality of the regulation; (2) the government must demonstrate a compelling interest; and (3) the government must show that its regulation is the least restrictive alternative. (See Rosenberger, p. 833; Barnette, p. 859; Johnson, p. 874; R.A.V., p. 882; Hudak, p. 889; Bollard, p. 901; Primus, p. 927).</td>
</tr>
<tr>
<td><strong>Middle Tier—Intermediate Scrutiny</strong></td>
<td>“Speech plus”—that is, the combination of speech and nonspeech elements in the same activity, so that both of the following conditions are met: (1) there is an intent to convey a message; and (2) it is likely that the message would be understood by those for whom it is intended. If both of these conditions are not met, the activity is not expression but simply conduct and falls into the bottom tier.</td>
<td>When speech and nonspeech elements are combined in the same activity, a governmental regulation is justified (1) if it is within the constitutional power of government; (2) if it furthers an important or substantial governmental interest; (3) if the regulation is not related to the suppression of expression; and (4) if the incidental impact on expression is no greater than necessary to further that interest. (See O’Brien, p. 871; Barnes, p. 880. In Madsen, p. 827, the Court applied intermediate scrutiny because an injunction, not a statute, was at issue).</td>
</tr>
<tr>
<td><strong>Lower Tier—Reasonableness</strong></td>
<td>Content-neutral time, place, and manner regulation of speech in a public forum.</td>
<td>Government may impose generally applicable, reasonable restrictions on the time, place, and manner of speech, provided the restrictions (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communicating the information. (See Rock Against Racism, p. 821; Hill, p. 831).</td>
</tr>
</tbody>
</table>
It may be that expression is not implicated at all. Of course, this cannot be true literally because every action (including murder and every other crime) is itself a form of expression. Because of this, constitutionally speaking, the Court has taken great care to distinguish "pure speech" and "speech plus," on the one hand, from action or conduct, on the other. Finally, as the cases clearly show, the mortality rate of government regulations decreases as one moves from the top to the bottom tier. Precisely because selecting the test to be applied so often seems to determine the outcome in advance, judges will usually take great care to justify the applicable tier of constitutional analysis and to exclude the others.
Because freedom of the press, like freedom of speech, is a fundamental right governmental infringement of which triggers strict scrutiny, there is an understandable tendency to regard free press questions as simply free speech questions set in print. Although at any given time freedom of the press may serve one or more of the functions of freedom of expression identified previously by Emerson (see pp. 776–777), there is a dimension to most free press cases that usually sets them apart from free speech cases: Unlike most free speech cases, the interested party in free press cases is usually a business, not an individual. To be sure, the Internet has had a profoundly democratizing effect by providing individuals with the means for easy, instant, virtually unrestricted expression and a world-wide audience. It may well be that this represents the technological realization of the dream that inspired those who secured the adoption of the First Amendment. But the cold, hard fact remains that the dissemination of news is still overwhelmingly controlled by big business. The difficulty of reconciling the competing interests presented in free press cases is, therefore, compounded by the concentration of power in the media. A First Amendment guarantee written with the aim of protecting the lone pamphleteer largely operates to shield powerful commercial enterprises. Libertarians, sympathetic to the argument that the absolute protection of a free press was indispensable to safeguarding the integrity of the small town newspaper publisher and the independent journalist, see that such a comprehensive guarantee today often amounts to sanctioning laissez-faire capitalism for the media conglomerate. The dilemma posed for the First Amendment by the development of a media establishment is especially perplexing, for the hazards of regulation are well known; yet, on its face, the First Amendment applies with equal force to both the political essayist and the newspaper syndicate. Ironically, one of the chief obstacles to the exercise of a wide freedom of the press has turned out to be the exercise of freedom by the giants of the media. In First National Bank of Boston v. Bellotti (p. 901), presented in the previous chapter, the Court struck down limitations on corporate spending to influence state referenda in the face of contentions that corporations, such as banks, possessed tremendous potential to influence the political process. In the following excerpt from his concurring opinion in that case, Chief Justice Burger argues that if corporate influence is the worry, critics should focus their concern on the media:
Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many activities, some directly related—and some not—to their publishing and broadcasting activities. * * * Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or worldwide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timber lands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for the purpose of transporting the newsprint to the presses. Such activities would be logical economic auxiliaries to a publishing conglomerate. Ownership also may extend beyond to business activities unrelated to the task of publishing newspapers and magazines or broadcasting radio and television programs. * * *

In terms of "unfair advantage in the political process" and "corporate domination of the electoral process," it could be argued that such media conglomerates as I describe pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues. * * *

Even without the clout that comes from being a media heavyweight, a business after all is still a business. The stir of the profit motive—reflected in the old adage that news sells, history doesn't—means that the actions of media businesses (such as those in libel cases) often have effects on particular individuals, as distinguished from the public at large. The consequences thus seem more unacceptable because they are identifiable in personal terms. All these elements appear to be present much less often in run-of-the-mill free speech cases.

A. CENSORSHIP AND PRIOR RESTRAINT

Freedom from censorship or prior restraint is an umbrella concept. Proponents of a free press have argued that it is comprised of several distinguishable liberties: a right to publish, a right to confidentiality of sources, and a right of access. This section examines the extent to which the Supreme Court has recognized each of these as a constitutionally guaranteed freedom of the press.

The Right to Publish

By its decision in Near v. Minnesota (p. 937), the Supreme Court recognized freedom of the press as a fundamental right and incorporated the prohibition on its abridgment by the states as well as the federal government. Although the Court in Near found the Minnesota statute constitutionally obnoxious (because it weighted the scales heavily in favor of the government by forcing offending publishers to establish not only the truth of their

1. Concern about the concentration of power in large media corporations bothered many legislators as well. When the Federal Communications Commission announced in June 2003 that it was going to relax the rules and allow media companies to own several newspapers and broadcasting stations serving the same market, there was major effort in Congress to overrule the FCC and prevent such acquisitions. Legislators split roughly along the same lines as divided the commissioners (Republicans in favor of allowing greater media concentration and Democrats opposed). However, the legislation never got off the ground, nor, it turned out, did the commission's rules. After issuing a temporary restraining order that put the new rules on hold, a federal appeals court subsequently told the FCC to rewrite many of them, although it upheld the commission's authority. See Prometheus Radio Project v. Federal Communications Commission, 373 F.3d 372 (3d Cir. 2004), cert. denied, 545 U.S. 1123, 125 S.Ct. 2904 (2005). Illustrative of the concentration of power in media conglomerates is the Gannett Company, which controls some 101 daily papers and 22 television stations. Other large media corporations whose expansion was delayed by the court decision include News Corporation (which runs the Fox Entertainment Group, Fox Television, and the New York Post), and Viacom (which owns CBS). See New York Times, June 25, 2004, pp. C1, C4.
statements, but their good motives as well, because it could be used to suppress criticism of
government officials, and because it prevented any continued publication as distinguished
from punishing the commission of particular criminal offenses, it disclaimed any notion
that freedom of the press was absolute. In Near, the Court took issue with Blackstone’s
famous characterization that “[t]he liberty of the press * * * consists in laying no previous
restraints upon publications, and not in freedom from censure for criminal matter when
published * * *.” By recognizing that this definition of freedom of the press was inadequate
because the First Amendment also encompassed some limitation on the sort of sanctions
that could be imposed after publication, the Court appeared at the very outset to
demonstrate a keen awareness of the notion of “chilling effect” (the idea that the prospect
of severe sanctions could deter publication in the first place and thus indirectly operate as a
form of prior restraint).

NEAR V. MINNESOTA
Supreme Court of the United States, 1931
283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357

BACKGROUND & FACTS  A 1925 Minnesota law provided for the
abatement as a public nuisance of any “malicious, scandalous, and defamatory
newspaper, magazine, or other periodical.” As a defense, the statute permitted anyone
charged with violating the law to show that the material was true and was published
with good motives and justifiable ends. The statute empowered the prosecuting
attorney of any county where such a publication was produced or circulated to seek an
injunction abating the nuisance by preventing any further publication or distribution
of the material.

Pursuant to this law, the county attorney for the county including and surrounding
the City of Minneapolis brought suit to enjoin Near from further publication of a
small paper known as The Saturday Press. In nine issues of that paper published in the
autumn of 1927, articles appeared which “charged, in substance, that a Jewish
gangster was in control of gambling, bootlegging, and racketeering in Minneapolis
and that law enforcing officers and agencies were not energetically performing their
duties.” Various and sundry charges, such as dereliction of duty, complicity,
participation in graft, inefficiency, and the like, were leveled at the mayor, the
county attorney, and particularly the chief of police. The paper’s call for reform was
trumpeted with a shrill anti-Semitism evident in the following excerpt:

I simply state a fact when I say that ninety per cent of the crimes committed against
society in this city are committed by Jewish gangsters.

It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who
employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault
that gentleman when he refused to yield to their threats. It was a JEW who wheedled or
employed Jews to manipulate the election records and returns in the Third ward in
flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to
pay to our chief of police just before the last municipal election, and:

It is Jew, Jew, Jew, as long as one cares to comb over the records.

I am launching no attack against the Jewish people AS A RACE. I am merely calling
attention to a FACT. And if the people of that race and faith wish to rid themselves of
the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT
UPON THEM, they need only to step to the front and help the decent citizens of
Minneapolis rid the city of these criminal Jews.2

The trial court overruled Near’s demurrer (a response to a complaint in which the defendant concedes for the sake of argument that he did what he is accused of doing, but argues that what he did broke no law) and issued an injunction preventing further publication. (The statute additionally provided that disobedience to an injunction issued under the law constituted contempt and specified a penalty of a $1,000 fine or a year’s imprisonment.) The Minnesota Supreme Court upheld the constitutionality of the statute over Near’s contention that it violated the First Amendment, whereupon he appealed to the U.S. Supreme Court.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

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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.* * *  

***

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. * * * 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. * * * 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 * * *.

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. * * *

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. * * * 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. * * *

Fourth. The statute * * * put[s] 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. * * *

[The * * * effect of the statute * * * 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 question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licensor, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.” 4 Bl.Com. 151, 152.

The criticism upon Blackstone’s statement has not been because immunity from previous restraints cannot be all that is secured by the constitutional provisions,” and that “the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.” 2 Cooley, Const. Lim. (8th Ed.) pp. 885.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. * * * [In wartime, no one] would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. * * * [But these] limitations are not applicable here. * * *

Liberty of the press, historically considered * * * has meant, principally although not exclusively, immunity from previous restraints or censorship. * * * That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. * * *

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws.
providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. **

[That, with time,] the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

**

For these reasons we hold the statute ** to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. **

Judgment reversed.

Mr. Justice BUTLER (dissenting).

**

The Minnesota statute does not operate as a previous restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors, but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous, and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state Supreme Court, that they threaten morals, peace, and good order. There is no question of the power of the state to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. **

There is nothing in the statute purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent further publication of malicious, scandalous, and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.

**

It is well known, as found by the state Supreme Court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.

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Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice SUTHERLAND concur in this opinion.

Six decades later, however, in Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766 (1993), the Supreme Court rejected the contention that the forfeiture of property by someone convicted of racketeering had a “chilling effect” on the dissemination of nonobscene publications. In that case the longtime owner and operator of numerous “adult
entertainment” businesses had been convicted of selling several obscene magazines and videotapes and, in addition to imprisonment and a fine on the obscenity charge, the judge ordered the forfeiture of both Alexander’s businesses and some $9 million associated with his racketeering activity. Alexander challenged the forfeiture as constituting a “prior restraint” since the seizure of all his business property included materials that had not been determined to be obscene. The Court distinguished the facts in Alexander from those in Near. Speaking for a bare majority, Chief Justice Rehnquist explained:

Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints. * * * In Near v. Minnesota * * * we invalidated a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from producing any future “malicious, scandalous and defamatory” publication. Near, therefore, involved a true restraint on future speech—a permanent injunction. * * *

By contrast, the RICO forfeiture order in this case does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities. It only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores, restock his inventory, and hire staff, petitioner can go back into the adult entertainment business tomorrow, and sell as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order.

Unlike the injunction in Near, * * * the forfeiture order in this case imposes no legal impediment to—no prior restraint on—petitioner’s ability to engage in any expressive activity he chooses. He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses.

Alexander’s real complaint, the Chief Justice pointed out, was not that the forfeiture constituted a prior restraint but that it had a “chilling effect.” He rejected that contention as well, saying: “[T]he threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine. * * * [T]he prospect of * * * a lengthy prison sentence would have a far more powerful deterrent effect on protected speech than the prospect of any sort of forfeiture. * * * Similarly, a fine of several hundred thousand dollars would certainly be as fatal to most businesses—and, as such, would result in the same degree of self-censorship—as a forfeiture of assets. Yet these penalties are clearly constitutional * * *.”

The majority also went on to reject the argument that the penalties imposed were “excessive” in violation of the Eighth Amendment.

Speaking for three other dissenting Justices (Blackmun, Stevens, and Souter) as well as himself, Justice Kennedy concluded that the facts in Alexander were much more like those in Near than the majority cared to acknowledge:

The operation and effect of RICO’s forfeiture remedies is different from a heavy fine or a severe jail sentence because RICO’s forfeiture provisions are different in purpose and kind from ordinary criminal sanctions. * * * The Government’s stated purpose under RICO, to destroy or incapacitate the offending enterprise, bears a striking resemblance to the motivation for the state nuisance statute the Court struck down as an impermissible prior restraint in Near. The purpose of the state statute in Near was “not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical.” * * * The particular nature of Ferris Alexander’s activities ought not blind the Court to what is at stake here. Under the principle the Court adopts, any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction.

Thus, at bottom, what was at issue in Alexander was “not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech.” Said Justice Kennedy, “The forfeiture provisions accomplished this in an indirect
way by seizing speech presumed to be protected along with instruments of its dissemination, and in an indirect way by threatening all who engage in the business of distributing adult or sexually explicit materials with the same disabling measures.”

In sum, the Court has not accepted Blackstone’s precept that freedom of the press entails freedom from any previous restraint. Films and records have long been held to fall within the First Amendment’s protection just as books and magazines do, but the Court rejected the proposition that those disseminating material were constitutionally entitled to one free shot in Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S.Ct. 391 (1961), when—by a bare majority—it turned aside a constitutional attack on Chicago’s movie licensing procedure. In that case, a motion picture distributor challenged the city’s practice of examining films before they were shown on the grounds that the First Amendment guaranteed freedom from any prior restraint and not because of the obscenity standards the city applied. The Court upheld the practice of submitting films for examination before they were shown in the city’s movie theaters. In Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965), however, the Court imposed stringent procedural requirements on such beforehand examination. In that case, Freedman, the owner of a Baltimore movie theater, exhibited the film Revenge at Daybreak without first submitting it to the Maryland Board of Censors as required by state law. He argued that the film review process was so extensive, time-consuming, and burdensome that it was tantamount to a prior restraint. Speaking for the Court, Justice Brennan said:

[We] hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. * * * Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor’s determination whether a film constitutes protected expression. * * * [B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * * The procedure must also assure a prompt final judicial decision,3 to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor’s determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor’s stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country * * *.

These requirements, together with the central principles guiding the Court’s prior restraint doctrine, are well summarized and illustrated in the following case involving a recording by 2 Live Crew, which the sheriff’s office pressured local record store owners to remove from their shelves. Since provisions of the Bill of Rights protect us only from the actions of government and not from decisions by private individuals, had the store owners on their own decided not to sell the recording, no First Amendment issue would have been involved.

3. As subsequently emphasized by the Court, this means exactly what it says—prompt final judgment by the courts, not just “prompt access to judicial review.” See City of Littleton, Colorado v. Z.J. Gifts, 541 U.S. 774, 124 S.Ct. 2219 (2004).
In response to complaints from several south Florida residents about the recording *As Nasty As They Wanna Be* by 2 Live Crew, the Broward County Sheriff's Office began an investigation. A deputy sheriff obtained a copy of the recording, had the lyrics to 6 of the 18 songs transcribed, and filed an affidavit with a county judge seeking a determination that there was probable cause to believe that the recording violated the state's obscenity statutes. After the judge issued a finding of probable cause, agents of the sheriff's office visited retail stores throughout the county that sold records and tapes, identified themselves as acting in an official capacity, handed each store manager a copy of the judge's finding, advised them not to sell any more copies of the recording, and indicated that any further sales would be prosecuted as violations of the state's obscenity law. Within days, all retail stores throughout the county stopped selling the recording. Although some stores continued to sell a sanitized version called *As Clean As They Wanna Be*, the *Nasty* version was no longer sold even by stores that had a policy of specially marking the recording with a warning of its sexually explicit lyrics or that did not sell it to minors. The company that produced the recording and the members of 2 Live Crew brought suit seeking declaratory and injunctive relief against the Broward County Sheriff's Office on First Amendment grounds.

In Skyywalker Records, Inc. v. Navarro, 739 F.Supp.578 (S.D.Fla. 1990), Federal District Judge Jose Gonzalez found the recording to be obscene, but determined that the actions of the sheriff's office in visiting retail stores selling records and tapes and advising the store managers to stop selling the recording constituted a prior restraint in violation of the First Amendment. Judge Gonzalez explained:

> A prior restraint can be generally defined as any condition imposed by the government on the publication of speech. *Such a limitation can come in varying forms including permit requirements, licensing taxes, registration, prepublication submission of materials, seizures, and judicial injunctions.* The distinguishing characteristic of a prior restraint is that the condition vests power in a nonjudicial official to make the final decision as to whether speech will be permitted at all or in what form.

The final decision of whether *As Nasty As They Wanna Be* would be published was left in the nonjudicial hands of the Broward County Sheriff's office. Although the music store operators were the immediate parties who stopped distributing the recording, they so acted only after the police visits and the delivery of the court's probable cause order. Had the deputies only given advice to aid compliance with the law (without also threatening arrest while presenting a judicial order of probable cause) and had the store operators decided to accept the advice and remove the recording from their inventory, this would be a different case.

The argument that no other musical works were banned and that the sheriffs' visits did not otherwise disrupt business in the stores is of no consequence. The material issue in this case is that there was a county wide seizure of *As Nasty As They Wanna Be*. Every single copy of this recording was removed from the shelves of approximately forty stores. Because of the vulnerability of First Amendment rights, the seizure of even a single copy of one work is constitutionally significant.


In Bantam Books, an administrative commission created under state law was given authority to review books and magazines. The commission circulated blacklists of publications believed by them to be objectionable for sale to minors. The lists were sent on official stationery with a reminder that the commission had a legal duty to recommend prosecutions for obscenity law violations to the state Attorney General. Upon receiving the notices, publishers stopped selling the listed items. Police officers conducted follow-up visits to oversee compliance.

People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by
police visitations, in fact stopped the circulation of the listed publications. It would be naive to credit the State’s assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity.

The only procedural protections accompanying the ban of As Nasty As They Wanna Be were an ex parte application to a state judge for an order of probable cause and the fact of the order itself finding that there was probable cause to believe Nasty was obscene.

These two procedures were clearly insufficient to meet the minimum requirements of due process. The result was that Nasty was subjected to an unconstitutional prior restraint and the plaintiffs’ rights to publish presumptively protected speech were left twisting in the chilling wind of censorship.

The Supreme Court’s decision in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965), reaffirmed the minimum procedural safeguards necessary for a prior restraint to pass due process scrutiny.

By pretrial motion, the defendant accepted the burden of proving that Nasty was unprotected speech because it is obscene. As to all the other Freedman safeguards, however, the defendant’s conduct fell woefully short of legal and constitutional requirements.

First, the Sheriff did not institute judicial proceedings after threatening the music store operators and distributing Judge Grossman’s order.

It is well-established that prior restraints vesting unbridled discretion in nonjudicial officials, thereby making their suppression decision final, in effect, are constitutionally unacceptable.

Why the defendant chose to pursue this type of prior restraint is not clear. Had the Sheriff’s office initiated a criminal prosecution, the Freedman problems might not have arisen because of the rigorous procedures inherent in criminal proceeding.

Second, the prior restraint imposed on Nasty was not limited "for only a specified brief period" or restricted to "the purpose of preserving the status quo." Rather, the ban initiated by the visits and the presentation of the probable cause order when combined with the threat of future prosecution was designed to indefinitely suppress the recording.

[Third,] the Freedman decision requires that there be a prompt and final judicial decision. This includes not only the time from seizure to filing, but also considers the delay between commencement of the lawsuit and a full adversary hearing; and the time after the trial until the court enters a final order on the issue of obscenity. Unreasonable delay or the lack of assurance at any step is fatal to the constitutional adequacy of the state regulation.

Moreover, due process requires more than an assurance of a prompt judicial decision. When the government intends to seize large quantities of presumptively protected materials, the First and Fourteenth Amendments require an adversary hearing before any seizures are made. The Supreme Court has clearly held that in the case of massive seizures such as here, mere ex parte determinations of probable cause are simply impermissible under the U.S. Constitution.

Judge Gonzalez then issued a permanent injunction barring the sheriff’s office from any further interference with sales of the recording.

Obscenity, like that alleged in the 2 Live Crew recording at issue in Skyywalker Records, had been identified by the Court in Near as a valid ground for government intervention. Censorship and prior restraint are not concepts that address the substantive determination about whether something is obscene, but pertain instead to the mechanisms by which the government intervenes. Thus, in Skyywalker Records, the federal district judge could
conclude that the recording was obscene (later reversed on appeal)\(^4\), but that the police had unconstitutionally engaged in prior restraint when they sought to deal with it.

It is also clear from references to prohibiting the disclosure of troop movements and preventing interference with the recruitment of soldiers that the Court in Near thought the protection of national security amply justified the government’s resort to prior restraint. Lincoln’s imposition of censorship during the Civil War and the monitoring of correspondence and news reports from the battlefield and at home during other periods of hostilities may not have gone unchallenged, but they were consistently upheld. Publication of *The Pentagon Papers* following their theft, however, presented a much more difficult case. In *New York Times Co. v. United States*, several factors muddied the constitutional waters: the lack of explicit congressional authorization preventing publication, the historical nature of the materials, and the sense that government embarrassment, rather than a threat to the lives of American military personnel, was the real motivation for secrecy. A national security interest—preventing the proliferation of nuclear weapons to rogue states and terrorist groups—is also apparent in *United States v. Progressive* (p. 951), where it materializes under unusual circumstances. Recent developments in Iraq and the September 11, 2001 attacks on the World Trade Center and the Pentagon make the risk much less improbable than it seemed when the case was decided and perhaps make the end of that story more disturbing.

**NEW YORK TIMES CO. v. UNITED STATES**

*The Pentagon Papers Case*

Supreme Court of the United States, 1971

403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822

**BACKGROUND & FACTS** The U.S. government brought suit to restrain the *New York Times* from publishing excerpts of a classified study, “History of U.S. Decision-Making Process on Viet Nam Policy.” The Times came to have possession of a copy of this multivolume analysis, more popularly known as “The Pentagon Papers,” as a consequence of the efforts of one of the study’s contributors, Daniel Ellsberg. In a companion proceeding, the government sought similar injunctive relief against publication in another newspaper, the *Washington Post*. The federal district courts in which the suits were brought refused to issue orders halting publication, and the government appealed. The U.S. Court of Appeals for the District of Columbia affirmed the ruling of one district court, but the Court of Appeals for the Second Circuit remanded the *New York Times* case to the lower court for further hearings. Both the *New York Times* and the government sought review by the Supreme Court.

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4. The district judge had held that the lyrics—which contained “references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sadomasochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning”—were so graphic and driven home with such a beat that “the audio message [was] analogous to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts.” The determination that the recording was obscene was overturned by the appeals court in *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), cert. denied, 506 U.S. 1022, 113 S.Ct. 659 (1992), because of the absence of any evidence by the government to rebut the testimony by 2 Live Crew’s expert witnesses that the recording had artistic and cultural value. The appellate court also faulted the judge’s determination that the recording affronted contemporary community standards when the case had not been tried to a jury, which presumably would have reflected a cross-section of the community’s views.
PER CURIAM.

We granted certiorari***i n these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy.”


The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed, *** and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. ***

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Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring.

*** I believe that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. ***

***

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

***

We are asked to hold that despite the First Amendment’s emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of “national security.” The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to “make” a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. *** No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.
The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. * * *

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joins, concurring.

* * *

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625 (1931), repudiated that expansive doctrine in no uncertain terms. * * *

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. * * *

* * *

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment. * * *

Mr. Justice BRENNAN, concurring.

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. * * *

But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. * * *

Whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. * * * [T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

* * *

Mr. Justice STEWART, with whom Mr. Justice WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is
alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

* * * If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive— as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

* * *

In the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

Mr. Justice WHITE, with whom Mr. Justice STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. * * *

The United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

* * *

[terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its
constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

** * * * 

The Criminal Code [18 U.S.C.A.] contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the injunction, and consequently the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793(e) makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. * * * 

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. * * * It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. * * * In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

Mr. Justice MARSHALL, concurring. 

** * * * 

The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. * * * It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

** * * * 

Justice MARSHALL then discussed at some length Congress's explicit rejection on two occasions, once in 1917 and again in 1957, of proposals to give the President the power to prohibit the publication during any national emergency emanating from war of any information that might endanger the national security.

Mr. Chief Justice BURGER, dissenting. 

** * * * 

I suggest * * * these cases have been conducted in unseemly haste. * * * The prompt settling of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean judicial haste.

** * * * 

The newspapers make a derivative claim under the First Amendment; they denomi-
nate this right as the public “right to know”; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic “scoop.” The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout “fire” in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in Near v. Minnesota ex rel. Olson. * * * An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public’s “right to know,” has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged “right to know” has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government’s objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? * * * To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. * * * The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. * * *

* * *

Mr. Justice HARLAN, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting:

* * *

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

(1) Whether the Attorney General is authorized to bring these suits in the name of the United States. * * *

(2) Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. * * *

(3) Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

(4) Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.
(5) What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

(6) Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government’s possession and that the newspapers received them with knowledge that they had been feloniously acquired. * * *

(7) Whether the threatened harm to the national security or the Government’s possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a) The strong First Amendment policy against prior restraints on publication;

b) The doctrine against enjoining conduct in violation of criminal statutes; and
c) The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve.

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* * * [These great issues * * * should not] have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. * * *

NOTE—UNITED STATES v. PROGRESSIVE, INC.

The editors of The Progressive, a monthly magazine of political commentary and analysis published out of Madison, Wisconsin, with a nationwide circulation of about 40,000, commissioned Howard Morland, a freelance writer interested in nuclear weapons, to prepare an article about the U.S. weapons program. With the knowledge and consent of the Department of Energy (DOE), he visited most of the nuclear bomb component manufacturing facilities, and, after usually identifying himself as a journalist and stating his purpose, he engaged various government employees at these facilities in lengthy interviews. He did not have access to any classified information. From material that was available off the shelves at certain DOE facility libraries and from what he saw and was told, Morland was apparently able to deduce the design of the U.S. hydrogen bomb. The point of the planned article, "The H-Bomb Secret: How We Got It, Why We’re Telling It," was to show that the much-touted security surrounding American nuclear weaponry was largely an illusion. After the final draft of the manuscript was completed, including several sketches that were to be published as part of the article, the material was submitted to DOE for verification of some technical information. DOE responded that, whatever its source, the projected article contained "restricted data" in violation of the Atomic Energy Act of 1954, and, while not desiring to prohibit publication entirely, the department insisted on the deletion of certain sensitive material. (DOE officials claimed that about 20% of the text and all of the sketches were "restricted data" and offered to rewrite the article.)

When The Progressive refused to comply, the government filed suit in federal district court to enjoin publication of the article in its existing form.

In United States v. Progressive, Inc., 467 F.Supp. 990 (W.D.Wis. 1979), Judge Robert Warren granted the injunction. The magazine argued that the planned article contained data already in the public domain and available to anyone diligent enough to search for it. The government argued that not all of the information had come from sources available to the public and even if it did, the
Morland article posed a danger by exposing certain concepts that up to that point had not been
disclosed in relationship to each other.

Although Judge Warren doubted that all of the relevant concepts contained in the Morland
article appeared in the public realm, even so “due recognition must be given to the human skills and
expertise in writing this article. The author needed sufficient expertise to recognize relevant, as
opposed to irrelevant, information and to assimilate the information obtained. The right questions
had to be asked or the correct educated guesses had to be made.” Rejecting any characterization of
the article as a “do-it-yourself” guide for the hydrogen bomb because “[o]ne does not build a
hydrogen bomb in the basement,” the judge allowed as how “the article could possibly provide
sufficient information to allow a medium size nation to move faster in developing a hydrogen
weapon,” since “[i]t could provide a ticket to by-pass blind alleys.” The Morland article focused on
basic concepts, yet “once basic concepts are learned, the remainder of the process may easily follow.”

The State and Defense Departments were of the view that publication would “irreparably impair the
national security of the United States” by “substantial[y] increas[ing] * * * the risk of thermonuclear
proliferation.” Although Judge Warren conceded that the purpose of the article was to “alert the
people of this country to the false illusion of security created by the government’s futile efforts at
secrecy,” he could find “no plausible reason why the public needs to know the technical details about
hydrogen bomb construction to carry on informed debate on this issue.”

Distinguishing this controversy from New York Times Co. v. United States, Judge Warren wrote:
This case is different in several important respects. In the first place, the study involved in the
New York Times case contained historical data relating to events that occurred some three to twenty
years previously. Secondly, the Supreme Court agreed with the lower court that no cogent reasons
were advanced by the government as to why the article affected national security except that
publication might cause some embarrassment to the United States.

A final and most vital difference between these two cases is the fact that a specific statute is
involved here. Section 2274 of The Atomic Energy Act prohibits anyone from communicating,
transmitting, or disclosing any restricted data to any person “with reason to believe such data will be
utilized to injure the United States or to secure an advantage to any foreign nation.”

Section 2014 of the Act defines restricted data: “Restricted Data” means all data concerning
1) design, manufacture, or utilization of atomic weapons; 2) the production of special nuclear material;
or 3) the use of special nuclear material in the production of energy, but shall not include data
declassified or removed from the Restricted Data category pursuant to section 2162 of this title.”

As applied in this case, the judge found the Atomic Energy Act neither vague nor overbroad.
Observing that issuing the injunction was the lesser of two evils, Judge Warren said: “A mistake in
ruling against The Progressive will seriously infringe cherished First Amendment rights. * * * A
mistake in ruling against the United States could pave the way for thermonuclear annihilation of us
all.” Concluded the court:

In the Near case, the Supreme Court recognized that publication of troop movements in time of
war would threaten national security and could therefore be restrained. Times have changed
significantly since 1931 when Near was decided. Now war by foot soldiers has been replaced in large
part by war by machines and bombs. No longer need there be any advance warning or any
preparation time before a nuclear war could be commenced.

In light of these factors, this Court concludes that publication of the technical information on the
hydrogen bomb contained in the article is analogous to publication of troop movements or locations
in time of war and falls within the extremely narrow exception to the rule against prior restraint.

Because of this “disparity of risk,” because the government has met its heavy burden of showing
justification for the imposition of a prior restraint on publication of the objected-to technical
portions of the Morland article, and because the Court is unconvinced that suppression of the
objected-to technical portions of the Morland article would in any plausible fashion impede the
defendants in their laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions, the Court finds that the objected-to portions of the article fall within the narrow area recognized by the Court in Near v. Minnesota in which a prior restraint on publication is appropriate.

The government has met its burden under section 2274 of the Atomic Energy Act. In the Court's opinion, it has also met the test enunciated by two Justices in the New York Times case, namely grave, direct, immediate and irreparable harm to the United States.

After Judge Warren issued the injunction, the magazine's publishers sought expedited review by the U.S. Supreme Court, but the Court declined by a 7–2 vote, 443 U.S. 709, 99 S.Ct. 3086 (1979). The case was then argued before the U.S. Court of Appeals for the Seventh Circuit.

Although the federal appeals court affirmed the district court decision, 610 F.2d 819 (7th Cir. 1979), subsequent events mooted this case. Before the appellate court's decision could be announced, Madison Press Connection, a small Wisconsin newspaper with a circulation of approximately 11,000, printed an 18-page letter written to Illinois Senator Charles Percy by Charles Hansen, a computer programmer whose hobby since 1971 had been collecting public documents about the hydrogen bomb. Hansen's letter was prompted by a request from a member of Percy's staff inviting him to elaborate on statements concerning the Progressive case that the article in question could easily have been written from sources accessible to the public. Hansen had even launched a national H-bomb contest, offering $200 to anyone who could design a nuclear device using only materials available to the public. In the letter, Hansen poured out his eight years of research and endeavored to show that the "secret" of the hydrogen bomb was a myth, that the necessary information to design such a bomb was available to the public, and that government security policies were inept and misused. The letter discussed in detail and with illustrations what he had deduced as the principles behind the construction of the bomb. In addition to mailing the letter to Senator Percy, Hansen sent copies to newspapers that had been covering his crusade against the myth of H-bomb secrecy. After Hansen's letter appeared verbatim in the Madison Press Connection and the Chicago Tribune, the Justice Department withdrew its suit against the Progressive. Regardless of whether the Madison Press Connection ran afoul of the Atomic Energy Act and could have faced criminal sanctions itself, the publication of Hansen's letter raises another closely related issue that is suggested by the statement of one observer that "if you really want to publish, it's almost impossible to stop you." As a postscript, it should be noted that the Morland article, which had been planned for the April 1979 issue of the Progressive, was finally published in the November 1979 issue. Outside of obscenity cases, it constituted the longest prior restraint in history.5

5. Although the circumstances in the Progressive case may seem extraordinary and highly unlikely to be repeated—such as the government publicly disclosing secrets facilitating the construction of a nuclear weapon—several of the most salient features in fact recurred 27 years later. In 2006, officials of the International Atomic Energy Agency protested to the American representative at the agency that technical experts "were shocked" to discover that the U.S. government had publicly disclosed a dozen charts, diagrams, equations, and lengthy narratives on the construction of nuclear weapons from among 48,000 boxes of documents confiscated in the aftermath of the March 2003 invasion of Iraq. Rather than burden intelligence agents, the treasure trove of documents had been posted on a U.S. government website for the purpose of encouraging private individuals to go on-line, hunt through them, and find evidence that Saddam Hussein was indeed working on the production of weapons of mass destruction in hope of salvaging the discredited rationale originally used by the Bush Administration to justify the Iraq war. “Among the dozens of documents in English were Iraq reports written in the 1990’s and in 2002 for United Nations inspectors in charge of making sure Iraq abandoned its unconventional arms programs after the Persian Gulf war. Experts said that at that time * * * Hussein’s scientists were on the verge of building an atom bomb." Diplomats said that the documents disclosed on the website were identical to those filed with the U.N., except that "the papers given to the Security Council had been extensively edited, to remove sensitive information on unconventional arms." With all of the details left in, the materials on the website amounted to a virtual "cookbook" for those interested in constructing a nuclear device by providing helpful short-cuts and thereby minimizing wasted effort. The website was subsequently shut down. New York Times, Nov. 3, 2006, pp. Al, A12.
The problems posed by censorship and postpublication penalties are equally apparent in government efforts to keep certain information from the media, either as a matter of national security, as in the Pentagon Papers and Progressive cases, or in order not to sully the reputation of innocent individuals, as in Cox Broadcasting Corp. v. Cohn, which follows, Landmark Communications, Inc. v. Commonwealth of Virginia (p. 955), Smith v. Daily Mail Publishing Co. (p. 955) and The Florida Star v. B.J.F. (p. 955). Although these decisions run against the imposition of censorship and postpublication sanctions, they are distinguishable one from another on the basis of the availability of the information as a matter of public record—at least this factor distinguishes Cox Broadcasting and arguably Progressive. In the absence of this factor, to what extent do you think the Court has implicitly adopted a “hide and go seek” view on the question of newspaper publication of sensitive information? In other words, without impinging on government’s right to withhold information not a matter of public record, what limits, if any, has the Court placed on the media’s right to publish such information when and by whatever manner (including theft) such information falls into its hands?

**NOTE—COX BROADCASTING CORP. v. COHN**

In August 1971, Martin Cohn’s 17-year-old daughter, Cynthia, was raped. She suffocated in the course of the attack. While covering the criminal proceedings against the six youths who were subsequently indicted for her rape and murder, Wassell, a reporter, learned the victim’s name. The same day he broadcasted her name as part of a news report over a television station operated by his employer, Cox Broadcasting Corporation. Georgia law made it a misdemeanor to publicize the name of a rape victim, and Cohn, relying upon that statute and alleging that his privacy had been invaded by its violation, brought an action for money damages. The trial court agreed and awarded a summary judgment to Cohn with damages to be determined later by jury trial. On appeal and subsequent rehearing, the Georgia Supreme Court held (1) that the misdemeanor statute failed to support a cause for civil action, but that a civil suit was supported by a common law tort for invasion of privacy; (2) that the case was not appropriate for summary judgment, but should have been sent to a jury for a determination of the facts; (3) that Cohn should be required to establish that the reporter and broadcasting company “invaded his privacy with willful or negligent disregard for the fact that reasonable men would find the invasion highly offensive”; and (4) that the name of a rape victim was not a matter of public concern and hence not necessarily within the range of journalistic activity protected by the First Amendment. On appeal, the U.S. Supreme Court in the initial segment of its opinion concluded that it had jurisdiction, since the state supreme court had rendered a final judgment as to the constitutional issue raised in the case. The Supreme Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), reversed the judgment below. Addressing the question “whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection,” the Court, per Justice White, held that “the State may not do so.” Observing at the outset that, “[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice” and that “even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record,” Justice White reasoned:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a
public benefit is performed by the reporting of the true contents of the records by the media. * * * In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. * * *

Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. * * *

The right to publish is in a much weaker constitutional posture when it comes to the freedom possessed by the editors of school newspapers. In Hazelwood School District v. Kuhlmeier, which follows, the Court sustained very substantial control over school papers by
school officials. Are you persuaded by the majority that a very different set of interests is implicated when it comes to school newspapers? Or does this decision, when taken together with New Jersey v. T.L.O. (p. 673) and Bethel School District v. Fraser (p. 869), signal a clear reversal of the Court’s position on the role of constitutional rights in public schools that Tinker (p. 866) once proclaimed?

Hazelwood School District v. Kuhlmeier
Supreme Court of the United States, 1988
484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592

BACKGROUND & FACTS  Cathy Kuhlmeier and other staff members of Spectrum, the Hazelwood East High School newspaper, filed suit in federal district court against school officials, alleging a violation of First Amendment rights. The students’ complaint stemmed from action taken by Robert Reynolds, the principal, in deleting from an issue of the school paper two pages that contained one article describing some Hazelwood East High students’ experiences with pregnancy and another article that discussed the impact of divorce on the lives of other students. Spectrum was written and edited as part of one of the school’s journalism courses, and, as in the past, the faculty adviser in charge of the paper submitted page proofs to the principal for his approval. Reynolds objected to the pregnancy article because, although students were not specifically named, he believed it might be possible for readers to identify the female students involved and because he thought sexual activity and birth control were not suitable topics for younger students. Reynolds objected to the divorce article on the ground that it identified by name a student who complained about her father’s behavior and because it had been produced without providing any opportunity for her parents to respond or to consent to its publication. Because it was very near the end of the school year and because Reynolds believed that there was no time to make the necessary changes, he directed that the entire two pages on which the articles appeared be deleted from the paper, even though those pages contained several unobjected-to articles as well. The federal district court found no violation of the First Amendment in Reynolds’ action, but a federal appellate court reversed this judgment, and school officials subsequently sought review by the Supreme Court.

Justice WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school’s journalism curriculum.  

*** Students in the public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker [v. Des Moines Indep. Community School Dist.], 393 U.S., at 506, 89 S.Ct., at 736. They cannot be punished merely for expressing their personal views on the school premises—whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,” * * * unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.” * * *  

* * * A school need not tolerate student speech that is inconsistent with its “basic educational mission.” [Bethel School Dist. No. 403 v.] Fraser, 478 U.S., at 685, 106
S.Ct., at 3165, even though the government could not censor similar speech outside the school. * * *

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play “disassociate itself,” not only from speech that would “substantially interfere with [its] work” or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with “the shared values of a civilized social order,” *Fraser, supra,* 478 U.S., at 683, 106 S.Ct., at 3164, or to associate the school with any position other than neutrality on matters of political controversy. * *

The standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that “[a]ll names have been changed to keep the identity of these girls a secret.” The principal concluded that the students’ anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly
all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. * * *

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is therefore Reversed.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

* * *

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. See Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "Socialism is good," subverts the school's inculcation of the message that capitalism is better. Even * * * the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral
position at odds with the school’s official stance might subvert the administration’s legitimate incultation of its own perception of community values.

If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into “enclaves of totalitarianism” * * * that “strangle the free mind at its source” * * *. The First Amendment permits no such blanket censorship authority. * * *

* * * Under Tinker, school officials may censor only such student speech as would “materially disrupt[ing]” a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that “is designed to teach” something—than when it arises in the context of a noncurricular activity. Thus, under Tinker, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. * * * That is not because some more stringent standard applies in the curricular context. * * * It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced,” or that fails short of the “high standards for * * * student speech that is disseminated under [the school’s] auspices * * *.” The educator may, under Tinker, constitutionally “censor” poor grammar, writing, or research because to reward such expression would “materially disrupt[ing]” the newspaper’s curricular purpose.

The same cannot be said of official censorship designed to shield the audience or dissociate the sponsor from the expression. Censorship so motivated * * * in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court’s second excuse for deviating from precedent is the school’s interest in shielding an impressionable high school audience from material whose substance is “unsuitable for immature audiences.” * * *

Tinker teaches us that the state educator’s * * * undeniably vital mandate to inculcate moral and political values is not a general warrant to act as “thought police” stifling discussion of all but state-approved topics and advocacy of all but the official position. * * *

* * * The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk “that the views of the individual speaker [might be] erroneously attributed to the school.” * * *

* * * Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the “Statement of Policy” that Spectrum published each school year announcing that “[a]ll * * * editorials appearing in this newspaper reflect the opinions of the Spectrum staff, which are not necessarily shared by the administrators or faculty of Hazelwood East,” * * * or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. * * *

* * *

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I
would emphatically object to the brutal manner in which he did so. * * * He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. * * *  

Confidentiality of Sources

The right to publish is of very little value, though, without a free flow of information to reporters. Investigative journalists are heavily dependent upon individuals inside and outside of government both for information and for leads to where relevant information can be found. Being forced to divulge one's sources, journalists argue, has an obvious "chilling effect" on the operation of a free press. In *Branzburg v. Hayes* below, the Supreme Court rejected the contention that freedom of the press protected by the First Amendment contained by implication a reporter's privilege against disclosing confidential news sources. Branzburg and the dissenters argued that a presumptive privilege against compelled disclosure exists. Although the ruling in *Branzburg* settled the question as a matter of federal constitutional law, the New Jersey legislature responded by passing a state law that accorded journalists an absolute privilege. In *In re Farber and the New York Times Co.* (p. 964), the state supreme court explained why an absolute privilege could not stand in the face of federal and state guarantees of the defendant's right to confront and cross-examine witnesses against him. Thus, in some states there exists a presumptive privilege as a matter of state law. The framework for overriding this presumptive privilege is explained in *Farber* and draws heavily on the procedures approved by the U.S. Supreme Court in *United States v. Nixon* (p. 211) for overriding the President's claim of executive privilege, an analogous protection of confidentiality in communications between him and his advisers.

**Branzburg v. Hayes**

Supreme Court of the United States, 1972
408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626

**BACKGROUND & FACTS** The Supreme Court granted certiorari to review several cases involving the refusal of newsmen to reveal the identity of confidential sources of information before grand jury investigations of criminal activity. In one case, Paul Branzburg, a reporter for the Louisville Courier-Journal, who had written an article on processing hashish from marijuana, was ordered by a judge to answer questions of a grand jury concerning the identity of the individuals he had observed making the hashish. Branzburg refused to comply and brought proceedings to restrain Judge John Hayes from imposing a contempt ruling. The Kentucky Court of Appeals denied Branzburg's petition for relief, rejecting his claim that immunity against such compelled testimony flowed from the guarantees of a free press contained in the First and Fourteenth Amendments.

In the companion cases, two newsmen, Pappas and Caldwell, refused to testify before grand juries whose inquiries touched on the Black Panthers. Pappas declined to answer questions about what he saw and heard during the time he remained in Panther headquarters while covering "civil disorders" in New Bedford, Massachusetts, even though no articles or publications were produced by him following the events.
And, in response to queries put to him by a federal panel investigating threats against the President and interstate travel to incite riots, Caldwell refused to discuss interviews he had had with militants.

Opinion of the Court by Mr. Justice WHITE, announced by THE CHIEF JUSTICE [BURGER].

The issue in these cases is whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

Petitioners * * * press First Amendment claims * * * that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. * * *

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. * * * Associated Press v. NLRB, 301 U.S. 103, 132–133, 57 S.Ct. 650, 656 (1937), * * * held that the Associated Press * * * was not exempt from the requirements of the National Labor Relations Act. * * * Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news gathering and disseminating organization. * * * Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449 (1936). * * *

The press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. * * * A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377–378, 67 S.Ct. 1249, 1255–1256 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. * * *

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. * * *

* * *
A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury’s task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsmen from performing the citizen’s normal duty of appearing and furnishing information relevant to the grand jury’s task.

[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification. * * * We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

[Affirmed.]

Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL, join, dissenting.

The Court’s crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. * * * [T]he Court in these cases holds that a newsmen has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press’ constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice. * * *

The impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would
actually be dissuaded from engaging in First Amendment activity.

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Mr. Justice DOUGLAS, dissenting.

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.
The attorneys general of 34 states (with shield laws) filed a brief supporting Cooper and Miller's petitions for cert. arguing that the absence of federal protection for journalistic sources undermined existing state laws that did afford some protection of confidentiality. However, the Supreme Court denied cert., refusing the opportunity to reexamine Branzburg. Time, Inc. later said Cooper would turn over his notes and, after being released from the promise of confidentiality by his source, he also agreed to testify. Miller, who had not been released from confidentiality by her source, went to jail. After serving 85 days, she was released by her source from a pledge of confidentiality and cooperated with the special prosecutor. New York Times, July 1, 2005, pp. A1, A12; July 7, 2005, pp. A1, A16; Sept. 30, 2005, pp. A1, A23. Ultimately, a federal grand jury indicted I. Lewis ("Scooter") Libby, formerly Vice President Cheney's chief of staff, on five counts of perjury and obstruction of justice for lying to the FBI when he denied that he revealed Plame's identity to Cooper and Miller. Libby was subsequently convicted on four felony counts and sentenced to serve two and a half years in prison and a $250,000 fine. After federal courts rejected a request to reduce the jail-time, President George W. Bush commuted the punishment to probation and the fine, terming the prison sentence "excessive." New York Times, July 3, 2007, pp. A1, A15.

**NOTE—In re Farber and the New York Times Co.**

Myron Farber, a reporter, and the New York Times Company, his employer, were each charged with civil and criminal contempt for refusal to produce certain subpoenaed materials for in camera inspection by the judge in the murder trial of Dr. Mario E. Jascalevich. Jascalevich was alleged to have brought about the deaths of several of his patients by administering doses of the drug curare. Farber's investigative reporting was said to have contributed significantly to the decision to prosecute Dr. Jascalevich. Indeed, Farber was alleged to have worked closely with the prosecutor's office for some time and, in the defense's view, was the driving force in getting the case to court. The defense contended that Farber had in his possession notes, statements, and other materials relevant to information supplied by half a dozen of the state's witnesses (one of whom had died and others of whom had made themselves inaccessible to the defense) presumed to bear directly on the guilt or innocence of the defendant. For willful violation of the trial judge's order, the New York Times Company was fined $100,000, and Farber was ordered ultimately to serve a six-month jail sentence and to pay a $1,000 fine. Furthermore, in order to compel production of the materials, the Times was ordered to pay $5,000 a day for each day that elapsed until compliance with the court order, and Farber was jailed until he decided to comply with the subpoena. A New Jersey appellate court denied applications to stay the order, as did two separate Justices of the U.S. Supreme Court. Farber and the Times subsequently appealed to the New Jersey Supreme Court. They argued that the contempt citations could not stand because the trial judge's order to produce the materials for in camera inspection violated both the First Amendment and a New Jersey "shield law," which guaranteed the confidentiality of a reporter's source materials.

In Matter of Farber and the New York Times Co., 78 N.J. 259, 394 A.2d 330 (1978), the New Jersey Supreme Court upheld both the subpoena duces tecum and the contempt citations. As to the First Amendment contention, the court found the U.S. Supreme Court's decision in Branzburg binding and "applicable to * * * the particular issues framed here. * * * [T]he obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury."

The state supreme court then turned its attention to the statutory provision, observing that, whereas Branzburg involved no shield law, "[h]ere we have a shield law, said to be as strongly worded as any in the country." The law granted to any person employed by the news media for the purpose of gathering or disseminating news to the general public an apparently absolute privilege of refusing to
disclose both the source of any information and any information obtained in any judicial, legislative, or administrative proceeding or investigation. Although the court observed that the statute was constitutional on its face, it also believed the law conflicted with the Sixth Amendment guarantee that the defendant “have compulsory process for obtaining witnesses in his favor,” incorporated into the Due Process Clause of the Fourteenth Amendment in Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967), and thus made applicable to the states, and with Article 1, paragraph 10 of the state constitution, which secured an identical right.

The New Jersey court drew support for subordinating the statutory privilege to the Sixth Amendment claim by citing the U.S. Supreme Court’s decision in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974), about which it said, “Despite th[e] conclusion that at least to some extent a president’s executive privilege derives from the Constitution, the Court nonetheless concluded that the demands of our criminal justice system required that the privilege must yield.” In this case, the New Jersey court rested its decision on Article 1, paragraph 10 of the state constitution and concluded that it prevailed over the statute. Although the court reached this conclusion, it “recogniz[ed] * * * the strongly expressed legislative viewpoint favoring confidentiality” and, therefore, prescribed several safeguards. Chief among these was the guarantee of a full hearing in camera (in the judge’s chambers, not in open court) “on the issues of relevance, materiality, and overbreadth of the subpoena.”

The state supreme court continued:

If in camera inspection by the court * * * is no more than a procedural tool, a device to be used to ascertain the relevancy and materiality of that material. Such an in camera inspection is not in itself an invasion of the statutory privilege. Rather it is a preliminary step to determine whether, and if so to what extent, the statutory privilege must yield to the defendant’s constitutional rights.

* * * The defendant properly recognizes Myron Farber as a unique repository of pertinent information. But he does not know the extent of this information nor is it possible for him to specify all of it with particularity, nor to tailor his subpoena to precise materials of which he is ignorant. Well aware of this, Judge Arnold refused to give ultimate rulings with respect to relevance and other preliminary matters until he had examined the material. * * *

The court also held that in deference “to the very positively expressed legislative intent to protect the confidentiality and secrecy of sources from which the media derive information,” newspersons in such situations are entitled to a preliminary hearing “before being compelled to submit the subpoenaed material to a trial judge for such inspection.” The court explained:

If the newspaper or media representative * * * qualified[ed] for the statutory privilege[,] * * * it would then become the obligation of the defense to satisfy the trial judge, by a fair preponderance of the evidence including all reasonable inferences, that there was a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to his defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it.

The New Jersey court drew its opinion to a close by “mak[ing] it clear * * * that this opinion is not to be taken as a license for a fishing expedition in every criminal case where there has been investigative reporting, nor as permission for an indiscriminate rummaging through newspaper files.” The Farber case was decided by a 5–2 vote. The U.S. Supreme Court later denied certiorari, 439 U.S. 997, 99 S.Ct. 598 (1978).

Following the Farber decision, the New Jersey legislature amended the shield law to require the party seeking enforcement of such a subpoena to show that the materials sought were necessary to the defense and were not available from a less intrusive source or that there was clear and convincing evidence that the privilege had been waived. This determination was to precede any in camera inspection of material by the trial judge. In Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982), a libel case, the state supreme court held that the amended shield law afforded newspersons “an absolute privilege” not to disclose confidential sources and editorial processes “in
the absence of any conflicting constitutional guarantees. Since plaintiffs in libel suits have no
overriding constitutional interests at stake, inquiry into editorial decisions was absolutely precluded
by the shield law in such a suit."

Court considered the constitutionality of police searches of newspaper offices, specifically
how the Fourth Amendment is to be construed when police have probable cause to believe
that a newspaper is in possession of information relevant to the investigation of a criminal
offense but the newspaper is not itself implicated in the criminal activity. The Stanford
Daily, a student newspaper, had published several articles and pictures about a violent clash
in which several police officers had been injured by club-wielding demonstrators while
forcibly evicting them from their barricaded positions on university premises. Police had
probable cause to believe that a newspaper photographer at the scene had taken several
other pictures that would help identify the assailants. A warrant was subsequently issued to
allow police to search the photographic darkroom, wastepaper baskets, desks, and filing
cabinets in the Daily’s offices.

The Daily challenged the constitutionality of the search and a federal district court ruled
that the Constitution required law enforcement authorities to proceed by subpoena
duces tecum rather than by a search warrant. The subpoena would require the newspaper to turn
over specifically identified materials instead of exposing potentially confidential materials
located in the newspaper’s offices to police view in the course of a search. The district court
held that the Constitution required law enforcement authorities to proceed by subpoena
unless there was a clear showing that important materials would be removed or destroyed. A
federal appeals court affirmed this judgment, but the Supreme Court reversed. Speaking for
the Court, Justice White explained:

As the District Court understands it, denying third-party search warrants would not have
substantial adverse effects on criminal investigations because the nonsuspect third party, once
served with a subpoena, will preserve the evidence and ultimately lawfully respond. The
difficulty with this assumption is that search warrants are often employed early in an
investigation, perhaps before the identity of any likely criminal and certainly before all the
perpetrators are or could be known. The seemingly blameless third party in possession of the
fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to
or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the
articles that may implicate his friends, or at least not to notify those who would be damaged by
the evidence that the authorities are aware of its location. In any event, it is likely that the real
culprits will have access to the property, and the delay involved in employing the subpoena
duces tecum, offering as it does the opportunity to litigate its validity, could easily result in the
disappearance of the evidence, whatever the good faith of the third party.

The Framers, Justice White pointed out, well aware “of the long struggle between the
Crown and the press * * * nevertheless did not forbid warrants where the press was
involved, did not require special showing that subpoenas would be impractical, and did not
insist that the owner of the place to be searched, if connected with the press, must be shown
to be implicated in the offense being investigated.” In sum, he concluded, it was difficult to
see why the preconditions of a warrant, properly administered, would not be sufficient to
protect against the harms asserted by the newspaper.

In a dissenting opinion, in which he was joined by Justice Marshall, Justice Stewart wrote:

It seems to me self-evident that police searches of newspaper offices burden the freedom of
the press. The most immediate and obvious First Amendment injury caused by such a
visitation by the police is physical disruption of the operation of the newspaper. * * * By
contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed. * * * * *

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. * * * * *

On the other hand, a subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its possession. * * * If, in the present case, The Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

Justice Stevens dissented separately. Justice Brennan did not participate in the decision.

Congress substantially modified the Stanford Daily ruling when it passed the Privacy Protection Act of 1980, 94 Stat. 1879. The Act specifically makes it “unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce” unless “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate”; or “the offense to which the materials relate consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data” under specifically enumerated sections of the U.S. Code; or “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.” Subsequent provisions of the statute also bar searches for and seizures of “documentary materials, other than work product materials,” unless these same circumstances are present; or unless “there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials”; or where “such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum” and all appellate remedies have been exhausted or where delay would “threaten the interests of justice.”

The Right of Access

A right of access is often asserted to be the third component of freedom of the press. Although usually this claim is made by journalists acting as trustees of “the public’s right to know,” it has been made by citizens seeking access to newspaper coverage. At issue in Miami Herald Publishing Co. v. Tornillo, which follows, was a Florida statute that gave political candidates who had been attacked the opportunity to rebut those criticisms by
affording them a "right of reply" in the newspaper. The statute was motivated by the social function view discussed in the preceding chapter (see p. 779), which defines the expressive freedoms protected by the First Amendment largely in terms of their contribution to democracy's deliberative function. In *Tornillo*, the Court rejected such a view in favor of sustaining the newspaper's editorial freedom. Although the Court rejected mandatory access, the opinions of Chief Justice Burger in *Tornillo* and in *Bellotti* (at the beginning of this chapter) manifest deep concern about the concentration of power and influence in media conglomerates. In view of the vast power and increasing monopoly of media conglomerates and in light of the Court’s understandable reluctance to uphold infringements on the editorial judgment of the media, what other options are there if the situation identified by Chief Justice Burger is to be anything other than just lamented?

**MIAMI HERALD PUBLISHING CO. v. TORNILLO**

Supreme Court of the United States, 1974
418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730

**BACKGROUND & FACTS**

A Florida "right to reply" statute required any newspaper attacking a candidate for public office to make available to the candidate equal space to rebut the criticism. Noncompliance constituted a misdemeanor. Pat Tornillo, the executive director of the Classroom Teachers Association and a candidate for election to the Florida House of Representatives, was the butt of a Miami Herald editorial questioning his fitness for office and castigating his leadership as a bargaining agent for the teachers union as inimical to the public welfare. After the paper refused to print his reply, Tornillo brought suit in a state court. That court held the statute an infringement of the First Amendment guarantee of a free press, but the ruling was overturned on appeal by the Florida Supreme Court. The newspaper obtained certiorari from the United States Supreme Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

* * *

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and is not defamatory.

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that Government has an obligation to ensure that a wide variety of views reach the public. * * * It is urged that at the time the First Amendment to the Constitution was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially
similar to those of 1791, the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a “wired” nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated “interpretative reporting” as well as syndicated features and commentary, all of which can serve as part of the new school of “advocacy journalism.”

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretative analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership. ***

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be “surrogates for the public” carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the “marketplace of ideas” is today a monopoly controlled by the owners of the market.

***

But the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.

***

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment
because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

Reversed.

Mr. Justice BRENNAN, with whom Mr. Justice REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. * * *

Mr. Justice WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. * * * A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. * * * We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. * * * Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

It is one thing to say that the First Amendment guarantees a broad, if not unlimited, right to publish; it is something else, the Court has said, to adopt the view of many journalists and argue that freedom of the press encompasses "the public's right to know." Although Congress has recognized a statutory "right to know" with its passage of the Freedom of Information Act (p. 977) as amended, the Court has never recognized the existence of a broad-based constitutional "right to know." As the Court has pointed out repeatedly—especially and most explicitly in Houchins v. KQED, Inc. following and less pointedly in both Branzburg v. Hayes (p. 960) and Tornillo—the First Amendment does not guarantee to the press any right of special access to information not available to the public generally. Nor do the cases on commercial speech, notably Virginia State Board of Pharmacy v. Virginia Citizens Consumer
Council (see p. 915), support the recognition of any “right to know,” since there the government’s restraint on publication of price information was imposed despite the fact that the parties concerned wanted public disclosure, not because they sought to maintain secrecy. Neither can it be argued that the Framers of the Amendment—by and large the same individuals responsible for drafting the Constitution proper—favored such a right in view of both the fact that Article I, section 5, paragraph 3 provides with respect to Congress that “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy” and the fact that the Constitutional Convention itself was held behind closed doors. More important, could the press as agent of “the public’s right to know” act as trustee of that right and still hope to exercise the very kind of independent editorial judgment the Court felt compelled to recognize in Tornillo? Can journalists claim a right to know what others know and at the same time refuse to disclose what they, as reporters, know? Ultimately, the Court recognized some right of access emanating from the First Amendment—to criminal trials, at least—in Richmond Newspapers, Inc. v. Virginia (p. 1041). Justice Stevens was quick to call this “a watershed case.” Was it? How broad is the right recognized in Richmond Newspapers? A spirited debate on a kindred theme is reflected in the Court’s disposition of the Pico case (p. 978). Does the decision in Pico turn on the students’ right of access to the books, or does it turn on the criteria school officials used in deciding to remove certain books from school libraries?

**HOUCHINS v. KQED, INC.**

Supreme Court of the United States, 1978
438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553

**BACKGROUND & FACTS** In the wake of a prisoner’s suicide allegedly prompted by conditions at a portion (Little Greystone) of the Alameda County Jail, station KQED asked for and was refused permission to inspect and photograph that area of the detention facility. The broadcasting company, joined by local branches of the NAACP, brought suit under the federal civil rights statutes against Houchins, the county sheriff, alleging abridgment of First Amendment rights. The plaintiffs argued that such a restriction thwarted efforts to report on the condition of the facility and to bring the prisoners’ grievances to the public’s attention. The sheriff subsequently inaugurated a regular program of monthly tours—open to the public and representatives of the media—of part of the jail (not including Little Greystone). Cameras and sound recording equipment were not allowed on these tours, nor were interviews permitted with the inmates. However, members of the public and representatives of the media who knew a prisoner were allowed to visit him. A federal district court enjoined the sheriff from denying the media reasonable access to the jail (including Little Greystone), from preventing the use of photographic and audio recording equipment, and from barring the conduct of interviews with inmates. The court of appeals affirmed this judgment, whereupon the sheriff appealed.

Mr. Chief Justice BURGER announced the judgment of the Court and delivered an opinion, in which Mr. Justice WHITE and Mr. Justice REHNQUIST joined.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

* * *
Notwithstanding our holding in *Pell v. Procunier,* 6 respondents assert that the right recognized by the Court of Appeals flows logically from our decisions construing the First Amendment. They argue that there is a constitutionally guaranteed right to gather news under *Pell v. Procunier,* 417 U.S., at 835, 94 S.Ct., at 2810, and *Branzburg v. Hayes,* 408 U.S. 665, 681, 707, 92 S.Ct. 2646, 2656–2669 (1972). From the right to gather news and the right to receive information, they argue for an implied special right of access to government controlled sources of information. This right, they contend, compels access as a constitutional matter. * * * Respondents contend that public access to penal institutions is necessary to prevent officials from concealing prison conditions from the voters and impairing the public’s right to discuss and criticize the prison system and its administration.

We can agree with many of the respondents’ generalized assertions; conditions in jails and prisons are clearly matters “of great public importance.” * * * Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions. Beyond question, the role of the media is important; acting as the “eyes and ears” of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.

The media are not a substitute for or an adjunct of government, and like the courts, they are “ill-equipped to deal with problems of prison administration. * * * We must not confuse the role of the media with that of government. * * *

The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.

[Earlier decisions] emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. But an analysis of those cases reveals that the Court was concerned with the freedom of the media to communicate information once it is obtained; neither case intimated that the Constitution compels the government to provide the media with information or access to it on demand. * * *

* * *

The right to receive ideas and information is not the issue in this case. * * * The issue is a claimed special privilege of access which the Court rejected in *Pell and Saxbe,* a right which is not essential to guarantee the freedom to communicate or publish.

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6. 417 U.S. 817, 94 S.Ct. 2800 (1974). Proceeding from the premises that “prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the correct system, to whom custody and care the prisoner has been committed in accordance with due process of law” and that “[t]he Constitution does not * * * require government to accord the press special access to information not shared by members of the public generally,” the Court upheld the constitutionality of an order issued by the director of the California Department of Corrections, barring “[p]ress and other media interviews with specific individual inmates * * *.” In a companion case, *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811 (1974), the Court also sustained the validity of a comparable ban on interviews with specifically named prisoners at federal medium- and maximum-security institutions.
The respondents' argument is flawed *** also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes. Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.

A number of alternatives are available to prevent problems in penal facilities from escaping public attention. *** Citizen task forces and prison visitation committees continue to play an important role in keeping the public informed of deficiencies of prison systems and need for reforms. Grand juries, with the potent subpoena power—not available to the media—traditionally concern themselves with conditions in public institutions; a prosecutor or judge may initiate similar inquiries and the legislative power embraces an arsenal of weapons for inquiry relating to tax supported institutions. In each case, these public bodies are generally compelled to publish their findings, and if they default, the power of the media is always available to generate public pressure for disclosure. But the choice as to the most effective and appropriate method is a policy decision to be resolved by legislative decision. ***

Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment. Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire. *** Public bodies and public officers, on the other hand, may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known.

There is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient." We, therefore, reject the Court of Appeals' *** assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.

The First Amendment is "neither a Freedom of Information Act nor an Official Secrets Act." *** The guarantee of "freedom of speech" and "of the press" only "establishes the contest [for information] not its resolution. *** For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society." ***

Petitioner cannot prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions. *** Respondents are free to interview those who render the legal assistance to which inmates are entitled. *** They are also free to seek out former inmates, visitors to the prison, public officials, and institutional personnel, as they sought out the complaining psychiatrist here.

Moreover, California statutes currently provide for a prison Board of Corrections that has the authority to inspect jails and prisons and must provide a public report at regular intervals. *** Health inspectors are required to inspect prisons and provide reports to a number of officials, including the State Attorney General and the Board of Corrections. *** Fire officials are also
required to inspect prisons. * * * Following
the reports of the suicide at the jail involved
here, the County Board of Supervisors
called for a report from the County
Supervisor, held a public hearing on the
report, which was open to the media, and
called for further reports when the initial
report failed to describe the conditions in
the cells in the Greystone portion of the jail.

Neither the First Amendment nor Four-
teenth Amendment mandates a right of
access to government information or sources
of information within the government’s
control. Under our holdings in Pell v.
Procunier, supra, and Saxbe v. Washington
Post, supra, until the political branches
decree otherwise, as they are free to do,
the media has no special right of access to
the Alameda County Jail different from or
greater than that accorded the public
generally.

The judgment of the Court of Appeals is
reversed and the case is remanded for
further proceedings.

Reversed.

Mr. Justice MARSHALL and Mr. Justice
BLACKMUN took no part in the consider-
ation or decision of this case.

Mr. Justice STEWART, concurring in
the judgment.

I agree that the preliminary injunction
issued against the petitioner was unwar-
ranted, and therefore concur in the judg-
ment. In my view, however, KQED was
entitled to injunctive relief of more limited
scope.

The First and Fourteenth Amendments
do not guarantee the public a right of access
to information generated or controlled by
government, nor do they guarantee the
press any basic right of access superior to
that of the public generally. The Constitu-
tion does no more than assure the public
and the press equal access once government
has opened its doors. * * *

* * * Whereas [THE CHIEF JUSTICE]
appears to view “equal access” as meaning
access that is identical in all respects,
I believe that the concept of equal access
must be accorded more flexibility in order to
accommodate the practical distinctions
between the press and the general public.

* * *

That the First Amendment speaks sepa-
ately of freedom of speech and freedom of
the press is no constitutional accident, but
an acknowledgement of the critical role
played by the press in American society.
The Constitution requires sensitivity to that
role, and to the special needs of the press in
performing it effectively. A person touring
Santa Rita jail can grasp its reality with his
own eyes and ears. But if a television
reporter is to convey the jail’s sights and
sounds to those who cannot personally visit
the place, he must use cameras and sound
equipment. In short, terms of access that are
reasonably imposed on individual members
of the public may, if they impede effective
reporting without sufficient justification, be
unreasonable as applied to journalists who
are there to convey to the general public
what the visitors see.

Under these principles, KQED was
clearly entitled to some form of preliminary
injunctive relief. At the time of the District
Court’s decision, members of the public
were permitted to visit most parts of the
Santa Rita jail, and the First and Fourteenth
Amendments required the Sheriff to give
members of the press effective access to the
same areas. The Sheriff evidently assumed
that he could fulfill this obligation simply by
allowing reporters to sign up for tours on the
same terms as the public. I think he was
mistaken in this assumption, as a matter of
constitutional law.

The District Court found that the press
required access to the jail on a more flexible
and frequent basis than scheduled monthly
tours if it was to keep the public informed.
By leaving the “specific methods of im-
plementing such a policy * * * [to] Sheriff
Houchins,” the Court concluded that the
press could be allowed access to the jail “at
reasonable times and hours” without causing
undue disruption. The District Court also found that the media required cameras and recording equipment for effective presentation to the viewing public of the conditions at the jail seen by individual visitors, and that their use could be kept consistent with institutional needs. These elements of the Court’s order were both sanctioned by the Constitution and amply supported by the record.

In two respects, however, the District Court’s preliminary injunction was overbroad. It ordered the Sheriff to permit reporters into the Little Greystone facility and it required him to let them interview randomly encountered inmates. In both these respects, the injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, and thus enlarged the scope of what the Sheriff and Supervisors had opened to public view. The District Court erred in concluding that the First and Fourteenth Amendments compelled this broader access for the press.

* * *

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice POWELL join, dissenting.

* * *

When this suit was filed, there were no public tours. Petitioner enforced a policy of virtually total exclusion of both the public and the press from those areas within the Santa Rita jail where the inmates were confined. At that time petitioner also enforced a policy of reading all inmate correspondence addressed to persons other than lawyers and judges and censoring those portions that related to the conduct of the guards who controlled their daily existence. Prison policy as well as prison walls significantly abridged the opportunities for communication of information about the conditions of confinement in the Santa Rita facility to the public. Therefore, even if there would not have been any constitutional violation had the access policies adopted by petitioner following commencement of this litigation been in effect all along, it was appropriate for the District Court to decide whether the restrictive rules in effect when KQED first requested access were constitutional.

In Pell v. Procunier, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810 (1974), the Court stated that “newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.” But the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny. Indeed, Pell itself strongly suggests the contrary.

* * *

Here, * * * [t]he public and the press had consistently been denied any access to those portions of the Santa Rita facility where inmates were confined and there had been excessive censorship of inmate correspondence. Petitioner’s no-access policy, modified only in the wake of respondents’ resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public’s right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses.

The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756, 96 S.Ct. 1817, 1822 (1976); Procunier v. Martinez, 416 U.S. 396, 408–409, 94 S.Ct. 1800, 1808–1809 (1974) * * *. [In Procunier v. Martinez, the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients. * * * So
here, petitioner’s prelitigation prohibition on mentioning the conduct of jail officers in outgoing correspondence must be considered an impingement on the noninmate correspondent’s interest in receiving the intended communication.

In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry. * * * It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.

For that reason information-gathering is entitled to some measure of constitutional protection. * * * [T]his protection is not for the private benefit of those who might qualify as representatives of the “press” but to insure that the citizens are fully informed regarding matters of public interest and importance.

Here, in contrast, the restrictions on access to the inner portions of the Santa Rita jail that existed on the date this litigation commenced concealed from the general public the conditions of confinement within the facility. The question is whether petitioner’s policies, which cut off the flow of information at its source, abridged the public’s right to be informed about those conditions.

The answer to that question does not depend upon the degree of public disclosure which should attend the operation of most governmental activity. Such matters involve questions of policy which generally must be resolved by the political branches of government. Moreover, there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy. For example, the public and the press are commonly excluded from “grand jury proceedings, our own conferences, [and] the meetings of other official bodies gathering in executive session.” * * * Branzburg v. Hayes, 408 U.S., at 684, 92 S.Ct., at 2658 * * *.

In this case, however, “[r]espondents do not assert a right to force disclosure of confidential information or to invade in any way the decision making processes of governmental officials.” They simply seek an end to petitioner’s policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. * * * [N]ot only are public institutions, financed with public funds and administered by public servants; they are an integral component of the criminal justice system. The citizens confined therein are temporarily, and sometimes permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a “public trial.” It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.

Some inmates—in Santa Rita, a substantial number—are pretrial detainees. Though confined pending trial, they have not been convicted of an offense against society and are entitled to the presumption of innocence. * * * Society has a special interest in ensuring that unconvicted citizens are treated in accord with their status.

* * *

* * * Though the public and the press have an equal right to receive information and ideas,
different methods of remedying a violation of that right may sometimes be needed to accommodate the special concerns of the one or the other. Preliminary relief could therefore appropriately be awarded to KQED on the basis of its proof of how it was affected by the challenged policy without also granting specific relief to the general public. * * *

If prison regulations and policies have unconstitutionally suppressed information and interfered with communication in violation of the First Amendment, the District Court has the power to require, at least temporarily, that the channels of communication be opened more widely than the law would otherwise require in order to let relevant facts, which may have been concealed, come to light. * * *

I would affirm the judgment of the Court of Appeals.

**NOTE—THE FREEDOM OF INFORMATION ACT**

Congress, in 1966, created a statutory “right to know” when it passed the Freedom of Information Act, which now constitutes § 552 of Title 5 of the United States Code Annotated. The aim of the law was to enhance public access to and understanding of the operation of federal agencies in respect to both the information held by them and the formulation of public policy. With this in mind, Congress required each federal agency to publish in the Federal Register descriptions of the agency’s central and field organization, together with an explanation of how individuals might obtain information, make requests, or obtain judgments; statements with respect to the general functioning and operation of the agency; procedures and forms by which to do business with the agency; and statements of substantive policy, regulations, and rules of interpretation. The law also mandated federal agencies to make available for inspection and copying by the public final opinions of all kinds and orders in the adjudication of cases; policy statements, regulations, and interpretive rules not published in the Federal Register; and staff manuals and staff instructions that affect any member of the public. The Act further authorized any party who alleged that he was prohibited access to these materials to file suit in federal district court for an order directing their disclosure. The law also assigned such suits priority hearing in the federal courts. A final section of the Act excluded from public disclosure among other things such items as defense and foreign policy secrets, internal agency personnel rules and practices, employees’ personnel and medical files, trade secrets, investigatory files, and geological maps.

As uneasiness over governmental secrecy grew with the transgressions of the Watergate era, Congress amended the Act significantly in 1974. Highlighting this effort to penetrate bureaucratic secrecy were provisions that (1) required agencies to maintain indices available to the public of all materials open to public inspection; (2) provided for de novo determination by the federal courts as to whether agency materials in question were justifiably classified and thus legitimately to be kept from public view; (3) specified contempt of court or disciplinary measures to be taken against recalcitrant federal employees judged to have withheld public materials; (4) mandated a timely response and devised appropriate procedures for agency response to a request for information by a member of the public; (5) directed the Attorney General annually to report to Congress on the disposition of all FOIA cases; and (6) extended the meaning of the term “agency” in the Act to include all establishments in the executive branch, including the Executive Office of the President.

Despite the fact that the purpose behind the FOIA was—in the Supreme Court’s words—to provide “a means for citizens to know what their Government is up to[,]” * * * there has been a
steep increase in the number of documents classified by the government. A record 15.6 million documents were classified in 2004—approximately double the number in 2001, while the number declassified by the Bush Administration dwindled to about a third of those declassified in 2001. See New York Times, July 3, 2005, p. 12.

NOTE—ISLAND TREES SCHOOL DISTRICT v. PICO

Steven Pico and other high school and junior high school students brought suit against the members of the local board of education for their action in removing nine books—including Kurt Vonnegut’s Slaughter House Five, Eldridge Cleaver’s Soul on Ice, Richard Wright’s Black Boy, Desmond Morris’s The Naked Ape, and Bernard Malamud’s The Fixer—from school libraries and use in the curriculum. The board’s action, which came after it rejected a report by a committee of citizens and staff it appointed, was taken because the board concluded the books were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.” The plaintiff students alleged that the motivation behind the board’s action was that “particular passages in the books offended their social, political, and moral tastes and not because the books, taken as a whole, were lacking in educational value.” A federal district court granted summary judgment for the board members, finding that “the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district’s junior and senior high school students.” A fragmented federal appeals court reversed and remanded the case for trial, apparently on the grounds that the board had not offered sufficient proof that its decision to remove the books was motivated by a concern about vulgarity and sexual explicitness and to give the plaintiff students an opportunity to demonstrate that the justification offered by the board was instead a pretext for the suppression of ideas. The board members petitioned the Supreme Court for certiorari.

In Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982), the Supreme Court affirmed the judgment of the federal appellate court. Announcing the judgment of the Court in an opinion in which Justices Marshall and Stevens joined and in which Justice Blackmun joined in part, Justice Brennan emphasized at the outset that the present case did not involve textbooks or other required reading, but library books, and that it did not involve the acquisition of such books, but their removal. Justice Brennan saw “two distinct questions”: “First, Does the First Amendment impose any limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, If so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations?” (Because the petitioner school board members moved for and obtained summary judgment in their favor from the district court, any disputed questions of fact had to be considered in a light most favorable to the respondent students.)

Addressing the first question, the plurality, although “recogni[ing] that local school boards have broad discretion in the management of school affairs,” reaffirmed the proposition adopted by the Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969), that “students do not ‘shed their rights to freedom of speech or expression at the schoolhouse gate’ ” and that school authorities must operate within the confines of the First Amendment. Justice Brennan continued, “[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library because—quoting controlling principles of prior First Amendment cases— "the State may not * * * contract the spectrum of available knowledge" and because "the Constitution protects the right to receive information and ideas."” Said the plurality: “Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community
values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway. With respect to the extent to which the First Amendment places limitations upon the discretion of board members to remove books from their libraries, Justice Brennan wrote:

Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. On the other hand, * * * an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar * * * [if] the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." * * *

[N]othing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to remove books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." West Virginia [State Board of Education] v. Barnette, 319 U.S., at 642, 63 S.Ct., at 1187. * * *

As to the second question, the plurality concluded that a real question of fact existed about the board's motivation, and the plurality cited the following facts in the record as tending to contradict the "vulgarity" and "educational suitability" reasons offered by the board: (1) When a public explanation was first offered by the board, it characterized excerpts from some of the books as "anti-American"; (2) the report of the Book Review Committee empaneled initially by the board, which applied standards such as "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level" and which recommended that four of the books be retained and only two be removed (the committee could not agree on two other books and decided to make another available with parental approval), was rejected without any statement of reasons by the board; (3) the board's decision followed soon after some members attended a conference of "a politically conservative organization of parents concerned about education legislation in the State of New York"; and (5) the board's action empaneling the Book Review Committee, whose recommendation was subsequently rejected, was contrary to established procedures. Said the plurality: "[S]ome of the evidence before the District Court might lead a finder of fact to accept petitioners' claim that their removal decision was based upon constitutionally valid concerns. But that evidence at most creates a genuine issue of material fact on the critical question of the credibility of petitioners' justification for their decision" and this precluded summary judgment.

Justice White, providing the crucial fifth vote, concurred in the judgment, saying, "I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues."
Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissented, each writing separate opinions, although Burger’s and Rehnquist’s dissents each carried the approval of all or most of the other dissenters. Chief Justice Burger decried the Court’s “lavish expansion” of the First Amendment and feared it “would come perilously close” to making the Court “a super censor of school board library decisions.” He also objected to the “plurality[’s] suggestion that if a writer has something to say, the government through its schools must be the courier.” Finally, the Chief Justice protested the Court’s activism in a field where he thought democratic accountability should be the norm:

We can all agree that as a matter of educational policy students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children’s education. A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from book stores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.

The most vigorous attack on the plurality’s opinion, however, came from Justice Rehnquist, who offered at least half a dozen criticisms of it. He objected, first, to the plurality’s “combing through the record of affidavits, school bulletins, and the like for bits and snatches of dispute” that presented a version of the facts far more favorable to the students than that to which they had stipulated. Second, although the plurality might cite Tinker in support of the First Amendment rights of students, Justice Rehnquist pointed out that the right discussed there was a freedom of expression, not a right of access to information. He also observed, as a third matter, that such a right to receive ideas was basically incompatible with the educational process, at least at the junior high and high school level. He wrote:

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students’ individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information not to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

Fourth, Justice Rehnquist took the plurality to task for what he saw as the highly artificial and illogical restraints it fastened on the newly created right of access. For example, he thought the limitation of the decision to include only the removal of library books was both unsupported by precedent and deficient in failing to recognize that, since elementary and secondary schools are significantly involved with the socializing of children, i.e., with the inculcation of values, it must be seen that “[t]he libraries of such schools serve as supplements to this inculcative role.” And he failed to see why the plurality limited its access right to the removal of books and did not accept the logic implicit in the principle that would extend it as well to their acquisition, at which point he argued that the unacceptability and unworkability of the principle was manifest. Finally, Justice Rehnquist faulted the plurality for not recognizing the implications that flowed from the fact that government wears two different hats—“educator” and “sovereign”:

The most obvious reason that petitioners’ removal of the books did not violate respondents’ right to receive information is the ready availability of the books elsewhere. Students are not denied
The role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning. * * * With respect to the education of children in elementary and secondary schools, the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart. * * *

Although the constitutional issue in Pico concerned the removal of books from school libraries and the resulting lack of access to them by students, a little-noticed provision of the recently-passed USA PATRIOT Act, 115 Stat. 272, raises an even more serious First Amendment question of adult access to books and other informational materials. Section 215 of the statute, which was enacted by Congress following the terrorist attacks of September 11, 2001, empowers “[t]he Director of the Federal Bureau of Investigation or * * * [his] designee * * * [to] make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities * * *.” Among other things, this authorizes the government to “compel booksellers and librarians to turn over information as to what their customers are reading.” Ronald Rosenblatt, “Essay: Ban the Books,” MacNeil/Lehrer NewsHour, Sept. 23, 2002. It is, perhaps, small comfort that the statute continues, “provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.” (Emphasis supplied.) This suggests that checking up on what people are reading is all right if the investigation is based only somewhat on activities protected by the First Amendment. Such a law would appear to be especially vulnerable to constitutional challenge on both chilling-effect and overbreadth grounds. Although the Justice Department has said that it has never used this provision to request library records, nevertheless § 215 was continued until 2009 when Congress voted to extend the PATRIOT Act in March 2006.8

8. The “order” referred to in § 215 is a “national security letter.” A national security letter is an administrative subpoena to obtain business or library records, issued without any court or grand jury approval, which allows the executive branch to obtain information about people in terrorism and espionage investigations. Section 215 also imposed a gag order on libraries, bookstores, and Internet providers compelling them not to reveal the fact that they had received such an order to turn over customer records. This part of the law was struck down in Doe v. Gonzales, 386 F.3d 66 (D.Conn. 2005), appeal dismissed as moot, 449 F.3d 415 (2d Cir. 2006). The district judge held that the government failed to carry its heavy burden of proving that speculative national security interests justified interference with free speech. The court said that “the statute has the practical effect of silencing those who have the most intimate knowledge of the statute’s effect and a strong interest in advocating against the federal government’s broad investigative powers.” Moreover, the provision creates a situation where “the very people who might have information regarding investigative abuses and overreaching are peremptorily prevented from sharing that information with the public.” New York Times, Sept. 10, 2005, p. B15. After initially appealing the ruling, the government abandoned attempts to prosecute libraries and businesses for discussing their receipt of national security letters. The appeals court then dismissed the case.
B. OBSCENITY

As previously noted, the relationship between obscenity and censorship is one of substance to procedure: Obscenity standards identify what material is so sexually explicit that it can be prohibited; censorship deals with the means by which the prohibition is imposed. Obscenity, as with libel and “fighting words,” has been regarded from the very beginning as falling outside First Amendment protection. As explained in the preceding chapter (see p. —), the Court in this respect has adopted the social function theory of free speech: The content of these three forms of expression contributes nothing to the functioning of the democratic process, and, thus, they are “utterly without redeeming social importance”—to use the Court’s words.

Yet to conclude that obscenity is not protected by the First Amendment does not get us very far. The real challenge lies in defining what constitutes obscenity. From 1957, when it began the attempt, until 1973, when the addition of the four Nixon appointees to the Court provided sufficient votes to create a consensus, the Court was deeply divided in its efforts to construct a definition. In the Court’s disposition of a 1964 case involving a motion picture called The Lovers, Justice Stewart became so exasperated that he confessed in a concurring opinion, “I shall not attempt further to define the kinds of material to be embraced within the short-hand description of hard-core pornography; and perhaps I could never succeed in intelligibly doing so. But I do know it when I see it, and the motion picture involved in this case is not that.” Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964).

An intuitive, on-the-spot approach to the problem, however, violates a fundamental principle of due process because it fails to afford advance notice to people about what behavior would violate the law. Thus, it amounts to little more than ex post facto lawmaking, in which defendants are punished not so much for violating a legal obligation as for “wrongly guess[ing] the law and learn[ing] too late their error.”

Although the vagueness of definitions proved to be one of the intractable problems of the law of obscenity, it cannot be avoided at the expense of fair notice.

Until 1957, when the Supreme Court entered the field, American courts based their decisions as to what was obscene on the standard articulated in a nineteenth-century English case, Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). In that case, the facts of which are unimportant here, the standard laid out was “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” The application of this test had a particularly unfortunate antilibertarian thrust to it because, in addition to judging the obscenity of the material in terms of the most peripheral social group who might have contact with it (i.e., children), the judges looked only at the objectionable parts of the material and did so without regard to any artistic or literary merit the work might have.

Although some American judges struggled with the Hicklin test trying to liberalize it, notably by demanding that the work be considered as a whole and that expert testimony be taken into account concerning its artistic or literary value, it remained the standard for the determination of obscenity until the Supreme Court held that it swept so broadly and indiscriminately as to violate the First Amendment. As Justice Frankfurter noted, writing for the Court in Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524 (1957), a case involving the validity of a statute embodying the Hicklin test, “The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.”

Beginning with its decision in Roth v. United States and a companion case, Alberts v. California, which follows, the Supreme Court formulated a new constitutional standard. In

announcing its “prurient interest” test, Justice Brennan, speaking for the Court, took care to point out how its point of reference (the average adult) and its context of application (the work taken as a whole) differed from the approach in Hicklin. As the justification for concluding that obscenity could be constitutionally prohibited, Justice Brennan merely asserted that obscenity was without social value. In a vigorous dissent, Justice Douglas challenged the Court to produce some evidence that dirty pictures caused crime and thus could be shown to constitute a “clear and present danger”—the standard the Court applied in other First Amendment cases. Public safety, not purity of thought, had been the accepted basis in the Court’s free speech cases for permitting governmental regulation.

**Roth v. United States**

Supreme Court of the United States, 1957

354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498

**BACKGROUND & FACTS** Samuel Roth was indicted under the federal statute that makes it a criminal offense to send “obscene, lewd, lascivious, or filthy” matter or advertisements for such matter through the mail. Among the materials he sold and advertised for sale were “American Aphrodite,” a quarterly publication dealing in literary erotica, which appeared in bound volumes retailing for a price of $10 each; and sets of nude photographs. Roth was convicted on counts concerning the sale and advertisement of “American Aphrodite,” but acquitted on charges involving the obscenity of the photographs. The conviction was affirmed by a U.S. Court of Appeals.

A companion case heard by the Supreme Court involved the indictment and subsequent conviction of David Alberts under California’s obscenity law. Unlike Roth, Alberts disseminated pictures of “nude and scantily-clad women,” sometimes depicted in bizarre poses and without any literary pretentions. His conviction in municipal court was affirmed by a state superior court. Both Roth and Alberts appealed to the U.S. Supreme Court.

Mr. Justice BRENNAN delivered the opinion of the Court.

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.

* * *

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. * * *

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. * * *

In light of this history, it is apparent that the unconditional phrasing of the First
Amendment was not intended to protect every utterance. * * * 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.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. * * *

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Beauharnais v. People of State of Illinois, [343 U.S. 250, 72 S.Ct. 725 (1952)]:

"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.10 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. * * *

* * *

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, [1868] L.R. 3 Q.B. 360. Some American 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. * * * 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 antisocial 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. People of State of Illinois, [343 U.S. 250, 72 S.Ct. 725 (1952)]:

"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."

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* * *

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10. I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines prurient, in pertinent part, as follows:

"* * * Itching; longing, uneasy with desire or longing; or persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd * * *.

[Footnote by the Court.]
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.

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. These words, applied according to the proper standard for judging 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." * * *

[The Court found no merit to the other contentions raised.]

* * *

The judgments are * * *

Affirmed.

Mr. Chief Justice WARREN, concurring in the result.

* * * I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

* * * The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

* * *

Mr. Justice HARLAN, concurring in the result in [Alberts] and dissenting in [Roth]. * * * I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. See Beauharnais v. People of State of Illinois, supra. * * *

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. * * *

Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to
a large extent * * * depend on whether that government has, under the Constitution, * * * the power to act in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. * * * But in dealing with obscenity * * * the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. * * *

* * * Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

[Justice HARLAN went on to conclude that, while the states might be allowed fairly substantial latitude in the obscenity standards they promulgate, the national government is limited to proscribing only "hard-core pornography."]

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment. * * *

* * *

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred Dennis case conceded that speech to be punishable must have some relation to action which could be penalized by government. * * *

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society’s interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

* * *

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society’s values in literary freedom are sacrificed.

* * *

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

Without evidence addressing the causal connection between the viewing of materials and the commission of crimes, the proscription of obscenity smacked of thought control. Indeed, in the West Virginia Flag Salute Case (see p. 859), the Court had decried the imposition of orthodoxy by the government. In a pointed attack on the “redeeming social importance” justification that surfaced in his dissents from the Court’s later decisions in

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated. Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?

Although sufficient consensus could be mustered for opinions of the Court holding that there is no such thing as an obscene idea, as distinguished from an obscene book or picture (Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 79 S.Ct. 1362 (1959)), and that liability for selling obscene publications requires proof that a bookseller was at least aware of the contents of the books he or she was selling (Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959)), the Court lacked enough consensus to deliver a majority opinion in any case that called for a definition of obscenity during the decade that followed Roth-Alberts. Finally, in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 86 S.Ct. 975 (1966), popularly known as the Fanny Hill case, the Court announced a revised test comprising three elements that had been announced in various plurality opinions following Roth:

We defined obscenity in Roth in the following terms: "[W]hether the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." * * * Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

These factors, the Court pointed out, could not be weighed against one another. There had to be a separate finding as to each element, and all these had to be satisfied before material could constitutionally be judged obscene.

The premise behind the Court's fragmented effort to this point had been the concept of "constant obscenity"—that material that was obscene was so for all people, in all places, and at all times.11 The three prongs of the revised Roth test the Court announced in its

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Fanny Hill decision were designed as litmus to identify the content of proscribable material. There were numerous problems with this approach, not the least of which was simply that many types of obscenity had no appeal to the “average” person in the community.

With the other two major obscenity cases it decided along with Fanny Hill, Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942 (1966), and Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958 (1966), the Court shifted focus away from the constant obscenity approach and tacked to the position charted by Chief Justice Warren’s concurring opinion in Roth. Chief Justice Warren had articulated a “variable” approach to obscenity—whether something was obscene depended upon the context in which it was presented. In his view, the defendant’s conduct was the issue at trial, not the book or picture, although the material might be relevant to evaluating his conduct. In Ginzburg, the Court held that material without obscene content can be judged to be obscene if it is marketed or purveyed in a manner that emphasizes its sexual appeal. And in Mishkin, the Court rewrote the Roth test without changing a word when it held that “average person” need not mean average person in the community if the material in question is purveyed to a group different from the community at large. Where material is disseminated to a particular audience, rather than the public generally, the Roth test can be met by assessing whether the material appeals to the prurient interest of an average person in the target group. Applying this approach two years later in Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274 (1968), the Court upheld the defendant’s conviction for selling a “girlie magazine” to a 16-year-old boy on the grounds that such magazines could be judged obscene on the basis of their prurient appeal to an average juvenile.

The Court’s bout with obscenity reached its nadir in Stanley v. Georgia, which follows. In Stanley, the Court held that the First Amendment forbids making it a crime to privately possess and view obscene materials at home. Although Stanley is technically still good law, it has been held not to apply when possession of child pornography is the issue (p. 993). At least as significant was the fact that Justice Marshall’s opinion, which spoke for a majority, explicitly criticized the Court’s previous holdings concerning prurient appeal and redeeming social value.

STANLEY V. GEORGIA
Supreme Court of the United States, 1969
394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542

BACKGROUND & FACTS
Stanley was charged under a Georgia statute with possession of obscene matter. His arrest on that charge stemmed from a search of his home by police officers executing a warrant to seize evidence of bookmaking activity. While they found little trace of that for which they were looking, they did stumble upon three rolls of motion picture film and several other items of an allegedly obscene nature. Stanley was convicted in a state superior court, and the conviction was upheld by the Georgia Supreme Court. The U.S. Supreme Court granted certiorari.

Mr. Justice MARSHALL delivered the opinion of the Court.

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*** Appellant argues that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.
We do not believe that this case can be decided simply by citing Roth. Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. * * * That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established that the Constitution protects the right to receive information and ideas. * * * This right to receive information and ideas, regardless of their social worth, * * * is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy. * * * See Griswold v. Connecticut. * * *

Appellant * * * asserts the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends * * * that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as “obscene” is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual’s mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person’s thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. * * * Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. * * * Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. * * * Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. * * * But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands
of children. * * * or that it might intrude upon the sensibilities or privacy of the general public. * * * No such dangers are present in this case.

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. * * *

Judgment reversed and case remanded. [Justice STEWART concurred in the result and, in an opinion in which Justices BRENNAN and WHITE joined, voted to reverse on Fourth Amendment grounds.]

The prospect that a majority of the Court was on the verge of accepting the position Justice Douglas had advocated all along quickly vanished with the arrival of the four Nixon appointees. In a major revision of the Court's obscenity jurisprudence, the Burger Court completed the cycle back to the original Roth position with its decision in Miller v. California. The Court abandoned the requirement that obscene materials have to be utterly without redeeming social importance and permitted social value to be weighed against prurient appeal and patent offensiveness. In an effort to address the vagueness problem, the Court provided examples of censorable depictions—what Justice Harlan had earlier identified as "hard-core pornography"—although no guidance was provided as to how much artistic, political, literary, or scientific value it would take to redeem a proscribed depiction. However, consistent with the contemporary push against child pornography, the Court has held that the obscenity standard in "kiddie porn" cases may be tougher (pp. 993–994).

MILLER V. CALIFORNIA
Supreme Court of the United States, 1973
413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419

BACKGROUND & FACTS A jury found Miller guilty of mailing unsolicited brochures advertising four "adult"-type books and a film in violation of California's obscenity law. Besides some printed matter that described the items offered for sale, the pamphlets contained pictures and drawings explicitly portraying men and women in groups of two or more engaged in sexual acts, frequently with genitals clearly shown. Miller's conviction was summarily affirmed by a state appellate court, and he petitioned the U.S. Supreme Court for certiorari.

Mr. Chief Justice BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." * * *

* * *

Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. * * * We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." * * *
The case we now review was tried on the theory that the California Penal Code § 311 [the statute applied here] approximately incorporates the three-stage Memoirs test. But now the Memoirs test has been abandoned as unworkable by its author and no member of the Court today supports the Memoirs formulation.

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. * * * We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. * * * As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts * * *, that concept has never commanded the adherence of more than three Justices at one time. * * * If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. * * *

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. * * *

* * *

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *

* * *

Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is
simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the requisite consensus exists. When triers of fact are asked to decide whether “the average person, applying contemporary community standards” would consider certain materials “prurient,” it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national “community standard” would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a “national” standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the “dominant theme of the material as a whole * * * appeals to the prurient interest” and in determining whether the material “goes substantially beyond customary limits of candor and affronts contemporary community standards of decency” it was to apply “contemporary community standards of the State of California.”

During the trial, both the prosecution and the defense assumed that the relevant “community standards” in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. * * *

We conclude that neither the State’s alleged failure to offer evidence of “national standards,” nor the trial court’s charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable “national standards” when attempting to determine whether certain materials are obscene as a matter of fact. * * *

* * * People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. * * *

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a “misuse of the great guarantees of free speech and free press.” * * * The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. “The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” Roth v. United States. * * * But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

* * *

* * * One can concede that the “sexual revolution” of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive “hard core” materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

* * *

Vacated and remanded for further proceedings.

Mr. Justice DOUGLAS, dissenting.

* * *

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This
effort, like the earlier ones, is earnest and well-intentioned. The difficulty is that we do not deal with constitutional terms, since “obscenity” is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no exception for “obscene” publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not “obscene.” The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with problems of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

* * *

[Justices BRENNAN, STEWART, and MARSHALL also dissented.]

NOTE—CHILD PORNOGRAPHY IS DIFFERENT

Although the Miller and the Stanley decisions recognize limitations on the governmental regulation of pornography—only “hard-core pornography” (obscenity) can be prohibited, and private possession of such materials in the home cannot be forbidden—the Court has held that these limitations do not apply in the case of child pornography. In New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982), the Supreme Court unanimously upheld a state criminal law aimed at preventing the exploitation of children, which prohibits the knowing production, direction, or promotion of visual material depicting sexual conduct by children below the age of 16, regardless of whether the material is obscene in the legal sense, i.e., within the meaning of Miller v. California. Speaking for the Court, Justice White acknowledged that “[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem” and noted that the federal government and 47 states have sought to combat child pornography by adopting statutes specifically directed at it. The Court concluded that “the States are entitled to greater leeway in the regulation of pornographic depictions of children” than that furnished by the decision in Miller for the following reasons: (1) “A state’s interest in ‘safeguarding the physical and psychological well being of a minor’ is ‘compelling’”; (2) “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children” because “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation” and because “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled”; (3) “[t]he advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation”; (4) “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimus”; and (5) “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.” Justice White then declared:

The test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for purpose of clarity. The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance
or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter [i.e., of acting knowingly] on the part of the defendant. * * *

The Court went on to uphold the constitutionality of the statute’s definition of “sexual conduct” as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals” against attack on grounds of overbreadth.

In a subsequent case, Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691 (1990), the Supreme Court ruled that a state could make private possession of child pornography a crime. Justice White, again speaking for the Court, cautioned against reading Stanley “too broadly” and found “this case distinct from Stanley because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia statute at issue” there. Noting that “Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers,” Justice White declared, “[T]he State does not rely on a paternalistic interest in regulating Osborne’s mind. Rather, Ohio has enacted * * * [its statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.” The Court then reiterated the weighted interests and their connection to the prohibition on child pornography discussed earlier in Ferber. Justices Brennan, Marshall, and Stevens dissented. While recognizing that child pornography is a serious problem, they noted that Ohio and other states had enacted “a panoply of laws prohibiting the creation, sale, and distribution” of such material. Since Ohio had not demonstrated that these laws were inadequate and since the criminalization of private possession as an antidote to the production of child pornography was speculative and tenuous at best, the dissenters concluded the statute was fatally overbroad. They concluded that the statute’s definition of child pornography as nude pictures of minors that involved “lewd exhibition” of or “graphic focus” on the genitals was vague as well.

The Court’s decisions in Ferber and Osborne upheld legislation prohibiting the manufacture, distribution, or possession of visual images of actual children engaged in sexual conduct. But can government prohibit virtual child pornography—what only appear to be, but are really not, pictures of actual children having sex?

Because new computer technology was being used to outflank federal laws directed at halting the production and dissemination of child pornography, Congress in 1996 passed the Child Pornography Prevention Act (CPPA), 18 U.S.C.A. § 2251 and sections following, to get at “high tech kiddie porn.” As a federal appeals court explained, “[T]echnological improvements* * * have made possible for child pornographers to use computers to ‘morph’ or alter innocent images of actual children to create a composite image showing them in sexually explicit poses. Through readily available desktop computer programs, one can even create a realistic picture of an imaginary child engaged in sexual activity and pass off that creation as an image of a real child.” Taking account of these developments, the statute punished the reproduction, sale, distribution, or possession of a sexually explicit altered image of a real child or a similar image of what “appears to be” a minor (defined by the law as someone under 18 years of age). The law also criminalized the pandering of material as child pornography by making it a crime to advertise, promote, or present material “in such a manner that it conveys the impression that the material is, or contains” child pornography.

A trade association of businesses that manufactured and distributed adult-oriented material argued that simulated child pornography did not injure real children, the central premise of the Court’s decision in Ferber. A virtual image, after all, is neither evidence that child sexual abuse has occurred nor a permanent record that might haunt a victim in the future.

The prohibition in the CPPA also extended to material beyond that held to be “obscene” under Miller v. California because, in Justice Kennedy’s words (1) “[t]he materials
need not appeal to the prurient interest," (2) “[a]ny depiction of sexually explicit activity, no matter how it is presented, is proscribed[,]” and (3) the CPPA applies to any visual image of children having sex “despite its serious literary, artistic, political, or scientific value.” Thus, “[t]he CPPA applies to a picture in a psychology manual, as well as to a movie depicting the horrors of sexual abuse.” If Academy-Award-winning films “or hundreds of others of lesser note that explore * * * ["teenage sexual activity and the sexual abuse of children"] contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment [15 years for a first offense in most instances and up to 30 years for a subsequent violation] without inquiry into the work’s redeeming value.” Under the CPPA, unlike adult pornography, an isolated, single forbidden scene triggers liability; violation of the statute does not depend on considering the scene in relation to the work as a whole. Thus, “[t]he principal question to be resolved is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under Miller nor child pornography under Ferber.”

In Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002), Justice Kennedy, speaking for a 6–3 majority, held that the statute was overbroad. He readily distinguished Ferber on the ground that there neither “[t]he production of the work, nor its content, was the target of the statute.” “In contrast to the speech in Ferber* * * that itself is ‘a permanent record’ of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.” Moreover, the Court in Ferber “did not hold that child pornography is by definition without value”—as an explicit film version of Shakespeare’s Romeo and Juliet would readily attest. Because the Court in Ferber “relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression[,]” * * * Ferber provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.”

The Court also rejected as insufficient the government’s arguments (1) that “virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct”; (2) that the availability of virtual “kiddie porn” would continue to fuel the market for child pornography; and (3) that it would be difficult to prosecute offenders because virtual images are often indistinguishable from the real thing. To these contentions, Justice Kennedy responded, “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it” and cited Brandenburg (p. 803) in support. He added, “The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.” He explained: “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. * * * The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”

12. In response to the Court’s decision in Free Speech Coalition, Congress passed the PROTECT Act (Prosecuting Remedies Or Tools to end the Exploitation of Children Today), 117 Stat. 650, which redefined “virtual child pornography” to mean any “digital image, computer image, or computer generated image that is, or is indistinguishable * * * from, that of a minor engaging in sexually explicit conduct.” “Images of simulated—rather than actual—acts had to be ‘lascivious’ to be within the meaning of ‘child pornography.’” By “indistinguishable,” Congress meant “ virtually indistinguishable”—that is, the average person viewing the image would conclude it was a picture of a real child engaged in sexual conduct. That the image was not one involving a real child could be offered as an affirmative defense to the charge, which means the burden would be on the defendant to prove that the picture was not actual. Most child pornography, however, involves pictures of real children engaged in sexual acts.
The principles of privacy and consent underpinning Stanley v. Georgia (p. 988) suggested that the First Amendment right recognized there by the Court might extend beyond the home to other places where people voluntarily choose to view obscene materials. The Court's decision in Paris Adult Theatre I v. Slaton, which follows, effectively foreclosed any such extension of Stanley. Indeed, the Court recognized very broad interests supporting the prohibition on obscenity and specifically rejected Douglas's position in Roth that government had to produce empirical evidence demonstrating the connection between viewing obscenity and committing sex crimes. Do you believe these interests sufficiently support the Court's ruling? In his argument that neither consent nor privacy justified the viewing of obscene movies in "public places," such as movie theaters, Chief Justice Burger attempted to draw support from certain civil rights-public accommodations decisions of the Court championed by Justices Douglas, Brennan, and Marshall. Is Burger's argument—that you cannot argue a movie theater is a place of public accommodation subject to government regulation when it comes to civil rights and then turn around and argue it is a private place when it comes to viewing dirty movies—persuasive? Why did Justice Brennan, who had been the principal architect of so many of the Court's obscenity decisions throughout the 1950s and 1960s, finally abandon his previous position in favor of that long espoused by Douglas?

PARIS ADULT THEATRE I V. SLATON
Supreme Court of the United States, 1973
413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446

BACKGROUND & FACTS Lewis Slaton, the district attorney for an area including the city of Atlanta, and others brought suit under a Georgia civil statute to enjoin operators of a movie house from showing two allegedly obscene films, Magic Mirror and It All Comes Out in the End. At a bench trial, the judge dismissed the complaint, ruling that exhibition of the pictures to consenting adults in the confines of a commercial theater was "constitutionally permissible." Moreover, he did not require any "expert testimony" as to the obscenity of the films in order to reach his conclusion. On appeal, the Georgia Supreme Court reversed, holding that the sex activity portrayed in the motion pictures was "hard-core pornography," whereupon operators of the theater sought review by the U.S. Supreme Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

* * *

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. * * * [T]he state[s]' interest[s] in regulating the exposure of obscene materials to juveniles and unconsenting adults [are not] the only legitimate state interests permitting regulation of obscene material. * * *
But, it is argued, there is no scientific data which conclusively demonstrates that exposure to obscene materials adversely affects men and women or their society. * * * We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. * * * Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality." Roth v. United States, supra, 354 U.S., at 485, 77 S.Ct., at 1309 (1957) * * *

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. * * * On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and may not publish and announce. * * * * * *

* * * The sum of experience, including that of the past two decades, affords an ample basis for legislators to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that Government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. * * * States are told by some that they must await a "laissez faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez-faire," particularly in solving urban, commercial, and environmental pollution problems. * * *

The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the market place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. * * *

It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theatre, open to the public for a fee, with the private home of Stanley v. Georgia, 394 U.S., at 568, 89 S.Ct., at 1249, and the marital bedroom of Griswold v. Connecticut, 381 U.S., at 485-486, 85 S.Ct., at 1682-1683. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. * * *

Our prior decisions recognize a right to privacy guaranteed by the Fourteenth Amendment * * *. This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. * * * Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the
concept of ordered liberty" to watch obscene movies in places of public accommodation.

We have declined to equate the privacy of the home relied on in Stanley with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. * * * The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theatre stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

It is also argued that the State has no legitimate interest in "control [of] the moral content of a person's thoughts," * * * and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theatres. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, * * * is distinct from a control of reason and the intellect. * * * Where communication of ideas, protected by the First Amendment, is not involved, nor the particular privacy of the home protected by Stanley, nor any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. * * * The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution. * * *

Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. * * * Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' "right * * * to maintain a decent society." * * *

* * * In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theatres from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v. California, supra. * * *

Vacated and remanded for further proceedings.

Mr. Justice DOUGLAS, dissenting.

* * *

I applaud the effort of my Brother BRENNAN to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims. But since we do not have here the unique series of problems raised by government imposed or government approved captive audiences * * * I see no constitutional basis for fashioning a rule that
makes a publisher, producer, bookseller, librarian, or movie house criminally responsible, when he or she fails to take affirmative steps to protect the consumer against literature or books offensive to those who temporarily occupy the seats of the mighty.

* * *

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL join, dissenting.

* * *

After 15 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964) (STEWART, J., concurring) we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

* * *

Moreover, institutional stress * * * inevitably results where the line separating protected from unprotected speech is excessively vague. In Roth we conceded 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." * * * Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty. * * *

* * *

The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

* * *

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required. * * *

* * *

Our experience since Roth requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of Roth: that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials [and] to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech * * *

* * *

* * * Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion. The existence of these assumptions cannot validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally-protected privacy interests of a pregnant woman.

* * *
Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment. Where the state interest in regulation of morality is vague and ill-defined, interference with the guarantees of the First Amendment is even more difficult to justify.

In short, I would hold that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents.

Critics of the Court—on and off the Bench—objected that the prohibition of obscenity and the punishment of those who disseminated it constituted a form of thought control because government was in the business of enforcing orthodoxy in the representation of sexual matters. In National Endowment for the Arts v. Finley below, the Supreme Court considered a constitutional challenge to governmental efforts aimed at influencing the content of expression through its decisions to fund artistic projects. Although the agency may have pulled the teeth of the controversial statute and the Court may have aided and abetted that effort by the way it finessed the constitutional question presented, the issue is clearly highlighted in both Justice Scalia's opinion concurring in the judgment and Justice Souter's dissent. They agreed that the statute amounted to nothing less than viewpoint discrimination, even if they reached diametrically opposed conclusions as to its constitutionality.

**National Endowment for the Arts v. Finley**

Supreme Court of the United States, 1998

569 U.S. 524, 118 S.Ct. 2168, 141 L.Ed.2d 500

**Background & Facts** Since it was established by Congress in 1965, the National Endowment for the Arts (NEA) has distributed more than $3 billion in federal funds to support various artistic and cultural projects. Applications for NEA grants are initially reviewed by advisory panels of experts drawn from the relevant artistic fields. The panels report to the National Council on the Arts, which then advises the NEA Chairperson. After highly controversial photographs by Serrano and Mapplethorpe appearing in two NEA-funded exhibits in 1989 produced a strong public reaction against NEA funding decisions, Congress tacked an amendment on to NEA's 1990 budget authorization. The provision, § 954(d)(1), directs that the Chairperson shall ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

Although NEA did not promulgate an official interpretation of this provision, the Council adopted a resolution to implement it by ensuring that advisory panel members reflect geographic, ethnic, and aesthetic diversity.

Karen Finley and three other performance artists applied for NEA funding before § 954(d)(1) was adopted. Although an advisory panel recommended funding their projects, the Council disapproved funding, and funding was denied. Finley and the others sued for restoration of their grants or reconsideration of their applications on First Amendment grounds. Plaintiffs later amended their complaint to allege that the
provision was unconstitutionally vague as well. A federal district court granted summary judgment to Finley and the other plaintiffs. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed on grounds the provision violated both the First and Fifth Amendments, and the Supreme Court granted certiorari at the government’s request.

Justice O’CONNOR delivered the opinion of the Court.

***

Respondents argue that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency. The premise of respondents’ claim is that § 954(d)(1) constrains the agency’s ability to fund certain categories of artistic expression. The NEA, however, reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction. Section 954(d)(1) adds “considerations” to the grant-making process; it does not preclude awards to projects that might be deemed “indecent” or “disrespectful,” nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application. Indeed, the agency asserts that it has adequately implemented § 954(d)(1) merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications. * * * We do not decide whether the NEA’s view—that the formulation of diverse advisory panels is sufficient to comply with Congress’ command—is in fact a reasonable reading of the statute. It is clear, however, that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA’s grant-making authority, it has done so in no uncertain terms. See § 954(d)(2) (“[O]bscenity is without artistic merit, is not protected speech, and shall not be funded”).

***

The “decency and respect” criteria do not silence speakers by expressly “threaten[ing] censorship of ideas.” * * * [T]he considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. * * *

Respondents’ claim * * * that the criteria in § 954(d)(1) are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague exhortation to “take them into consideration,” it seems unlikely that this provision will introduce any greater element of selectivity than the determination of “artistic excellence” itself. * * *

***

Permissible applications of the mandate to consider “respect for the diverse beliefs and values of the American public” are also apparent. * * * The agency expressly takes diversity into account, giving special consideration to “projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community,” * * * as well as projects that generally emphasize “cultural diversity” * * *

* * *

Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that propose “artistically excellent” projects. The agency may decide to fund particular projects for a wide variety of reasons, “such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community,
or even simply that the work could increase public knowledge of an art form." * * *

* * * The NEA's mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from * * * objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater * * *

Respondents do not allege discrimination in any particular funding decision. * * * Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. * * *

Finally, * * * the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. * * * [A]s we held in Rust [v. Sullivan] Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S., at 193, 111 S.Ct., at 1772. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." * * *

The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. * * * [W]hen the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." * * *

Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process. It does not, on its face, impermissibly infringe on First or Fifth Amendment rights. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

[The Court's opinion * * * sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. * * * I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

* * *

The statute requires the decency and respect factors to be considered in evaluating all applications—not, for example, just those applications relating to educational programs * * * or intended for a particular audience * * *.

* * *

This unquestionably constitutes viewpoint discrimination. * * * The applicant who displays "decency," that is, "conformity to prevailing standards of propriety or modesty" * * * and the applicant who displays "respect," that is, "deferential regard," for the diverse beliefs and values of the American people, * * * will always have an edge over an applicant who displays the opposite. * * *

* * *

* * * With the enactment of § 954(d)(1), Congress did not abridge the speech of those who disdain the beliefs and values of the American public, nor did it abridge indecent
speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. * * *

The nub of the difference between me and the Court is that I regard the distinction between “abridging” speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. * * *

* * * Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications. * * * For that reason, I concur only in the judgment.

Justice SOUTER, dissenting.

* * * The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. * * *

* * * It goes without saying that artistic expression lies within this First Amendment protection. * * * [A]rt is entitled to full protection because our “cultural life,” just like our native politics, “rests upon [the] ideal” of governmental viewpoint neutrality. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641, 114 S.Ct. 2445, 2458 (1994).

When called upon to vindicate this ideal, we characteristically begin by asking “whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration.” * * * The answer in this case is damning. One need do nothing more than read the text of the statute to conclude that Congress’s purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. * * *

* * * “Sexual expression which is indecent but not obscene is protected by the First Amendment,” Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989), and except when protecting children from exposure to indecent material, * * * the First Amendment has never been read to allow the government to rove around imposing general standards of decency * * *.

Because “the normal definition of ‘indecent’ refers to nonconformity with accepted standards of morality,” FCC v. Pacifica Foundation, 438 U.S., at 740, 98 S.Ct., at 3035, restrictions * * * couched in terms of “general standards of decency,” are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores. * * *

Just as self-evidently, a statute disfavoring speech that fails to respect America’s “diverse beliefs and values” is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace. * * * [T]he limitation obviously means that art that disrespects the ideology, opinions, or convictions of a significant segment of the American public is to be disfavored, whereas art that reinforces those values is not. After all, the whole point of the proviso was to make sure that works like Serrano’s ostensibly blasphemous portrayal of Jesus would not be funded, * * * while a reverent treatment, conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that. * * *

* * *
The Government calls attention to the roles of government-as-speaker and government-as-buyer, in which the government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page; and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third.

So long as Congress chooses to subsidize expressive endeavor at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their “freedom of thought, imagination, and inquiry” to defying our tastes, our beliefs, or our values. It may not use the NEA’s purse to “suppres[s] . . . dangerous ideas.” Regan v. Taxation with Representation of Wash., 461 U.S., at 548, 103 S.Ct., at 2002.

Scarce money demands choices, of course, but choices “on some acceptable [viewpoint] neutral principle,” like artistic excellence and artistic merit; “nothing in our decision[s] indicate[s] that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.”

Since the decency and respect proviso of § 954(d)(1) is substantially overbroad and carries with it a significant power to chill artistic production and display, it should be struck down on its face.

Citing its decision in Finley, the Court also sustained restrictions on what materials could be accessed and viewed on-line by patrons of libraries that receive federal funding. One federal program, for example, qualified libraries to receive Internet access at a discount; another helped pay the cost of linking libraries to one another and defrayed some of the expense in the acquisition and sharing of computer systems. Congress was concerned that patrons of all ages might use library computers to access pornography on-line, so in the Child Internet Protection Act, it barred any library from receiving federal funds unless the library installed a software filter to block visual images that constituted obscenity, child pornography, or material that was “harmful to minors.” In United States v. American Library Association, 539 U.S. 194, 123 S.Ct. 2297 (2003), the Court upheld the condition on the receipt of federal money as a valid exercise of Congress’s taxing and spending power. It also concluded that the restriction did not induce the libraries “to engage in activities that would themselves be unconstitutional.” Indeed, by a 6–3 vote, the Court said that limiting what patrons could view on-line was indistinguishable from the sort of discretion a library customarily exercised in purchasing books and in making them and other publications available to patrons.

In American Booksellers Association v. Hudnut, which follows, the U.S. Court of Appeals for the Seventh Circuit confronted an Indianapolis ordinance whose enactment resulted from an unusual alliance between religious fundamentalists and radical feminists. The ordinance sought to ban all pornography, not just obscene material, as a form of sex discrimination. In substance and in the manner of its operation, the law imposed a form of “political correctness.” This did not escape the notice of the appeals panel, which held that the ordinance was a clear violation of the Supreme Court’s decision in Miller.
BACKGROUND & FACTS
An Indianapolis city ordinance banned and punished “pornography” as a practice that discriminates against women. The city dealt with “pornography” through administrative agencies and courts as it would sex discrimination. According to the ordinance, “pornography” was defined as “the graphically sexually explicit subordination of women, whether in pictures or words,” which presents women as “sexual objects” who “enjoy pain or humiliation”; “experience sexual pleasure in being raped”; or are “tied up, * * * cut up, * * * mutilated, * * * bruised or physically hurt, or as dismembered * * * into body parts.”

Also defined as “pornography” were depictions of women “as being penetrated by objects or animals,” or as “presented in scenarios of degradation, abasement, [or] torture” where they are shown as “filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.” Finally, the ordinance defined as “pornography” depictions of women as “sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility, * * * submission, * * * or display.”

The ordinance provided that the “use of men, children, or transsexuals in the place of women” under the circumstances identified above also constituted “pornography.” Although the ordinance, as originally passed, defined “sexually explicit” to mean “actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus,” this section was later deleted, but nothing was substituted in its place. The above definitions of the term “pornography” constitute a complete summary of the factors that were to be taken into account. As constituted, the ordinance punished any of the above depictions regardless of their relationship to the whole work and made irrelevant any consideration of literary, artistic, or scientific value. In effecting its ban on “pornography,” the ordinance contained several prohibitions: People could not “traffic” in pornography, “coerce” others into performing in pornographic works, or “force” pornography on anybody. Anyone assaulted by someone who had seen or read pornography had a right of legal action against the manufacturer or distributor if a connection between pornography and the injury could be established.

The city argued that pornography influences attitudes and routinely reflects contempt for women and their dignity as human beings. The ordinance was defended as a way to alter and upgrade the socialization of men and women rather than to express the existing standards of the community. As one of the feminist drafters of the ordinance asserted, “[I]f a woman is subjected, why should it matter that the work has other value?”

Plaintiffs included various distributors and readers of books, magazines, and films. In this suit against the mayor and others to enjoin enforcement of the ordinance, a federal district court found the ordinance to be unconstitutional, and the city appealed.

Before CUDAHY and EASTERBROOK, Circuit Judges, and SWYGERT, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

* * *
of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value.” Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501, 105 S.Ct. 2794, 2800 (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than “normal, healthy sexual desires” are essential elements of “obscenity.”

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The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness.

***

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters “premised on equality” is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

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Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

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* * *

Declarations of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].” Indianapolis Code § 16-1(a)(2).

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech.

Racial bigotry, anti-semitism, violence on television, reporters’ biases—these and many more influence the culture and shape
our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Much of Indianapolis's argument rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, so the government may not restrict speech on the ground that a free exchange truth is not yet dominant.

We come, finally, to the argument that pornography is "low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. [However,] "pornography" is not [always] low value speech. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small. The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. Indianapolis has created an approved point of view.

The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it. The definition of "pornography" is unconstitutionsal. No construction or excision of particular terms could save it.

The defamation/discrimination rationale put forth by the advocates of the ordinance, however, has been adopted in a more limited form elsewhere. In The Queen v. Butler, 1992 1 S.C.R. 452, the Canadian Supreme Court held that Canadian obscenity law, consistent with the Charter of Rights and Freedoms (Canada's Bill of Rights), legitimately punished only the possession or distribution of material that amounted to the "undue exploitation of sex." Ordinarily, material containing scenes of "explicit sex with violence" and "explicit sex without violence that is neither degrading nor dehumanizing," was protected: material containing scenes of "explicit sex with violence" and "explicit sex without violence but which subjects
people to treatment that is degrading or dehumanizing was not. In order to be classified as "obscene," the exploitation of sex had to be its dominant characteristic and such exploitation had to be "undue," that is "not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to." As the Canadian Supreme Court explained:

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. * * *

In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

The Court added, "[M]aterial which may be said to exploit sex in a 'degrading or dehumanizing' manner will necessarily fail the community standards test * * * not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women." [D]egrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation—"as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage." "They run against the principles of equality and dignity of all human beings." Unlike Indianapolis's regulatory scheme, though, such material could still be saved by asking, '"[I]s undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose?"

A court would then have to "determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole * * * and any doubt in this regard must be resolved in favour of freedom of expression."

As the appeals court in American Booksellers pointed out, aside from the element of thought control implicit in any form of political correctness, the Indianapolis ordinance failed to distinguish between material that is obscene and that which is merely indecent. In the eyes of the ordinance's proponents, of course, this was a distinction without a difference because both treated women as sexual objects and therefore constituted forms of sexual discrimination. The failure to distinguish obscenity from indecency is critical, however, because the U.S. Supreme Court has repeatedly held—at least where adults are concerned—that only obscenity is undeserving of First Amendment protection.

Although disseminating indecency to adults is protected, there is no First Amendment right to disseminate indecent material to children or unconsenting adults. As a practical matter, however, in everyday life we are all likely to be confronted by things we do not like (see Chapter 11, pp. 851–857). Even if one accepts that the Court has managed a tolerably clear and workable definition of obscenity and that there are individuals with a legitimate interest in not being exposed to indecent material, there still remains the question whether specific means to protect children and unconsenting adults from indecency are consistent with the First Amendment. The following note surveys the regulation of indecency in three contexts: dial-a-porn services, cable television, and the Internet. Striking a balance between protected expression and legitimate governmental interests is troublesome anyway, but the difficulty of reaching this accommodation is compounded when new technology is involved
and existing legal precedents address regulation only in terms of traditional formats of expression, such as books, magazines, and motion pictures. As the following note shows, compared with the Court’s review of anti-obscenity statutes after Miller, laws and regulations restricting indecent expression have experienced a much bumpier constitutional ride.

**Note—The Regulation of Indecency**

Through administrative and legislative action, the federal government has sought to regulate indecency over the phone, on cable television, and on the Internet. After the FCC imposed regulations prohibiting both indecent and obscene phone messages, a dial-a-porn service challenged their constitutionality. In Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 109 S.Ct. 2829 (1989), the Supreme Court upheld the anti-obscenity rule, relying on its decision in *Paris Adult Theatre I v. Slaton*, but struck down the ban on indecent communications. Speaking for a unanimous Court, Justice White began from the premise that “*sexual expression which is indecent but not obscene is protected by the First Amendment* * *.” Although the Court agreed that the protection of minors and unconsenting adults furnished adequate grounds for governmental regulation, restrictions on communications had to be narrowly tailored to serve those interests. A ban on all indecent messages, like the sweeping ban on materials struck down by the Court in *Butler v. Michigan* (p. 982), would reduce adults to hearing only what was fit for children and was, therefore, fatally overbroad. Justice White went on to distinguish the Court’s ruling in *FCC v. Pacifica Foundation* (p. 855), which upheld governmental regulation of indecency on the grounds (1) that the regulation in that case did not place a total ban on the broadcast of material, but only required that the material be aired late in the day when children were not apt to be listening; and (2) that the problem posed by the sensitivities of unconsenting adults was not a factor here, since callers seeking dial-a-porn services would have to dial in and thus would not be surprised by what they heard.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329 (1997), a more divided Court struck down part of the Communications Decency Act (CDA) of 1996 (Title V of the *Telecommunications Act of 1996*, 110 Stat. 56), 47 U.S.C.A. §§ 223(a) to (h), which made anyone guilty of a felony who “in interstate or foreign communications knowingly * * * initiates the transmission of any comment, request, suggestions, proposal, image, or other communication which is obscene or indecent” to a person under 18 years of age. Other sections of the statute prohibited sending or displaying in any manner such material to a person under age 18 or using “*any interactive computer service*” for similar purposes, regardless of who initiated the communication. The law imposed a fine and maximum two years imprisonment for each offense. The statute failed to identify what constituted indecency, but defined obscene material as that which “*in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.*” The law provided affirmative defenses against criminal charges for those who took “*good faith * * * effective * * * actions*” to restrict access by minors by requiring certain designated forms of proof of age, such as a verifiable credit card number or adult identification number.

The Court, per Justice Stevens, began by acknowledging the “dynamic, multifaceted” and rapidly expanding sort of communication afforded by the Internet, surpassing traditional print, audio, and video media, so that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” Thus, “[t]hrough the use of Web pages, mail explorers, and newsgroups, the same individual can become a pamphleteer.” Given the failure of the statute to adequately define obscenity or to define indecency at all, Internet speakers had no notice of what specific communications were prohibited. Justice Stevens asked, “Could a speaker confidently assume that a serious discussion about birth control practices,
homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA?" These were not idle concerns in light of the fact that the law prohibited certain content of speech and imposed criminal penalties. The law’s definition of obscenity, for example, differed from that announced in the Miller case because there the Court approved a ban on descriptions of sexual conduct while the legislation in this case prohibited even describing sexual organs. Furthermore, the statute provided no mechanism for guaranteeing that material having scientific, educational, or other redeeming value will be protected. Nor was there any assurance that the "community standards" criterion applied to Internet communication available to a nationwide audience would not "be judged by the standards of the community most likely to be offended by the message." Finally, it was not technologically possible to zone-out minors from such communications (in the sense that a bouncer could prevent underage drinkers from entering a bar), but even if it were possible to be sure when someone under 18 years of age was participating in Internet fora, any minor could—simply by his or her presence—exercise a "heckler’s veto," since any indecent communications among the adults would have to cease.

In response to the Court’s decision in Reno v. ACLU, Congress enacted the Child Online Protection Act (COPA), 112 Stat. 2681, which prohibits any person from "knowingly or with knowledge of the character of the material" making available to any minor material that is harmful to them using the World Wide Web for commercial purposes. As compared with the CDA struck down in Reno, "Congress limited the scope of COPA’s coverage in at least three ways: First, while the CDA applied to communications over the Internet as a whole, including "* * * e-mail messages, COPA applies only to material displayed on the World Wide Web. Secondly, unlike the CDA, COPA covers only communications made for ‘commercial purposes.’ * * * And third, while the CDA prohibited ‘indecent’ and ‘patently offensive’ communications, COPA restricts only the narrower category of ‘material that is harmful to minors.’ The statute then defined ‘material that is harmful to minors’ as "any communication, picture, image, "* * * article, recording, writing, or other matter" identified as obscene according to the three-part test set forth in Miller v. California. In Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S.Ct. 1700 (2002), the Court held that COPA’s reliance upon "community standards" to identify matter that "is harmful to minors" did not make the statute overbroad. But the Court was seriously divided over whether the "community standards" referred to could be those of a local community or whether, given the global reach of the Internet, standards of the "national community" were the litmus. The Court put off to future cases any decision about whether the statute was unconstitutionally vague or whether it could survive strict scrutiny.

Another round in this constitutional saga dealt with a challenge to § 505 of the CDA that regulates what is called "signal bleed" (that is, the partial reception of video images or audio sounds) of sexually explicit adult cable television programming in the homes of nonsubscribers. To deal with the problem, the law requires that the cable operator must either completely scramble the signal or limit its transmission to hours of the day when a significant number of children are not likely to see it (10 P.M. until 6 A.M.)—what are called "safe harbor hours." Cable operators are also required to bear the cost of preventing signal bleed through the installation of a lockbox. The issue was whether the "safe harbor" requirement was the least restrictive alternative, since parents may not be sufficiently aware or informed of the free lockbox. By a 5–4 vote, in United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878 (2000), the Court held that the "safe harbor" requirement was overkill. Speaking for the Court, Justice Kennedy began by recognizing that "a key difference between cable television and the broadcasting media" was the fact that "cable systems have the capacity to block unwanted channels on a household-to-household basis." This distinction is important because "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban
speech if targeted blocking is a feasible and effective means of furthering its compelling interests."

The Court then concluded that blocking was sufficiently effective from a technological standpoint to render the “safe harbor” requirement overbroad. Justice Kennedy said that the government had “failed to establish a pervasive, nationwide problem justifying its nationwide daytime ban.” He continued, “There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they consider it a problem and have not yet controlled it themselves).” The fact is, he said, some children could be exposed to signal bleed under both voluntary blocking or the “safe harbor” requirement. He added, “Just as adolescents may be unsupervised outside of their own households, it is hardly unknown for them to be unsupervised in front of the television set after 10 P.M.” Chief Justice Rehnquist and Justices O’Connor, Scalia, and Breyer dissented.

Likewise, in Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 124 S.Ct. 2783 (2004), the return bout over whether COPA could survive strict scrutiny, the Supreme Court affirmed a preliminary order enjoining enforcement of the Act on grounds that blocking and filtering were less restrictive than the law’s criminal provisions and the latter were, therefore, probably unconstitutional. As noted earlier, COPA sought to address the problem of on-line exposure of sexually explicit materials to minors by punishing anyone who knowingly posts a commercial Internet website containing any material “harmful to minors.” Violation was punishable by a $50,000 fine and a six-month prison term. The law provided that a website operator could escape conviction by requiring the use of a credit card or by employing other means that would effectively restrict access by those underage. In light of the established effectiveness of blocking and filtering in restricting minors’ access to sexually-explicit materials, the Court held (by the same majority as in Playboy Entertainment) that it was doubtful COPA constituted a less restrictive alternative, since blocking and filtering “impose selective restrictions on speech at the receiving end, not universal restrictions on the source.” Aside from the fact that the blocking and filtering approach is less heavy-handed than imposing criminal sanctions on website operators, it was also likely to be more effective in reducing youngsters’ access to pornography because filtering, while not technologically perfect, could prevent minors from seeing most pornography, not just that posted to the Web from the United States. (Purveyors of pornography, after all, could evade COPA by simply moving their Internet operations overseas.) At any rate, the ensuing trial on the merits, the Court declared, would afford ample opportunity to evaluate the technological effectiveness of blocking and filtering, especially in light of technological improvements that had occurred in the years since the start of the litigation.

At least as constitutionally troublesome as the regulation of indecency has been the effort to limit access to “violent” video games. Since 2000, at least nine federal courts have blocked state and local laws to limit the sale of violent videos to minors (or access to them) based on their content. A California law, for example, prohibited retailers from renting or selling violent video games to persons under 17. It imposed a $1,000 fine on violators and mandated stricter product labeling. In Video Software Dealers Association v. Schwarzenegger, 401 F.Supp.2d 1034 (N.D.Calif. 2005), a federal district court issued a preliminary injunction against enforcement of the law until the merits of the constitutional challenge could be decided. The video game retailers were able to show that they were likely to prevail on the merits of the constitutional argument and that, meanwhile, they would suffer irreparable injury. The law aimed to restrict the distribution of video games in which the depiction of violence was “especially heinous, cruel, or depraved.” The court agreed with the retailers that such a definition of a “violent video” was probably void for vagueness. Presumably, what the law’s proponents had in mind were videos such as “Grand Theft Auto: San Andreas.” Similar efforts at regulation in Indiana, Illinois, Michigan, Missouri,

The seminal case on the constitutional difficulties of limiting access to violent videos is American Amusement Machine Association v. Kendrick, 244 F.3d 572 (7th Cir. 2001), cert. denied, 534 U.S. 994, 122 S.Ct. 462 (2001). Speaking for the court, Judge Richard Posner pointed out that, unlike obscenity which can constitutionally be banned because of its offensiveness, limiting access to violent video games must rest on the demonstration that exposure to violence predisposes youngsters to act violently. After examining the argument at length, he concluded that, as yet, there was no compelling evidence to support it.

C. Libel

Although defamation shares with obscenity the Court’s judgment that it is unworthy of First Amendment protection because it lacks social value, defamation cases generally present a different clash of interests. To be sure, the Indianapolis ordinance at issue in American Booksellers would have made it possible for women to recover damages for personal injury if they were victims of indignities and assaults traceable to the viewing of pornography, but the typical obscenity case pits the government against an individual. Defamation cases—whether libel (where the injury to reputation occurs through the written word) or slander (where the injury is done by word of mouth)—normally array one set of private interests against another. To the extent, however, that government permits individuals who have been defamed to recover damages and enforces such judgments, there is governmental action, and the First Amendment is implicated. The focus then turns to the conditions under which government permits victims of libel and slander to recover for their injury. Until the 1960s, the Court seemed to accept Blackstone’s assertion that postpublication sanctions imposed on the press—which in libel cases often took the form of substantial money awards—presented no free press issue because the Court afforded the states wide latitude in the operation of their libel laws. Out of a concern that libel laws could have a “chilling effect” on the capacity of the press to contribute to our debate of public issues, the Warren Court began to scrutinize their application.

The Court’s effort to narrow the reach of state libel laws began in New York Times v. Sullivan by focusing on the right of public officials to recover damages. The Alabama statute under which Sullivan sued was fairly typical of libel statutes at that time. What procedure did the law dictate? Why did this have a “chilling effect” on freedom of the press? In New York Times, the Court announced that, where public officials sought damages for libel, they would have to establish that the defendant acted with “actual malice.” What does this mean, and on what basis did the Court justify the imposition of this standard?

NEW YORK TIMES CO. v. SULLIVAN
Supreme Court of the United States, 1964
376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686

BACKGROUND & FACTS L. B. Sullivan was one of three elected commissioners of the city of Montgomery, Alabama, whose duties included supervision of the police and fire departments. He brought a libel suit against four African-American clergymen and the New York Times because of a full-page
advertisement placed in the paper by them. A jury in the circuit court for Montgomery County awarded him $500,000 in damages, the full amount claimed. The advertisement, which contained statements Sullivan alleged libeled him, bore the title “Heed Their Rising Voices.” Several paragraphs described a “wave of terror” that had descended on student nonviolent civil rights demonstrations throughout the South. The advertisement concluded with an appeal for contributions to support the student movement, voter registration efforts, and the legal defense fund for Dr. Martin Luther King, Jr., who was facing a perjury indictment in Montgomery.

Sullivan took exception to two paragraphs of the newspaper ad. One of these contained a number of factual inaccuracies about events during and after a group of student protesters assembled on the steps of the Alabama state capitol. Contained in it was a statement that truckloads of police armed with shotguns and tear gas had ringed the campus of Alabama State College. Although the ad never mentioned Sullivan by name, he argued that as the city official in charge of the police, his reputation had suffered from the inaccurate way the ad asserted actions had been taken by the police against the students.

Another paragraph declared: “Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home ***. They have assaulted his person. They have arrested him seven times—for ‘speeding,’ ‘loitering,’ and similar ‘offenses.’ And now they have charged him with ‘perjury’ ***.” Sullivan argued that the “they” in these statements referred to the police. Insofar as the ad suggested that the police had answered Dr. King’s protests with a campaign of “intimidation and violence,” then, as the commissioner in charge of police, Sullivan contended, the accusation also damaged his reputation.

The judgment of the circuit court was affirmed by the Alabama Supreme Court. The newspaper then petitioned the U.S. Supreme Court for certiorari.

Mr. Justice BRENNAN delivered the opinion of the Court.

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.

***

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. ***

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. ***

*** 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. *** Any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. *** The effect would be to shackle the First Amendment in its attempt to secure “the widest possible dissemination of information from diverse and antagonistic sources.” *** To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly
libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

Under Alabama law as applied in this case, a publication is “libelous per se” if the words “tend to injure a person * * * in his reputation” or “bring [him] into public contempt”; the trial court stated that the standard was met if the words are such as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust.” * * * The jury must find that the words were published “of and concerning” the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once “libel per se” has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. * * * His privilege of “fair comment” for expressions of opinion depends on the truth of the facts upon which the comment is based. * * * Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. * * *

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.

Respondent relies heavily, as did the Alabama courts on statements of this Court to the effect that the Constitution does not protect libelous publications. * * * [But] none of those cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. * * * Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, and obscenity, * * * that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

* * * [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. * * *

* * * A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to * * * “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. * * * Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

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
conduct 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. * * *

Such 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, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341 (1959), this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The * * * [cases] 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." * * * 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. * * * 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. * * * 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. * * *

* * *

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. * * *

[Since Sullivan was not identified in the advertisement either personally or by position, the Court also found the evidence to be "constitutionally defective" because only a remote relationship existed between the criticism contained in the advertisement and any interest asserted by the plaintiff.]

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins (concurring).

* * * I base my vote to reverse on the belief that the First and Fourteenth Amendments [do] not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticism of the Montgomery agencies and officials. * * *

* * *
The Court next extended constitutional limitations on the recovery of damages for libel to cases involving public figures who were not public officials, as exemplified by the rulings in *Curtis Publishing Co. v. Butts* and a companion case, *Associated Press v. Walker*, below. However, the consensus the Court achieved in *New York Times* dissolved, much as it had disappeared in the obscenity cases shortly after the initial decision in *Roth–Alberts*. Although the Justices were very much divided in the *Curtis Publishing* and *Walker* cases over the standard to be applied, there seemed to be agreement that the facts in the two cases warranted different outcomes. What differences did they see in the facts of these two cases? Are you persuaded by those distinctions?

**CURTIS PUBLISHING CO. V. BUTTS**  
**ASSOCIATED PRESS V. WALKER**  
Supreme Court of the United States, 1967  
388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094

**BACKGROUND & FACTS** In an article titled “The Story of a College Football Fix,” *The Saturday Evening Post* published accusations that Wally Butts, football coach at the University of Georgia, conspired to rig a game in 1962 between his team and another representing the University of Alabama. Stemming from information supplied by one George Burnett, an Atlanta insurance salesman who accidentally overheard a telephone conversation between Butts and Alabama coach Paul Bryant, the article charged that a week before the teams were to play Butts had revealed to Bryant Georgia’s offensive and defensive game plans. After his resignation from the coaching position, ostensibly for health and business reasons, Butts brought suit for $10 million in compensatory and punitive damages against Curtis Publishing Company, owner of *The Saturday Evening Post*.

At trial, Curtis Publishing offered only the defense of truth, but the content of the telephone conversation at issue was hotly disputed by Butts, who contended that he and Bryant had engaged in nothing more than general talk about football, and by expert witnesses, who analyzed Burnett’s notes of the conversation in the context of films of the game. Aside from relating the usual standards concerning truth as a defense to libel, the federal district judge who presided in this diversity proceeding additionally instructed the jury that it could award punitive damages at any figure in its discretion if it found that malice (defined by the judge as “ill will, spite, hatred and an intent to injure” or “wanton or reckless indifference * * * with regard to the rights of others”) had been proved. The jury voted $60,000 in general damages and $3 million in punitive damages, reduced subsequently by the trial judge to a total award of $460,000. A U.S. court of appeals affirmed, explicitly rejecting defendant’s motion for a new trial. Even though the *New York Times* decision was handed down very soon after the damages had been awarded in this case, the appellate court ruled that the judgment should be allowed to stand (1) because Butts was not a public official and (2) because Curtis Publishing had knowingly waived defense as to malice in spite of the fact that many of the very same lawyers defending it here were also engaged in litigating the Times case and Curtis Publishing was, therefore, well aware of it as a factor to be considered in the developing constitutional standard of libel.

On hearing before the Supreme Court, Butts was scheduled for argument with a suit brought by Edwin Walker, who as a former Army general gained considerable fame heretofore in attacks on what he termed as the efforts of civilian leadership in the Pentagon to “muzzle the military” (i.e., control the expressions of opinion by
military personnel on controversial issues of the day). His suit against the Associated Press grew out of the dissemination of an AP news dispatch that contained an eyewitness account of efforts by federal authorities to enforce a court order enrolling James Meredith, an African-American, at the University of Mississippi. The news report stated that Walker was present on the campus the night Meredith arrived and that he personally “took command” of a violent crowd that had gathered, “encouraging rioters to use violence and giving them technical advice on combatting the effects of tear gas.” Walker, who was a private citizen, had an established record as an enthusiast of right-wing causes, including vigorous opposition to federal efforts at forcing desegregation. At the conclusion of trial, instructions relatively similar to those in Butts were given, and the jury returned awards of $500,000 in compensatory and $300,000 in punitive damages. The trial judge, however, ruled that as a matter of law no evidence could be found to support a finding of malice and, as a consequence, struck the award of punitive damages. A Texas appellate court affirmed, and the Supreme Court of Texas denied certiorari.

Mr. Justice HARLAN announced the judgments of the Court and delivered an opinion in which Mr. Justice CLARK, Mr. Justice STEWART, and Mr. Justice FOR- TAS join.

* * * We brought these two cases here to consider the impact of [the] decision [in New York Times v. Sullivan] on libel actions instituted by persons who are not public officials, but who are “public figures” and involved in issues in which the public has a justified and important interest. * * *

* * * In Butts it is contended that * * * Butts[‘] responsibility of managing the athletic affairs of a state university[,] the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justify constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials.

A similar argument is raised in the Walker case where the important public interest in being informed about the events and personalities involved in the Mississippi riot is pressed. In that case we are also urged to recognize that Walker’s claims to the protection of libel laws are limited since he thrust himself into the “vortex” of the controversy.

* * * In the cases we decide today none of the particular considerations involved in New York Times is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss. In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants’ activities. * * * The courts have also, especially in libel cases, investigated the plaintiff’s position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. * * * We note that the public interest in the circulation of the materials here involved, and the publisher’s interest in circulating them, is not less than
that involved in New York Times. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. * * *

These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of New York Times are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. * * *

In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

In contrast to the Butts article, the dispatch which concerns us in Walker was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy. Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards. We therefore conclude that General Walker should not be entitled to damages from the Associated Press.

We come finally to Curtis' contention that whether or not it can be required to compensate Butts for any injury it may have caused him, it cannot be subjected to an assessment for punitive damages limited only by the "enlightened conscience" of the community. Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case * * * but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning. * * *

Where a publisher's departure from standards of press responsibility is severe enough to strip him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act
not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse. Moreover, punitive damages require a finding of "ill will" under general libel law and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation. * * *

Judgment of Court of Appeals for the Fifth Circuit in [Butts] affirmed; judgment of Texas Court of Civil Appeals in [Walker] reversed and case remanded with directions.

Mr. Chief Justice WARREN, concurring in the result. * * *

**** Mr. Justice HARLAN's opinion departs from the standard of New York Times and substitutes in cases involving "public figures" a standard that is based on "highly unreasonable conduct" and is phrased in terms of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." ** I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment. * * *

I therefore adhere to the New York Times standard in the case of "public figures" as well as "public officials." * * *

I have no difficulty in concluding that * * * Associated Press v. Walker must be reversed since it is in clear conflict with New York Times. * * * The trial judge expressly ruled that no showing of malice in any sense had been made, and he reversed an award of punitive damages for that reason. * * * Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest.

*** I am satisfied that the evidence [in Butts] discloses that degree of reckless disregard for the truth of which we spoke in New York Times. * * * Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring in the result in [Walker] and dissenting in [Butts]. * * * I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. * * *

These cases illustrate, I think, the accuracy of my prior predictions that the New York Times constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. * * *

*** Justice BRENNAN, in an opinion in which he was joined by Justice WHITE, concurred in the result in Walker and dissented in Butts. He agreed with THE CHIEF JUSTICE that the New York Times standard should be applied in both cases, but would have remanded the Butts case for a new trial rather than having the Court usurp the jury's function by directly affirming the award as consistent with the Times rule.

Four years later, a still badly fragmented Court went the full distance in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), and applied the New York Times rule to govern recovery of damages "by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or
But, sensing that it had gone too far in making recovery difficult for private individuals who had been victimized by irresponsible attacks by the media, the Court quickly retreated from its Rosenbloom holding in Gertz v. Robert Welch, Inc., which follows.

In Gertz, the Court redrew the line between public official and public figure libel plaintiffs and private individual libel plaintiffs. Henceforth, only public officials and public figures would have to meet the “actual malice” standard. What test has the Court devised to distinguish public figures from private individuals so we know who has to meet the higher standard of proof? Although it abandoned a constitutional insistence on making private individuals meet the “actual malice” standard—something Justice Brennan would have required—the Court did identify a constitutional threshold of proof in private figure libel cases. What was it? The Court’s subsequent ruling in Time, Inc. v. Firestone (p. 1025) illustrates some of the problems the Court encountered in applying the standards it articulated in Gertz. And in Herbert v. Lando (p. 1027), the Court agreed that a plaintiff made to bear the burden of proving “actual malice” should in all fairness be afforded the opportunity of inquiring into the editorial decisions that resulted in the publication of the disputed material.

In your view, has the Court struck an acceptable balance between freedom of the press and individual interests of reputation and privacy in these decisions? Do these decisions reflect a genuine, if tough-minded, appreciation for what Justice Brennan called “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *,” or do they demonstrate an insensitive regard for the value of the individual’s reputation and his privacy in the face of irresponsible attacks by the media?

**Gertz v. Robert Welch, Inc.**

Supreme Court of the United States, 1974
418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789

**BACKGROUND & FACTS** Richard Nuccio, a Chicago police officer, was tried and found guilty of second-degree murder in the shooting of a youth by the name of Nelson. Subsequently, the Nelson family retained Elmer Gertz, an attorney, to represent them in a suit for damages against Nuccio. As part of a continuing attempt during the 1960s to warn of what it saw as a concerted effort by Communists to discredit local law enforcement, American Opinion magazine, an arm of the John Birch Society published by Robert Welch, carried a story in its March 1969 issue on the Nuccio murder trial. The article purported to show that the evidence against Nuccio was false and contrived and that the officer had been framed. Gertz, who had only a very remote connection with the criminal proceedings, was nonetheless assailed as an architect of the frame-up. The article said that Gertz had been at one time a leader in the Marxist League for Industrial Democracy, described as a group that once advocated a violent takeover of the government, and called him a “Leninist” and a “Communist-fronter.” The story went on to say that he had also been an officer of the National Lawyers Guild, which it portrayed as an organization that “probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic convention.” The assertion that Gertz had been a member and official of the Marxist League was false, as were additional allegations to the effect that he had a criminal record. No evidence could be found that Gertz was a Communist, and, while he had indeed been a member and officer of the National Lawyers Guild for some 15 years, there was no proof that the organization had any connection with
planning demonstrations in Chicago in 1968. Though the article passed itself off as the product of “extensive research,” the managing editor made no attempt to check out any of the story.

Because of a diversity in state citizenship, Gertz filed a libel action in federal district court, and the case was tried to a jury, which later returned an award of $50,000. After the verdict was rendered, the trial judge, on further reflection, held as a matter of law that the New York Times standard should apply—a decision that anticipated the Supreme Court’s decision in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971)—and he set aside the award. The U.S. Court of Appeals for the Seventh Circuit affirmed, though it expressed doubt about the district court decision. Gertz then sought review by the Supreme Court.

Mr. Justice POWELL delivered the opinion of the Court.

** * * * We granted certiorari to reconsider the extent of a publisher’s constitutional privilege against liability for defamation of a private citizen. * * *

*** The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard [applies to libel plaintiffs who are] public officials and public figures. ** * * For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

*** * * * Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important[,] * * * [a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. * * *

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

The communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an “influential role in ordering society.” * * * He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private
individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." Rosenbloom v. Metromedia, Inc., 403 U.S., at 79, 91 S.Ct., at 1837. * * *

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach * * * recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." * * * Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. * * * Such a case is not now before us, and we intimate no view as to its proper resolution.

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times. * * * But this countervailing state interest extends no further than compensation for actual injury. * * * We hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

* * * Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award [such] damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. * * *

* * * It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

* * * Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the
former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

Notwithstanding our refusal to extend the New York Times privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner’s appearance at the coroner’s inquest rendered him a “de facto public official.” Our cases recognized no such concept. Respondent’s suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the “public official” category beyond all recognition.

Respondent’s characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen’s participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner’s inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the New York Times standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

Mr. Justice BLACKMUN, concurring.
I join the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of New York Times malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press.

2. The Court was sadly fractionated in Rosenbloom. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by Rosenbloom's diversity. I am not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount.

Mr. Justice DOUGLAS, dissenting.

Unlike the right of privacy, which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law.

With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

Mr. Justice BRENNAN, dissenting.

[Using the First Amendment] the Court has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove
not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will not be required.

* * *

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

* * *

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable per se. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

* * *

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few. * * * [O]ur political system can [not] survive if our people are deprived of an effective method of vindicating their legitimate interest in their good names.

* * *

NOTE—TIME, INC. v. FIRESTONE

Mary Alice Firestone brought suit against Time, Inc., because of the following squib, which it ran in the "Milestones" column of Time magazine. She alleged that it was "false, malicious, and defamatory":

DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one-time Palm Beach school-teacher; on grounds of extreme cruelty
and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, “to make Dr. Freud’s hair curl.”

She had married Russell Firestone, scion of a famous industrial family, in 1961. They separated in 1964, and she subsequently filed a complaint against him in a Florida circuit court for separate maintenance; he counterclaimed for divorce on grounds of cruelty and adultery. Changes of infidelity abounded on both sides. The circuit court judge finally granted the husband a divorce, finding “[t]hat the equities in this cause” were with him and concluding that, “[i]n the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.” In her suit against Time, Inc., for its “Milestones” sketch of their divorce, the Supreme Court of Florida affirmed a $100,000 award of damages against the publisher, and Time, Inc., sought certiorari from the U.S. Supreme Court, arguing that Mrs. Firestone was a public figure who was required to establish “actual malice” as a prerequisite to recovering damages and, absent such proof, that the libel judgment infringed the First and Fourteenth Amendments.

In Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958 (1976), the Supreme Court concluded that the New York Times rule was inapplicable because Mrs. Firestone was not a public figure. Speaking for the Court, Justice Rehnquist rejected Time’s contention that Mrs. Firestone was a public figure because the divorce had been characterized as a “cause célèbre.” If merely being a participant in “controversies of interest to the public” were sufficient, he observed, this would reinstate the Rosenbloom doctrine, which the Court had rejected in Gertz. Without more, defending her interests in a divorce action did not convert Mrs. Firestone into a public figure because people, often quite unwillingly, were compelled to go to court to defend themselves. This, the Court concluded, was insufficient evidence that she had injected herself into a public controversy.

Time also argued that its report was protected under Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), which held that “the Constitution precludes States from imposing civil liability based upon publication of truthful information contained in official court records open to public inspection.” However, the Court distinguished this case from Cox on the grounds that Time’s report of the Firestone divorce was factually wrong. The “Milestones” column reported that the divorce had been granted on grounds of cruelty and adultery. Although Russell Firestone had alleged both grounds in seeking the divorce, the divorce court never made any such finding. It granted Russell Firestone’s counterclaim for divorce without clearly specifying a ground for its judgment. In its consideration of the appeal in the libel case, the Florida Supreme Court concluded that the divorce court had relied upon “lack of domestication of the parties,” a ground not heretofore recognized in Florida law, and the state supreme court went on to affirm the divorce judgment on grounds of reckless cruelty. The fact that “the trial court’s decree was unclear,” said Justice Rehnquist, did not license Time “to choose from among several conceivable interpretations the one most damaging” to Mrs. Firestone. The Florida courts, therefore, “properly could have found the ‘Milestones’ item to be false.”

The Florida Supreme Court, in affirming judgment in the libel case, characterized Time’s reporting as “a flagrant example of journalistic negligence” because, had the magazine bothered to check, it would have discovered that under Florida law a wife whose husband has been granted a divorce on the grounds of adultery cannot be awarded alimony. Since Mrs. Firestone had been awarded alimony, the grounds for the divorce could not have been what was reported. Since Gertz precluded the awarding of libel judgments without some finding of fault—even though the Florida courts had reached the conclusion that the material published was false—the Court remanded the case for a determination of that issue. The Court regarded the single remark of the Florida Supreme Court as insufficient to constitute a finding to that effect.

Justice Powell, who concurred in an opinion in which Justice Stewart joined, thought the characterization of Time’s performance as “journalistic negligence” was harsh. On remand, Justice
Powell thought the Florida courts should more carefully consider several factors in addition to the falsity of the “Milestones” item: the Associated Press dispatch that highlighted the grounds alleged by Russell Firestone in its report of the divorce judgment; the message Time had received from its stringer in Palm Beach, which reported that the grounds for the judgment were cruelty and adultery and contained several quotations from the divorce court’s opinion; and “[t]he opaqueness of the Circuit Court decree” itself. Observing that “the Circuit Court decision was hardly a model of clarity,” Justice Powell continued, “In these circumstances, the decision of the Circuit Court may have been sufficiently ambiguous to have caused reasonably prudent newsmen to read it as granting divorce on the ground of adultery.”

The three dissenters reached conclusions entirely different from the Court and from each other. Justice White voted to simply affirm the judgment of the Florida Supreme Court. Justice Brennan, using the Court’s words in Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249 (1947), voted to award judgment to Time, Inc., because “[a] trial is a public event. What transpires in the courtroom is public property.” Justice Marshall was of the view that the case should be remanded for retrial using the New York Times standard. He believed there was ample evidence that Mrs. Firestone was a public figure, quite apart from her appearance in court to defend herself in the divorce action. Her prominence in Palm Beach society as an “active [member] of the sporting set” he thought was amply attested to by the fact that she kept a scrapbook of her press coverage and subscribed to a press clipping service for that purpose. He noted that during the 17-month trial there were at least 43 articles about the trial in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times. Furthermore, she held several press conferences during the course of the trial. In no sense, he concluded, was she subjected to the glare of media attention simply because she had gone to court to defend herself. Consequently, the “actual malice” standard should have applied.

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**NOTE—HERBERT V. LANDO**

Anthony Herbert, a retired Army officer who saw extended wartime duty in Vietnam, received national attention in the media in 1969 and 1970 when he charged that his superior officers covered up reports of atrocities and other war crimes. CBS broadcast a report on Herbert and his allegations three years later on its television program “60 Minutes.” The segment was produced and edited by Barry Lando and narrated by Mike Wallace. Lando later published an article with much the same focus in Atlantic Monthly magazine. Herbert subsequently sued Lando, Wallace, CBS, and Atlantic Monthly for defamation in federal court, predicated jurisdiction on diversity of citizenship. He contended that both the program and the article falsely and with malice portrayed him as a liar and as an individual who had made war crimes charges to explain his relief from command. Conceding that he was a “public figure” and, therefore, that the New York Times rule precluded recovery in the absence of a showing that the defendants had disseminated a damaging falsehood with “actual malice,” Herbert set about proving his case in light of that requirement. In preparation for the trial, Herbert sought a deposition from Lando, including statements with respect to inquiries about his conclusions about people or leads to be pursued or not pursued, his opinions as to the veracity and accuracy of various persons interviewed, and discussions about material to be included and excluded from the broadcast publication. In view of Rule 26(b) of the Federal Rules of Civil Procedure, which allows discovery of any matter “relevant to the subject matter involved in the pending action” if it either would be admissible as evidence or “appears reasonably calculated to lead to the discovery of admissible evidence,” the district court judge ruled that, since the defendant’s state of mind was of “central importance” to establishing malice, Herbert’s questions were relevant and proper. A divided federal appellate court reversed, finding the First Amendment privilege not to answer absolute and concluding that the Constitution protected Lando from any inquiry about his thoughts, opinions,
and conclusions during the editorial process. Herbert then petitioned the Supreme Court for certiorari.

In Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635 (1979), the Supreme Court rejected the argument that any First Amendment privilege precluded inquiry into the editorial process. Given that "New York Times and its progeny make it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant," the Court reasoned that the suggested immunity from inquiry into the editorial processes "would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by New York Times" and that direct inquiry into the editorial processes was justified in the interests of both equity and accuracy. Acknowledging that "the evidentiary burden Herbert must carry to prove at least reckless disregard for the truth is substantial indeed," Justice White, speaking for the Court, explained that "permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions." He continued:

[If] inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different. But as we have said, our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood ** **. Perhaps such examination will lead to liability that would not have been found without it, but this does not suggest that the determinations in these instances will be inaccurate and will lead to the suppression of protected information. On the contrary, direct inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests that more accurate results will be obtained by placing all, rather than part, of the evidence before the decisionmaker. Suppose, for example, that a reporter has two contradictory reports about the plaintiff, one of which is false and damaging, and only the false one is published. In resolving the issue whether the publication was known or suspected to be false, it is only common sense to believe that inquiry from the author, with an opportunity to explain, will contribute to accuracy. If the publication is false but there is an exonerating explanation, the defendant will surely testify to this effect. Why should not the plaintiff be permitted to inquire before trial? On the other hand, if the publisher in fact had serious doubts about accuracy, but published nevertheless, no undue self-censorship will result from permitting the relevant inquiry. Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which respondents do not suggest, constitutional values will not be threatened.

Disallowing direct inquiry about the editorial process would, the Court believed, be tantamount to according the press an absolute privilege. It would be flatly inconsistent with United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974), which recognized that, as powerful as is the President's interest in the confidentiality of communications between himself and his advisers, "that interest must yield to a demonstrated specific need for evidence." Moreover, evidentiary privileges are disfavored because "they are in derogation of the search for truth."

Justice Brennan dissented in part. Beginning from the premise that it was "a great mistake to understand * * * the First Amendment solely through the filter of individual rights" and that greater regard should be given to the function filled by the press in "serving democratic values" and "attaining social ends," Justice Brennan contended that United States v. Nixon articulated a more exact principle—that "[a] general claim of executive privilege, for example, will not stand against a demonstrated, specific need for evidence * * *;" he continued:

In my judgment the existence of a privilege protecting the editorial process must, in an analogous manner, be determined with reference to the circumstances of a particular case. In the area of libel, the balance struck by New York Times between the values of the First Amendment and society's interest in preventing and redressing attacks upon reputation must be preserved. This can best be accomplished if the privilege functions to shield the editorial process from general claims of
damaged reputation. If, however, a public figure plaintiff is able to establish, to the prima facie satisfaction of a trial judge, that the publication at issue constitutes defamatory falsehood, the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield.

## Other Cases on Libel

<table>
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<th>Case</th>
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<tr>
<td>Dun &amp; Bradstreet, Inc. v. Green moss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939 (1985)</td>
<td>Despite Gertz’s implication to the contrary, a private figure plaintiff need not show that the defendant acted with “actual malice” in order to collect punitive damages where the false statements did not involve matters of public concern. In this case, damages were sought because a credit-reporting firm had issued a false credit report to a building contractor’s creditors.</td>
<td>5–4; Justices Brennan, Marshall, Blackmun, and Stevens dissented.</td>
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<td>Hustler Magazine v. Falwell, 465 U.S. 46, 108 S.Ct. 876 (1988)</td>
<td>The magazine published a parody of a Campari Liqueur ad (in which a celebrity is interviewed about his or her “first time”) that depicted Jerry Falwell saying that his “first time” was in a drunken rendezvous with his mother in an outhouse. The fundamentalist preacher sued, charging invasion of privacy, libel, and intentional infliction of emotional distress. Where the ad parody was labeled as such at the bottom of the page, where it was listed in the magazine’s table of contents under “fiction,” where it was not reasonably believable, and where it could not be shown that the material contained a false statement of fact made with “actual malice,” the ad parody was not actionable by a public figure.</td>
<td>8–0; Justice Kennedy did not participate.</td>
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<td>Milkovich v. Lorain Journal Co., 497 U.S. 497, 110 S.Ct. 2695 (1990)</td>
<td>Statements of opinion are not immune from recovery under state libel laws where they contain a provably false factual component. Merely prefacing a statement like “Jones is a perjurer” with “I believe” or “In my opinion” does not immunize it. Matters of public concern that do not contain a provably false factual component (such as “Congressman Jones is a fool”) receive full constitutional protection.</td>
<td>7–2; Justices Brennan and Marshall dissented.</td>
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<td>Masson v. New Yorker Magazine, Inc. 501 U.S. 496, 111 S.Ct. 2419 (1991)</td>
<td>Falsity of material cannot be established merely by showing that words enclosed in quotation marks and attributed to the person interviewed were not said in exactly that fashion. Alteration of grammar or syntax or use of other than the exact words spoken also do not establish that the statements are false. Determination of falsity depends upon changing the substance of the remarks, as by altering their meaning or context or by making things up that were never conveyed in the interview and is a matter for the jury to determine.</td>
<td>7–2; Justices White and Scalia dissented in part.</td>
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Contrary to the suggestion of the Court, an editorial privilege so understood would not create "a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by New York Times." * * * Requiring a public figure plaintiff to make a prima facie showing of defamatory falsehood will not constitute an undue burden, since he must eventually demonstrate these elements as part of his case-in-chief. And since editorial privilege protects only deliberative and policymaking processes and not factual material, discovery should be adequate to acquire the relevant evidence of falsehood. A public figure plaintiff will thus be able to redress attacks on his reputation, and at the same time the editorial process will be protected in all but the most necessary cases.

Justices Stewart and Marshall also dissented.

The Court’s decisions from New York Times to Gertz clearly reflect close scrutiny of governmental regulation that impinges upon expressive freedoms. In 1952, however, the Court upheld the constitutionality of a state “group libel” statute in Beauharnais v. Illinois, which follows. Although Beauharnais has never been overruled and, therefore, technically is still good law, would such a statute be sustained today? Should it be? Although there is a close relationship between the law at issue in Beauharnais and the Indianapolis ordinance struck down in American Booksellers in the sense that both can be seen as enforcing a version of “political correctness,” it is doubtless the case that the Illinois legislature acted out of genuine concern that “hate speech” did much to fuel the annihilation of unpopular minorities in Nazi Germany, something that was an all-too-recent memory.

**BEAUHARNAIS V. ILLINOIS**

*Supreme Court of the United States, 1952*

343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919

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**BACKGROUND & FACTS**

Joseph Beauharnais, president of the White Circle League, was convicted and fined $200 for violating an Illinois statute that prohibited the publication and dissemination of literature or the exhibition of a play or picture that “portrays depravity, criminality, unchastity or lack of virtue of a class of citizens of any race, color, creed or religion,” exposing that class of people to “contempt, derision or obloquy,” or that “is productive of breach of the peace or riots.” The league had distributed certain leaflet-petitions in downtown Chicago, calling on the city government “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro.” It also urged “self-respecting white people in Chicago to unite,” if not by persuasion, then because of “the aggressions * * * rapes, robberies, knives, guns and marijuana of the Negro,” in order “to prevent the white race from becoming mongrelized.” The Illinois Supreme Court affirmed the conviction over Beauharnais’s assertion that the law abridged the freedoms of speech and press as guaranteed by the First and Fourteenth Amendments. The U.S. Supreme Court granted certiorari.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

* * *

Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction * * * punish[es] libels directed
at individuals. “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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. * * *” Such were the views of a unanimous Court in Chaplinsky v. State of New Hampshire, 315 U.S., at 571–572, 62 S.Ct., at 769.

It is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether the protection of “liberty” in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated. * * * [I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part. * * *

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. * * *

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. * * *

Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group * * * to which he belongs. * * * Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members. It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. * * *
[A] man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

***

As to the defense of truth [Beauharnais offered to prove the truth of the statements at trial], Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made “with good motives and for justifiable ends.” Ill. Const. Art. II, § 4. Both elements are necessary if the defense is to prevail. * * * Assuming that defendant’s offer of proof directed to a part of the defense was adequate, it did not satisfy the entire requirement which Illinois could exact.

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.

* * *

Affirmed.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, dissenting.

***

I think the First Amendment, with the Fourteenth, “absolutely” forbids such laws without any “ifs” or “buts” or “whereases.” Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. This method of decision offers little protection to First Amendment liberties “while this Court sits.”

***

Mr. Justice REED, with whom Mr. Justice DOUGLAS joins, dissenting.

***

These words—“virtue,” “derision,” and “obloquy”—have neither general nor special meanings well enough known to apprise those within their reach as to limitations on speech.

***

Mr. Justice DOUGLAS, dissenting.

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus.

***

My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights.

***

In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature, for there is no guarantee in the Constitution that the status quo will be preserved against regulation by government. Freedom of speech, however, rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged.
That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.

Mr. Justice JACKSON, dissenting.

The assumption of other dissents is that the "liberty" which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical "freedom of speech, or of the press" which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.

***

Punishment of printed words, based on their tendency either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable [however] only if the prosecution survives the "clear and present danger" test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities.

***

D. FAIR TRIAL—FREE PRESS

Although the Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial," it also assures that they will be tried "by an impartial jury of the State and district wherein the crime shall have been committed * * *." Media coverage of such a public matter as the administration of criminal justice has frequently clashed with the simultaneous expectation that procedural fairness, implicit in the selection and decision-making of an impartial jury, not be jeopardized. Thus freedom of the press, protected by the First Amendment, has often collided with the right to a fair trial protected by the Sixth Amendment.

At common law, the fairness of a trial always trumped the right to report about it and the criminal process that preceded it. Preventing the contamination of the jury pool by prejudicial pretrial publicity and allowing the jury, once selected, to reach its decision free of pressure and untainted by information not presented at trial, were paramount concerns. Courts weighed heavily the consequences of sensationalistic reporting and of publicizing evidence inadmissible at trial because, to use Justice Frankfurter’s words in Bridges v. California, 314 U.S. 252, 283, 62 S.Ct. 190, 203 (1941) (dissenting opinion), "A trial is not a ‘free trade in ideas’ * * *." But increasingly the Court has recognized that publicity may in fact help achieve a fair trial by encouraging individuals with relevant information to come forward; by deterring perjury through public scrutiny; by exposing or preventing wrongdoing by the prosecution, defense, or government; by reducing crime through public disapproval of it; and by promoting public discussion of important issues.

While any meaningful pretrial coverage of a criminal case in Britain would virtually ensure the dismissal of charges against the accused, media intrusion on the defendant’s right to trial before an impartial jury in this country depends upon whether the volume and nature of the publicity have in fact jeopardized the fairness of the proceedings. By itself, the
magnitude of pretrial coverage does not establish that the defendant’s rights have been denied. There has to be a showing of prejudicial impact. Accordingly, whether the defendant has been denied a fair trial thus depends upon the totality of the circumstances (Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975)).

Without a doubt, the double murder trial of O. J. Simpson was the most publicized trial in American history. Although the Simpson case surely was not the first to prompt the question whether the selection of an impartial jury is possible, the extent to which the airwaves were saturated with pretrial courtroom coverage, extensive out-of-court interviews, the “chase” broadcast live as it happened on the freeway, reports of evidence constantly being dribbled to the media, and endless speculation and analysis raised the issue in the most forceful terms. By the sheer volume of the publicity surrounding it, the Simpson case seemed to trivialize many of the fair-trial free-press decisions of the past. Past concerns, such as worrying about whether trials could be televised (Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965), and Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802 (1981)) or whether the press could be permitted to criticize the handling of pending cases (Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1946), and Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249 (1947)), paled by comparison. That cable television now carries Court TV, a channel devoted entirely to the coverage of trials from all over the country, has mooted much previous discussion.

The trial most frequently compared with the Simpson case in terms of intrusive media coverage was that of the Sam Sheppard murder case, which furnished the basic plot line for two motion pictures, The Lawyer and The Fugitive, and a popular former television series as well. The phrase “circus atmosphere” has been repeatedly used to describe the Sheppard trial. Although Sheppard was convicted of murdering his first wife, the Supreme Court later overturned that conviction on the grounds of prejudicial pretrial and trial coverage. Justice Clark’s opinion in the case details the intrusive nature of media involvement.

**Sheppard v. Maxwell**

Supreme Court of the United States, 1966

384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600

**Background & Facts**

Dr. Sam Sheppard, a physician and member of a prominent Cleveland family, was charged in the death of his wife, Marilyn. She was found bludgeoned to death in the upstairs bedroom of their suburban home on July 4, 1954. The evening before, the Sheppards had entertained the Aherns, some neighborhood friends. After dinner, they watched television in the living room. Sheppard became drowsy and fell asleep on the couch. Later, Marilyn woke him and said she was going to bed. According to Sheppard, he had been awakened by a cry from his wife in the early morning hours. He hurried upstairs, and in the dim light, he said he saw a “form” standing next to his wife’s bed. After struggling with the “form,” he was struck on the back of the neck and rendered unconscious. When he regained his senses, he heard his wife’s pulse and “felt that she was gone.” He looked in his son’s bedroom and found him undisturbed. Sheppard then said he heard a noise downstairs.

---

saw a “form” running out the door, and pursued it to the lake shore. There he grappled with the “form” again and lost consciousness. When he recovered, he found himself half in the water. Sheppard said he then returned to the house, checked his wife’s pulse again, and determined that she was dead. He was convicted of second-degree murder and, after exhausting his appeals, filed a petition for habeas corpus, alleging that prejudicial publicity had denied him a fair trial. Although a federal district court agreed, this judgment was reversed by a divided appeals court, and Sheppard then petitioned the U.S. Supreme Court for certiorari.

Mr. Justice CLARK delivered the opinion of the Court.

***

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, “Well, it is evident the doctor did this, so let’s go get the confession out of him.” He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. ***

*** On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard’s performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard’s refusal to take a lie detector test and “the protective ring” thrown up by his family. ***

*** On the 20th, the “editorial artillery” opened fire with a front-page charge that somebody is “getting away with murder.” The editorial attributed the ineptness of the investigation to “friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected.”

The following day, July 21, another page-one editorial was headed: “Why No Inquest? Do It Now, Dr. Gerber.” The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium. The hearing was broadcast with live microphones placed at the Coroner’s seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard’s counsel were present during the three-day inquest but were not permitted to participate. When Sheppard’s chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing the Coroner announced that he “could” order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. ***

*** Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. ***

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar.
railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. Station WSR was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" [The article then went on to discuss her family.]

4. [The jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so.

6. On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a 'bombshell witness' on tap..."
who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

(7) When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging. * * * Let's confine ourselves to this courtroom, if you please." * * *

Fair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. * * *

Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

Mr. Justice BLACK dissents.

The failure of "the state trial judge * * * [to] fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community" was certainly not a mistake that Judge Stuart made in trying Charles Simants, the alleged murderer of half a dozen family members in a rural Nebraska community. Sheppard fostered the view that trial judges often had to choose between protecting the defendant's right to a fair trial and preserving freedom of the press, and Court decisions in the 1960s left little doubt which was the paramount value. Given the need to harmonize these conflicting interests, Justice Black's unexplained dissent in Sheppard seems particularly unhelpful. By contrast, Chief Justice Burger's opinion for the Court in Nebraska Press Association v. Stuart takes care to discuss the conditions that might necessitate a gag order and reviews the options available...
to a trial judge in a highly charged case—many of them previously inventoried in Sheppard—that would protect the defendant’s right to a fair trial and still preserve a free press. Justice Brennan’s concurring opinion goes further in concluding that the existence of such plentiful options means that no choice between fair trial and free press is necessary at all.

**NEBRASKA PRESS ASSOCIATION V. STUART**
Supreme Court of the United States, 1976
427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683

**BACKGROUND & FACTS** Following the arrest and arraignment of Simants, the suspected murderer of six members of a family in a small Nebraska farm community, and after hearing arguments on the issue of potentially prejudicial pretrial publicity, Judge Stuart, the trial judge, imposed restrictions on press and media coverage of the case until a jury had been impaneled. Specifically, the judge banned reporting on five topics. As summarized later by the Supreme Court, they included 

"(1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; (5) the identity of the victims of the alleged sexual assault and the nature of the assault."

On appeal of the judge’s orders, the Nebraska Supreme Court upheld, but narrowed, the constraints on reporting to three matters: "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts strongly implicative of the accused." The U.S. Supreme Court granted certiorari to determine whether Judge Stuart’s orders, as modified, constituted a violation of the First Amendment.

Mr. Chief Justice BURGER delivered the opinion of the Court.

* * *

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. * * * [*] It is not for us to rewrite the Constitution by undertaking what [the Framers] declined. * * *

* * *

* * [W]e must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

* * *

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant’s right to a fair trial. He did not purport to say more, for he found only “a clear and present
danger that pretrial publicity could impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

We find little in the record that goes to determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect.

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in Sheppard v. Maxwell: (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; (b) postponement of the trial to allow public attention to subside; (c) use of searching questioning of prospective jurors to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

Pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." Murphy v. Florida, 421 U.S. [794, 799, 95 S.Ct. 2031, 2036 (1975)]. Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity.

We note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement—evidently a confession—that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the Nebraska Supreme Court, enjoined reporting of (1) "[c]onfessions or admissions against interests made by the accused to law enforcement officials"; (2) "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to the press or representatives of the news media".
information strongly implicative of the accused as the perpetrator of the slayings.”

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles * * *. [O]nce a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. * * * [The] prohibition regarding “implicative” information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. * * *

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require. * * *

[The] judgment of the Nebraska Supreme Court is therefore reversed.

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL concur, concurring in the judgment.

* * *

* * * Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained. This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values. * * *

I unreservedly agree with Mr. Justice Black that “free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.” Bridges v. California, 314 U.S. [252, 260, 62 S.Ct. 190, 192 (1941)]. But I would reject the notion that a choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. To hold that courts cannot impose any prior restraints on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system is not, I must emphasize, to countenance the sacrifice of precious Sixth Amendment rights on the altar of the First Amendment. For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension. * * *

* * * Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion. * * *
Mr. Justice STEVENS, concurring in the judgment.

For the reasons eloquently stated by Mr. Justice BRENNAN, I agree that the judiciary is capable of protecting the defendant’s right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. * * *

The Court’s more recent decisions in Richmond Newspapers, which follows, and Globe Newspaper Co. (p. 1047) have accentuated the trend away from the seemingly automatic preference for the “fair trial” interest that marked the decisions of the Warren Court during the 1960s. Richmond Newspapers makes it clear that there is a First Amendment expectation that criminal trials are to be open to the press. If, as Justice Frankfurter once forcefully argued, “[a] trial is not a free trade in ideas,” what justifications does the Court offer for a constitutional right of access by the press? How persuasively does the Court recognize a legitimate public interest in press access to trials as opposed to, say, the private interest of the press in capitalizing on the sensationalism of the moment?

**Richmond Newspapers, Inc. v. Virginia**

Supreme Court of the United States, 1980

448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973

**Background & Facts** At the beginning of the defendant Stevenson’s fourth trial on a murder charge (his conviction at the first trial having been reversed on appeal and two subsequent retrials having ended in mistrials), the Virginia trial judge granted a defense motion to close the trial to the public. Apparently referring to § 19.2–266 of the Virginia Code, he announced, “[T]he statute gives me that power specifically and the defendant has made the motion.” No objection was made either by the prosecutor or by two newspaper reporters who were present. Later that day, the newspaper sought and received a hearing on a motion to vacate the closure order. Counsel for the newspaper argued that federal constitutional guarantees required that the judge examine alternative methods of protecting the defendant’s rights and conclude that no other effective alternative existed before closing the trial to the public. Asserting that, if he felt the defendant’s rights were infringed in any way, he would be “inclined to go along with the defendant’s motion,” the judge ordered the trial to continue “with the press and public excluded.” The following day, the judge granted a defense motion to strike the prosecution’s evidence, excused the jury, and found the defendant not guilty. The trial judge then granted the newspaper’s motion to intervene in the case. On appeal, the Virginia Supreme Court denied the newspaper’s appeal from the closure order and it sought review from the U.S. Supreme Court.

Mr. Chief Justice BURGER announced the judgment of the Court and delivered an opinion in which Mr. Justice WHITE and Mr. Justice STEVENS joined.
The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979), the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment’s guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that “a hearing on a motion before trial to suppress evidence is not a trial.” 443 U.S., at 394, 99 S.Ct., at 2913 (Burger, C. J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, nor did the dissenting opinion reach this issue.

Here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant’s superior right to a fair trial, or that some other overriding consideration requires closure.

The historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. Openness gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice provide an outlet for community concern, hostility, and emotion. Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful “self-help,” as indeed they did regularly in the activities of vigilante “committees” on our frontiers.

A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice,” and the appearance of justice can best be provided by allowing people to observe it.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding

14. In his concurring opinion in Gannett, Chief Justice Burger, going to the heart of the matter, also observed: “When the Sixth Amendment was written and for more than a century after that, no one could have conceived that the Exclusionary Rule and pretrial motions to suppress evidence would be part of our criminal jurisprudence. The authors of the Constitution, imaginative, far-sighted, and perceptive as they were, could not conceivably have anticipated the paradox inherent in a judge-made rule of evidence that excludes undoubted truth from the truth finding processes of the adversary system. Nevertheless, as of now, we are confronted not with a legal theory but with the reality of the unique strictures of the Exclusionary Rule and they must be taken into account in this setting. To make public the evidence developed in a motion to suppress evidence would, so long as the Exclusionary Rule is not modified, introduce a new dimension to the problem of conducting fair trials.”
the system in general and its workings in a particular case. * * *

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. * * *

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court. * * *

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself * * *. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. * * *

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," * * * or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656 (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. * * * Subject to the traditional time, place, and manner restrictions, * * * streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised * * *; a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment * * *

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. * * * Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in Gannett, supra, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. * * *
There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. Accordingly, the judgment under review is reversed.

Reversed.

Mr. Justice POWELL took no part in the consideration or decision of this case.

Mr. Justice STEVENS, concurring.

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. * * *

* * * Today, * * * for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a long-standing policy of concealment, and an absence of any legitimate justification for abridging public access to information about how government operates. In this case we are protecting the interests of the most powerful voices in the community, we are concerned with an almost unique exception to an established tradition of openness in the conduct of criminal trials, and it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial.

In any event, for the reasons stated in [part *** of my *Houchins* opinion *** as well as those stated by The Chief Justice today, I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, concurring in the judgment.

Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with those of my Brethren who hold that, without more agreement of the trial judge and the parties cannot constitutionally close a trial to the public.

* * *

The Court's approach in right of access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable. * * * But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican
system of self-government. Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964), but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.

This Court has persistently defended the public character of the trial process. In re Oliver established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. Noting the “universal rule against secret trials,” 333 U.S., at 266, 68 S.Ct., at 504, the Court held that “in view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.”

Even more significantly for our present purpose, Oliver recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous “checks and balances” of our system, because “contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” Indeed, the Court focused with particularity upon the public trial guarantee “as a safeguard against any attempt to employ our courts as instruments of persecution,” or “for the suppression of political and religious heresies.” Thus, Oliver acknowledged that open trials are indispensable to First Amendment political and religious freedoms.

Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that “[a] trial is a public event. What transpires in the courtroom is public property.” Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947). As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation.

Mr. Justice STEWART, concurring in the judgment.

The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal. With us, a trial is by very definition a proceeding open to the press and to the public.

But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Much more than a city street, a trial courtroom must be a quiet and orderly place. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. And while there exist many alternative ways to satisfy the constitutional demands of a fair trial, those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.

Since in the present case the trial judge appears to have given no recognition to the right of representatives of the press and members of the public to be present at the Virginia murder trial over which he was
presiding, the judgment under review must be reversed.

Mr. Justice BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in Gannett Co. v. DePasquale, 443 U.S. 368, 406, 99 S.Ct. 2898, 2919 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I, of course, continue to believe that Gannett was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.

I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. The opinion in partial dissent in Gannett explained that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

Mr. Justice REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta Iolanthe, the Lord Chancellor recites:

"The Law is the true embodiment of everything that's excellent, 
It has no kind of fault or flaw. 
And I, my lords, embody the Law."

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case.
In Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S.Ct. 2613 (1982), the Supreme Court addressed the question whether a Massachusetts statute, construed so that it "requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim," violates the First Amendment as made applicable to the states through the Fourteenth. Relying principally on Richmond Newspapers, Justice Brennan, writing for the Court, held the statute unconstitutional as so construed. He found both interests asserted by the Commonwealth to support such a construction—safeguarding the physical and emotional well-being of a minor victim and encouraging minor victims of sex crimes to come forward and file a complaint—important, but
insufficient to support automatic exclusion of the press and public. As to the first of these interests, the Court concluded that the statute “cannot be viewed as a narrowly tailored means of accommodating the State’s asserted interest; that interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State’s legitimate concern for the well-being of the minor necessitated closure.” And with respect to the second interest proffered by the Commonwealth, Justice Brennan pointed out that it “has offered no empirical support for the claim,” but such a proposition “is also open to serious question as a matter of logic and common sense.” He observed that “the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim’s testimony. Thus [the statute] cannot prevent the press from publishing the substance of a minor victim’s testimony, as well as his or her identity.” As a result, the statute “hardly advances that interest in an effective manner,” and even if it did, such an interest would probably not be sufficient to support automatic closure.

Chief Justice Burger, joined by Justice Rehnquist, dissented. He regarded the Court’s ruling as an unwarranted extension of Richmond Newspapers and observed: “[T]oday the Court holds unconstitutional a state statute designed to protect not the accused, but the minor victims of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.” Justice Stevens also dissented, but did so on the grounds that, at least in terms of the facts of this case, “the Court’s comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.”

Relying heavily on the principles articulated in Richmond Newspapers, Globe Newspaper Co., and Press-Enterprise Co., a federal appeals court, in Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), enjoined the federal government from conducting secret deportation hearings in “special interest” cases involving persons whom the Attorney General determined had knowledge of, or were connected to, the terrorist attacks of September 11, 2001. The court accepted the media’s fair trial-free press argument that many (possibly hundreds) of immigration hearings were being closed to the public without any particularized finding that the closure was necessary to serve an important governmental interest. Categorically closing the hearings, the media argued, was not narrowly tailored to serve either the interest in avoiding setbacks to the government’s anti-terrorism investigations allegedly caused by holding open hearings or in preventing stigma or harm to detainees that might occur if the hearings were open to the public. Hearings, it ruled, could still be held behind closed doors on a case-by-case basis if particularized determinations were made supporting the action. However, a second federal appellate court reached the opposite conclusion in North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002), cert. denied, 538 U.S. 1056, 123 S.Ct. 2215 (2003), although by a split vote. Rejecting the applicability of Richmond Newspapers in this context, the two-judge majority said. “Deportation proceedings' history of openness is quite limited, and their presumption of openness quite weak. They plainly do not present the type of ‘unbroken, uncontradicted history’ that Richmond Newspapers and its progeny require to establish a First Amendment right of access. We do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend any immigration proceeding. Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns. In recognition [of] his experience (and our lack of experience) in this field, we will defer to his judgment. We note that although there may be no judicial remedy for these closures, there is, as always, the powerful check of political accountability on Executive discretion.”
A**NYONE WHO UNDERSTANDS** why parents warn their children that the fastest way to lose friends is to become embroiled in an argument over religion knows why the Religion Clauses figure so prominently in the rights protected by the First Amendment and why the prohibition on their abridgment is phrased as an absolute. Freedom to worship in accordance with one's own convictions was a dominant motive in the founding of such colonies as Plymouth, Rhode Island, Pennsylvania, and Maryland. The amendment's protection of the free exercise of religious belief reaffirmed acceptance of the proposition that matters of faith are uniquely personal. The religious wars that battered Europe between the Middle Ages and the Enlightenment and the theological intolerance that blemished the reign of the Tudors and brought down the rule of the Stuarts in the English Civil War provided ample testimony to the importance of not creating political cleavages along such emotional lines. The Establishment Clause was the fruit of a harsh European history lesson that taught that the solder of social cohesion was quite apt to melt under the heat generated by religious conflict. To use Justice Jackson's words, “[T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.” Yet, because the Constitution had given government no power to legislate on the subject of religion, no prohibition on such lawmaking was originally thought necessary. Consequently, until the adoption of the Bill of Rights in 1791, the only mention of religion in the Constitution was Article VI's provision that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

A. **THE ESTABLISHMENT CLAUSE**

The wording of the First Amendment is straightforward enough: “Congress shall make no law respecting an establishment of religion * * *.” But what sort of legislative enactment would come within the ambit of this prohibition? Historically, there have been two quite

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different answers to this question. One view holds that “establishment” should be interpreted in the narrow sense so that the amendment bars only the kind of establishment that existed in Europe prior to the American Revolution. Congress would be barred from creating an official, publicly supported church and could not prefer one religion over another, but nothing would prevent government from supporting religious activities so long as there was no discrimination among sects or religious groups. Repeatedly, members welded to this view proclaim that nothing in the amendment requires government to be neutral as between religion and irreligion. The much-respected constitutional historian Leonard Levy has denominated this group the “nonpreferentialists.”

A competing interpretation, favored by individuals we might call “separationists,” gives broader scope to the word “establishment” and would preclude any legislation on the subject of religion. According to this view of the prohibition, government would be barred from any support or involvement with religion. The fact that a given form of support is nondiscriminatory is irrelevant. Advocates of this view, such as Thomas Jefferson and James Madison, have emphasized the importance of maintaining “a wall of separation between Church and State” for the very reasons touched upon earlier.

Since advocates of “original intent” tend to be conservatives—Justice Black being an obvious exception—it is not surprising that Chief Justice Rehnquist and Justices Scalia and Thomas favor the nonpreferentialist position. Indeed, the doctrines the Court has developed over the last three decades to measure establishment have been criticized severely by nonpreferentialists in general and by these men in particular because, they argue, the Framers did not intend any wall of separation between religion and government that would make it illegitimate for government to favor religion in general.

Although the relevance of the Framers’ intent is itself debatable, it is worth mentioning here because of the exhaustive research conducted by Professor Levy, which concluded that the nonpreferentialists, such as the Chief Justice, are mistaken in their assertions. Responding to Rehnquist’s dissent in Wallace v. Jaffree (p. 1061) that the Establishment Clause “did not * * * prohibit the federal government from providing nondiscriminatory aid to religion,” Professor Levy wrote:

Rehnquist miraculously converted the ban on establishments of religion into an expansion of government power. He did not consider that the establishment clause prohibits even laws respecting (concerning) an establishment of religion, so that any law on the subject, even if falling short of an establishment of religion, is unconstitutional. He did not know that the clause meant to its framers and ratifiers that there should be no government aid for religion, whether for all religions or one church; it meant no government sponsorship or promotion or endorsement of religious beliefs or practices and no expenditure of public funds for the support of religious exercises or institutions. Rehnquist * * * and the nonpreferentialists wish to be bound by the original intent of the framers of the establishment clause because they mistakenly think that the original intent supports their view. In fact, it contradicts their view.

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While Justices Rehnquist, Scalia, and Thomas could be described as nonpreferentialists, the other Reagan-Bush appointees—Justices O'Connor, Kennedy, and Souter—could not. Justice Souter has sided with the separationists, Justice Kennedy has a mixed record but with a slightly preferentialist hue, and Justice O'Connor remained the pivotal center player in most church-state cases during her tenure on the Court. As you will see, the nonpreferentialist position has been articulated with increasing fervor and determination, but with Justice O'Connor a determined holdout, the Court—until her retirement, at least—had not attained a solid majority with that view.

When the Court incorporated the prohibition on establishment into the Fourteenth Amendment and thus made it applicable against the states as well as the federal government, the Court was comprised, rhetorically at least, of nine separationists. That case was Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947). The statute at issue contained a controversial provision that allowed school boards to reimburse parents of both public and parochial school students for expenses incurred using public transportation to go to and from school. Everson argued that rebating the expenses of parochial school students amounted to an establishment of religion. Addressing what it was that the Establishment Clause forbade, Justice Black, speaking for the Court, wrote:

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 disbelief, 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.”

Black's separationist interpretation of the Clause was shared by all the members of the Court. Nonetheless, the Court went on to uphold the New Jersey statute by a 5–4 vote. Conceding that the law lay at the perimeter of constitutional power, Black explained that it was saved because it provided benefits to the pupil, not the school. This approach, known as “the child benefit theory,” likened the statute to general public welfare legislation. Moreover, to deny parents of parochial school students a reimbursement that was allowed to other parents would seem tantamount to denying welfare benefits on the basis of religious faith—an act that might be thought to trigger the protection of the Free Exercise Clause.

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3. The theory was originally stated by the Court in Cochran v. Louisiana State Board of Education, 281 U.S. 370, 374–375, 50 S.Ct. 335 (1930), as follows: “The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.”
The four dissenting Justices agreed with Black on the principles that animated interpretation of the clause, but vigorously disagreed with the Court’s conclusion in this case. Although Justice Black proclaimed that the wall of separation had been kept high and impregnable, the dissenters argued that such rhetoric was more honored in the breach than in the observance. Justice Jackson in dissent observed that the Black opinion was simply inconsistent with the Black decision. Concluding with one of his typical literary allusions, Jackson remarked that the Court’s opinion reminded him of “Julia who, according to Byron’s reports, ‘whispering “I will ne’er consent,”’—consented.’”

After its failure to follow through on separationist principles in Everson, the Court was approached with more efforts to narrow the prohibition of establishment. In several early cases, the Court dealt with claims that government was using its power to bolster religious practices. More recently, it has been pressed by contentions that tax monies were going to support religious education. Whatever the issue, the Court has been dogged at every turn by those who seek a stringent reading of the clause on one side and by those who seek a permissive reading of the clause on the other. Surprisingly, it was the Court’s self-proclaimed First Amendment absolutists—Justices Black and Douglas—who made weakening statements in the early cases that came back to haunt separationists later.

Within a year after ruling in the Everson case, the Court was hearing arguments on the constitutionality of “released time” for religious instruction of students in public school. At issue in People of State of Illinois ex rel. McCullom v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948), was an arrangement whereby students with parental consent were allowed time off from class to go to another part of the school where they would receive religious instruction from instructors who were required to take attendance, but were not paid from public funds. The Court, distressed by the fact that a tax-supported building was being used for the propagation of religious doctrine and the state’s compulsory school attendance machinery was being used to provide students for religion classes, struck down the practice.

Four years later, in Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679 (1952), the Court approved the constitutionality of a modified released-time program that omitted many of the objectionable features of the plan challenged in McCullom. In the program sanctioned in Zorach, students who had parental consent went to centers off school grounds for religious instruction. Significantly, those students who remained behind were not given any work that would have advanced them beyond their classmates. In other words, students who went to religious instruction missed a study hall rather than a class. Religious instructors continued to take attendance. Speaking for the Court in Zorach, Justice Douglas emphasized the differences in the two programs and went on to add, “But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence” for “[t]hat would be preferring those who believe in no religion over those who do believe.” Rather, he concluded, “We are a religious people, whose institutions suppose a Supreme Being.” These words would repeatedly come back to haunt strict separationists.

4. The use of a tax-supported building in the context of this case must be distinguished from denying religious groups access to tax-supported buildings that are generally made available for use by student groups or the public at large during off-hours. In Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981), the Court held by an 8–1 vote that a state university’s policy of making its facilities generally available to registered student groups for their activities, but denying access to those facilities by groups seeking to use them “for purposes of religious worship or religious teaching,” violated the First Amendment. The Court reasoned that the university policy created a public forum and access to it could not be denied based upon the religious content of speech. A policy of affording equal access would have a secular purpose and would not foster excessive government entanglement with religion.
A. The Establishment Clause

Justices Black, Frankfurter, and Jackson found even this modified released-time plan unconstitutional.

Prayer, Bible-Reading, and Sunday Closing Laws

If religious groups were heartened by the Vinson Court’s stand in Zorach, their enthusiasm for the Court’s rulings was short-lived. In Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962), parents brought action against school board members, challenging the required recitation of the following prayer in classrooms 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.” The board had initiated the practice on the recommendation of the New York State Board of Regents, the governing body of the state’s educational system. By a 6–1 vote, the Court held recitation of the Regents’ Prayer unconstitutional. Again speaking for the Court, Justice Black wrote: “[T]he 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 the government.” He continued, “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 * * *.” Noting that the Free Exercise Clause and the Establishment Clause “may in certain circumstances overlap,” still “they forbid two quite different kinds of governmental encroachment upon religious freedom.” Justice Black explained, “The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enforcement of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.” Although the purposes of the Establishment Clause would be offended by “laws officially prescribing a particular form of religious worship,” they “go much further than that.” Said Justice Black:

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 New York laws officially prescribing the Regents’ prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

A year later in two cases heard together, Abington School District v. Schempp and Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963), the Court—again with only Justice Stewart dissenting—struck down public school policies of beginning the school day with the reading of verses from the Bible. The Court invalidated Bible-reading in the public schools for the same reasons as it had struck down recitation of the Regents’ Prayer. The Court, speaking through Justice Clark, declared that the practice failed to survive the test that “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.” Here the Bible was not being studied for its literary or historical value, but was being used in “religious exercises,” indistinguishable from the religious exercise invalidated in Engel v. Vitale.
Strong negative reaction followed the Court’s decisions in Schempp and Murray. Typical of the congressional criticisms that the Justices received were Senator Barry Goldwater’s statement that the Court had “ruled against God” and the remarks of other legislators to the effect that the Court had no business taking God out of the public schools. A surprisingly strong letter-writing campaign flooded Congress with messages of support for passage of a constitutional amendment to allow voluntary prayer in the schools. Despite the introduction of well over a hundred such proposals and the boost given such a move by its inclusion in the 1964 Republican platform, both of the major attempts to overturn the Court’s rulings and modify the First Amendment failed. Two years later, Senator Everett Dirksen’s (R–Ill.) attempt to secure approval of such legislation in the Senate failed by nine votes to get the necessary two-thirds majority. Nor did criticism of Engel and Schempp quickly abate. In the decade from the mid-1970s to the mid-1980s, for example, critics of the decisions, such as Senator Jesse Helms (R–N.C.), introduced some 65 proposed constitutional amendments and 45 bills aimed at curtailing the Court’s appellate jurisdiction. Helms also continued to offer amendments to education appropriation bills that would have required the withdrawal of federal funds from any school that denied students the opportunity for “constitutionally protected” school prayer. Efforts to amend the Constitution since Helms left the Senate have met with no greater success.

In light of the whirlwind of criticism reaped by the Court after its decisions in Engel, Schempp, and Murray and the large number of judicial appointments made by conservative Presidents afterward, the Supreme Court’s recent affirmation of the principles underlying those decisions in Lee v. Weisman, which follows, is particularly significant. At issue was the constitutional validity of a prayer delivered at public high school graduation ceremonies. Although the Court’s opinion was predictably criticized by the nonpreferentialist Justices, the facts that it was written by Justice Kennedy, a Reagan appointee, and that historical support bolstering it was presented in a concurring opinion by Justice Souter, a Bush appointee, joined by Justice O’Connor, who was also named by President Reagan, spoke to the continuing vitality of the separationist position.

**LEE V. WEISMAN**

Supreme Court of the United States, 1992
505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467

**BACKGROUND & FACTS** School principals in the public school system of Providence, Rhode Island, were permitted to invite clergymen to offer invocation and benediction prayers at graduation exercises for middle schools and high schools.

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7. The following Religious Freedom Amendment (H. J. Res. 78) was debated and voted upon by the House of Representatives on June 4, 1998. The vote on the proposed constitutional amendment was 224–203, well short of the required two-thirds majority.

“A clause—
“9. To secure the people’s right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people’s right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion.”

The Senate failed to act on the proposed amendment in the few months that remained of the 105th Congress.
Daniel Weisman brought suit on behalf of his daughter, Deborah, after his objection to any such prayers at her middle school graduation ceremonies was unavailing. The school principal, Robert Lee, had asked Rabbi Leslie Gutterman to deliver the prayers at the commencement exercises. The federal district court denied Mr. Weisman’s motion for a restraining order because it lacked time to consider it, and Rabbi Gutterman said the prayers at Deborah’s graduation ceremonies. Mr. Weisman subsequently amended his complaint to permanently enjoin Providence public school officials from continuing the practice in the future. The district court found such prayers to be a violation of the First Amendment and granted the injunction. This judgment was affirmed on appeal, after which the principal sought review by the Supreme Court.

Justice KENNEDY delivered the opinion of the Court.

* * * The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

* * * These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

* * * The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. * * *

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. * * *

* * * A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. * * *

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State’s attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

* * * Principal Lee provided Rabbi Gutterman with a copy of the “Guidelines for Civic Occasions,” and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayer. * * *

It is a cornerstone principle of our Establishment Clause jurisprudence that “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,” Engel v. Vitale, 370 U.S. 421, 425, 82 S.Ct. 1261, 1264 (1962), and that is what the school officials attempted to do.

* * *

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the
Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. * * *

The First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. * * *

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. * * * The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. * * * The explanation lies in the lesson of history that * * * in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. * * *

* * * What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. * * * The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. * * * It is of little comfort to a dissenter * * * to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dis- senter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. * * * Adolescents are often susceptible to pressure from their peers towards conformity, and * * * the influence is strongest in matters of social convention. * * *

* * * Government may no more use social pressure to enforce orthodoxy than it may use more direct means.

* * * Petitioners * * * argued that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. * * *

* * * Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions. A school rule which excuses attendance is beside the point. * * * Graduation is a time for family and those closest to the student to
celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

* * * The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. * * *

* * *

Inherent differences between the public school system and a session of a state legislature distinguish this case from Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983). * * * The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh.

* * * Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, and we cannot accept the parallel relied upon by petitioners and the United States between the facts of Marsh and the case now before us. Our decisions in Engel v. Vitale * * * and Abington School District v. Schempp * * * require us to distinguish the public school context. * * *

For the reasons we have stated, the judgment of the Court of Appeals is Affirmed.

Justice SOUTER, with whom Justice STEVENS and Justice O’CONNOR join, concurring.

* * *

Some have challenged * * * precedent by reading the Establishment Clause to permit “nonpreferential” state promotion of religion. * * * I find in the history of the Clause’s textual development a more powerful argument supporting the Court’s jurisprudence following Everson.

* * * [The First Amendment says:] “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language [of the Amendment] is not limited to laws respecting an establishment of “a religion,” “a national religion,” “one religious sect,” or specific “articles of faith.” The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for “religion” in general. Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated. See, e.g., Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875 (1986) 902–906; Levy, [The Establishment Clause (1986)] 91–119. * * * [The Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. * * * The Virginia Statute for Religious Freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the Statute broadly guaranteed that “no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever,” including his own. Act for Establishing Religious Freedom (1785) * * *.

What we thus know of the Framers’ experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid “requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language.” Laycock, “Nonpreferential” Aid
882–883 * * *. We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment. * * *

History neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than for one religion or some.

* * *

The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments, but their special antipathy to religious coercion did not exhaust their hostility to the features and incidents of establishment. Indeed, Jefferson and Madison opposed any political appropriation of religion * * * and, even when challenging the hated assessments, they did not always temper their rhetoric with distinctions between coercive and noncoercive state action. When, for example, Madison criticized Virginia’s general assessment bill, he invoked principles antithetical to all state efforts to promote religion. An assessment, he wrote, is improper not simply because it forces people to donate “three pence” to religion, but, more broadly, because “it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” J. Madison, Memorial and Remonstrance Against Religious Assessments (1785) * * *

* * * President Jefferson * * * [also] steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.

* * *

* * * By condemning such noncoercive state practices that, in “recommending” the majority faith, demean religious dissenters “in public opinion,” Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion. He accordingly construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance. * * *

* * *

* * * [As President, Madison later] expressed so much doubt about the constitutionality of [his wartime proclamations of prayer and thanksgiving as to] suggest[ ] a brand of separationism stronger even than that embodied in our traditional jurisprudence. So too does his characterization of public subsidies for legislative and military chaplains as unconstitutional “establishments” * * *.

* * *

While we may be unable to know for certain what the Framers meant by the Clause, we do know that, around the time of its ratification, a respectable body of opinion supported a considerably broader reading than petitioners urge upon us. This consistency with the textual considerations is enough to preclude fundamentally reexamining our settled law * * *.

* * *

Justice SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST], Justice WHITE, and Justice THOMAS join, dissenting.

* * *

From our Nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, “appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions” and avowed “a firm reliance on the protection of divine Providence.” In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President * * *. Such supplications have been a characteristic feature of inaugural addresses ever since. * * *

Our national celebration of Thanksgiving likewise dates back to President Washington. * * * This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. * * *
The other two branches of the Federal Government also have a long-established practice of prayer at public events. * * * Congressional sessions have opened with a chaplain’s prayer ever since the First Congress. * * * And this Court’s own sessions have opened with the invocation “God save the United States and this Honorable Court” since the days of Chief Justice Marshall. * * *

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public-school graduation exercises. * * *

Maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for participation, I would deny that the dissenter’s interest in avoiding even the false appearance of participation constitutionally trumps the government’s interest in fostering respect for religion generally. * * *

[M]aintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter’s interest in avoiding even the false appearance of participation constitutionally trumps the government’s interest in fostering respect for religion generally.

* * * The government can, of course, no more coerce political orthodoxy than religious orthodoxy. West Virginia Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187 (1943). Moreover, since the Pledge of Allegiance has been revised since Barnette to include the phrase “under God,” recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. * * * Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In Barnette we held that a public-school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to stand in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court’s bulldozer.

The other “dominant fact[s]” identified by the Court is that “[s]tate officials direct the performance of a formal religious exercise” at school graduation ceremonies. * * * The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

* * * The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). * * *

* * * I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term “establishment” had acquired an additional meaning—financial support of religion generally, by public taxation—that reflected the development of “general or multiple” establishments, not limited to a single church. * * *

But that would still be an establishment coerced by force of law. * * *

Thus, while I have no quarrel with the Court’s general proposition that the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise,” * * * I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty * * *

* * * Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals
One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

Eight years later, the Court reaffirmed the principles of Lee v. Weisman when it struck down a school district policy permitting student-initiated and student-led prayer over the public address system prior to all home football games. In Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266 (2000), Mormon and Catholic students brought suit arguing the prayer was a violation of the Establishment Clause. Before 1995, a student elected as the high school’s student council chaplain delivered the pre-game prayer. After the suit had been brought, the school board amended the policy to authorize two separate elections, the first to determine whether “invocations” should be delivered at games, and the second to select the student to deliver them. Speaking for the six-Justice majority in this case, Justice Stevens rejected the contention that the prayer amounted to private student speech and concluded that it constituted a government endorsement of religion. Justice Stevens explained:

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Lynch v. Donnelly, 465 U.S., at 688, 104 S.Ct., at 1367 (1984) (O’CONNOR, J., concurring). The delivery of such a message—over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as “private” speech.

Nor could it be said that there was no coercion because students could opt out of participating in extracurricular activities. He continued:

There are some students, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.” We stressed in Lee the obvious observation that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.” High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”

Chief Justice Rehnquist and Justices Scalia and Thomas dissented.
Some proponents of prayer in the schools tried another tack that did not involve public recitation. The following note discusses the constitutional fate of Alabama’s response, which was to authorize a moment of silence at the beginning of the school day “for meditation or voluntary prayer.”

**NOTE—DOES PERMITTING A MINUTE OF SILENT PRAYER CONSTITUTE GOVERNMENT ENDORSEMENT OF RELIGION?**

At issue in Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985), was the constitutionality of an Alabama statute that authorized a one-minute period of silence in all public schools “for meditation or voluntary prayer.” A federal district court sustained the statute in the face of a constitutional attack, holding that “the establishment clause of the First Amendment to the United States Constitution does not prohibit the state from establishing a religion”—a conclusion the Supreme Court later termed “remarkable.” The decision resulted from the district judge’s fresh examination of various historical materials that he thought warranted the view that the Fourteenth Amendment did not incorporate any of the guarantees of religious freedom contained in the First Amendment. On review, a federal appellate court reversed—not surprisingly, as the Supreme Court later commented—and held that the statute violated the First and Fourteenth Amendments by “advanc[ing] and encourag[ing] religious activities.” Even though the statute was permissive in form, the appeals court found it to have a sectarian purpose and therefore to be the kind of enactment specifically addressed by the Supreme Court in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962). The Supreme Court affirmed the judgment of the appellate court by a vote of 6–3.

Speaking for the Court, Justice Stevens began by emphasizing “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.” Having reaffirmed the precept that the Fourteenth Amendment binds the states in addition to the national government to those principles of constitutional interpretation emanating from the First Amendment, Justice Stevens then examined the statute and its legislative history in light of the tripartite establishment test announced by the Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971). He reasoned that the statute failed the first prong of the test. After surveying the history of the statute (including both explicit statements of purpose made by legislators and the contrast of the wording in the statute with that of a predecessor enactment that authorized a minute of silence only “for meditation”), he concluded that “[t]he Legislators enacted [the statute] * * * for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each school day.” He noted, “The addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.” “Such an endorsement,” he continued, “is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.” The statute thus failed the first prong of the test announced in Lemon because it “was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose.” As the opinion written by Justice Stevens implied, however, and as the separate concurring opinions of Justices Powell and O’Connor made more explicit, the Court apparently would hold constitutional a statute that authorized a minute of silence, but made no mention of prayer.

Chief Justice Burger, Justice White, and Justice Rehnquist dissented in separate opinions. Chief Justice Burger pointed out the irony of the Court striking down a statute because it mentioned prayer at the same time its “session opened with an invocation for Divine protection” and while “a few hundred yards away, * * * the House of Representatives and the Senate regularly opened each session with a prayer.” He continued:
The several preceding opinions conclude that * * * the sole purpose behind the inclusion of the phrase "or voluntary prayer" in [the statute] was to endorse and promote prayer. This * * * [results from] * * * focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all school-children, but may not add parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." * * * Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between [the statute] and its predecessor * * * rather than examining [the statute] as a whole. Any such holding would of course make a mockery of our decision making in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in [the statute] is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not forbidden in the public school building.

Justice Rehnquist's dissent concluded that the Court's interpretation of the clause had drifted off course from "the true meaning," which he saw evident in its history. Summarizing what he saw as the much narrower strictures imposed by the clause, he wrote:

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in Everson, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute * * * because the State wished to "endorse prayer as a favored practice." * * * It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

Similarly, in Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980), the Court—again, by a bare majority—ruled that a Kentucky statute that required posting a copy of the Ten Commandments (purchased with private money) in each classroom throughout the state also had no secular purpose and was plainly religious in nature. The legislature's aim, said the Court, was not to enhance the study of history, comparative religion, or literature, but to induce school children to venerate and obey religious teachings.

The dissents in both Lee and Jaffree pointed out that, if the principles of those decisions were carried to their logical conclusion, the phrase "under God" in the Pledge of Allegiance would also violate the First Amendment. Indeed, a federal appellate court so ruled in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002). The Supreme Court subsequently vacated the judgment in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004), but without reaching the Establishment Clause question. Instead, the Court held that Newdow did not have standing to bring suit. Newdow, an atheist and the father of an elementary school student, objected that public school teachers in California were required to begin the school day by leading their students in reciting the Pledge. Speaking for the Court, Justice Stevens pointed out that, although Newdow and his former wife shared custody of their daughter, under California law the mother "makes the final
decisions if the two . . . disagree" and the mother did not share Newdow's views on religion or support his constitutional challenge. In light of this and the other interests implicated in the case—"the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution"—a majority of Justices reasoned that it would be prudent to say Newdow's stake in the controversy was simply insufficient. On remand, in Newdow v. U.S. Congress, 383 F.Supp.2d 1229 (E.D.Cal. 2005), the federal district court, finding that other parents did have standing, held that it was bound by the appeals court's previous ruling on the constitutional merits (that the phrase "under God" amounted to an impermissible endorsement of religion, had the primary purpose of endorsing religion, and sent a message to nonbelievers that they were outsiders), and declared the phrase "under God" unconstitutional. (The decision of another federal appeals court squarely contradicts this; see Myers v. Loudoun County Public Schools, 418 F.3d 395 (4th Cir. 2005)). The recent run of Establishment Clause rulings by the Court makes it very likely that the Ninth Circuit's position would not prevail if the Justices ever reach the merits of the constitutional question.8 Congress left no doubt about its view of the matter: It enacted a statute, 116 Stat. 2057, that reaffirmed including the phrase "one Nation under God" in the Pledge and explicitly repudiated the Ninth Circuit's decision as "erroneous."

Sunday closing laws fared better. First enacted in Colonial times to compel worship on "the Lord's day," these statutes prohibiting the transaction of business on Sunday were deemed entirely defensible on utilitarian grounds that they enhanced social welfare. In McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961), with only Justice Douglas dissenting, Chief Justice Warren declared:

[D]espite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. * * *

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. * * * On economic and social grounds alike this weekly period of rest is best provided on Sunday."

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations * * *

That Sunday closing laws reflected a happy coincidence of religious and social welfare interests need not necessarily invalidate them. Warren continued:

The "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaic-Christian religions while it may disagree with others does not invalidate the

8. Three Justices (Rehnquist, O'Connor, and Thomas), not inclined to sidestep the constitutional issue in Newdow, voted to uphold the constitutionality of the phrase "one Nation under God." In their view, recitation of it was a patriotic exercise, not a religious one. Said Justice O'Connor, the "minimal reference to religion" was an act of "ceremonial desuetude" and its recitation was not coercive. [T]he Constitution," she added, "does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views they might find novel or even inflammatory."
regulation. So too with the questions of adultery and polygamy. * * * The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

* * *

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

The Court went on to say that the legislature could reasonably conclude a rest-one-day-in-seven statute would not accomplish these secular objectives as effectively as would the selection of Sunday as a common day of rest because enforcement would be difficult and because it would not provide “a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activity, a day on which people may visit friends and relatives who are not available during working days.” Although the selection of Sunday was a particularly convenient accommodation of both secular and religious interests for the majority of the population, it did penalize Orthodox Jews and others for whom Sunday was not a day of worship and who expected to work Sunday to make up for taking another day off. At this point, the problem posed becomes a free exercise question. It was addressed by the Court’s 1963 decision in Braunfeld v. Brown, summarized on p. 1111.

The Lemon Test and Financial Aid to Religion

The post–World War II baby boom that resulted in record numbers of children attending school by the 1960s generated cases that forced the Supreme Court to revisit the issues that underlay its Everson ruling. The legislation at issue in these cases stemmed principally from efforts to do something about the increasing financial plight of parochial schools and the frightening prospect that large numbers of students housed in such private educational institutions would suddenly be dumped on the already overburdened public school system. In Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968), the Court, again relying upon the child benefit theory, sustained a New York law that required school districts throughout the state to purchase and loan textbooks by request for use by all students attending parochial, other private, and public schools. Emphasizing that the textbooks pertained only to secular subjects, the Court declared that the statute passed constitutional muster. Citing Everson, Justice White, speaking for a six-vote majority, said: “The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * *” Justice Black in dissent thought the New York law was a “flat, flagrant, open violation of the First and Fourteenth Amendments.” Justice Douglas, who also dissented, thought reliance upon Everson was completely unpersuasive: “Whatever may be said of Everson, there is nothing ideological about a bus * * * or a school lunch, or a public nurse, or a scholarship. * * * The textbook [however] goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to a religion?” Because textbooks “will necessarily have certain shadings that will lead a parochial school to prefer one text over another,” powerful pressures and political forces will be uncorked “to provide
those books for religious schools which the dominant religious group concludes best reflect the theocratic or other philosophy of the particular church. By Allen has not been the end of such decisions because, although the post-war baby boom subsided, parental concern over the decline of public school systems in urban areas has continued the withdrawal of students to parochial schools where it is perceived that greater discipline and higher academic standards exist.

The criteria for applying the establishment prohibition came to be more clearly and fully defined following the appearance of a new Chief Justice at the Court’s October 1969 Term. The first occasion of the Burger Court’s formulation of the establishment problem came in a 1970 decision, Walz v. Tax Commission, following, that concerned the constitutionality of property tax exemptions given religious institutions. The modulated tone of the majority’s opinion was unmistakable. As contrasted with what critics saw as the hostile tenor of some of the Warren Court’s decisions, the new Chief Justice portrayed the constitutional relationship between church and state as one of “benevolent neutrality.” At the outset of the Court’s opinion, Chief Justice Burger summarized what he saw as the legacy of past decisions:

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court’s opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other.

Concluding, therefore, that “[t]he course of constitutional neutrality in this area cannot be an absolutely straight line,” the Chief Justice exhorted the Court to adopt a more flexible balancing approach. That approach is developed in Walz and succeeding decisions of the Burger Court. Do you think this position reflects a genuinely more insightful understanding of the judicial process, or is this just a sophisticated attempt by an appointee of a new and more conservative administration to secure an interpretation of these clauses more favorable to the support of religious interests?

Apart from assailing the rigidity of past religion rulings, the Burger Court generated a new test by which to further measure establishment—whether the practice in question invites “excessive governmental entanglement with religion.” Why does the Court reason that granting the tax exemption results in less of an entanglement with religion than not granting an exemption?

Walz v. Tax Commission of City of New York
Supreme Court of the United States, 1970
397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697

Background & Facts Walz owned real estate on Staten Island in New York City. He brought suit against city officials to enjoin the granting of a tax exemption on property utilized solely for purposes of religious worship. Walz asserted that the exemption given to religious property constituted a clear violation of the First Amendment’s Establishment Clause. The New York courts granted summary judgment for the commission, and Walz appealed.
Mr. Chief Justice BURGER delivered the opinion of the Court.

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The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

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The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its “moral or mental improvement,” should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against these dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. *** We cannot read New York’s statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

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Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. * * *

* * * The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State’s boundaries, along with many other exempt organizations. * * *

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church. If tax exemption can be seen as this first step toward "establishment" of religion, as Mr. Justice DOUGLAS fears, the second step has been long in coming. * * *

The argument that making "fine distinctions" between what is and what is not absolute under the Constitution is to render us a government of men, not laws, gives too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution. We must frequently decide, for example, what are "reasonable" searches and seizures under the Fourth Amendment. Determining what acts of government tend to establish or interfere with religion falls well within what courts have long been called upon to do in sensitive areas. * * *

Affirmed.
Mr. Justice BRENNAN, concurring.

As I said [concurring] in Schempp the First Amendment does not invalidate "the propriety of certain tax * * * exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. * * * Religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God." * * *

Mr. Justice DOUGLAS, dissenting.

* * * The question in the case therefore is whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers, while non-believers, whether organized or not, must pay the real estate taxes. * * *

In Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, we held that a State could not bar an atheist from public office in light of the freedom of belief and religion guaranteed by the First and Fourteenth Amendments. Neither the State nor the Federal Government, we said, "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." * * *

That principle should govern this case. * * *
This case is quite different from *Everson*. Education is not involved. The financial support rendered here is to the church, the place of worship. A tax exemption is a subsidy. Is my Brother BRENNAN correct in saying that we would hold that state or federal grants to churches, say, to construct the edifice itself would be unconstitutional? What is the difference between that kind of subsidy and the present subsidy? * * *

By the conclusion of the October 1970 Term, the Court, relying on *Allen* and *Walz*, had formulated a three-part establishment test, which it announced in *Lemon v. Kurtzman* following: (1) whether the program at issue has a secular purpose, (2) whether the primary effect is neither to advance nor to inhibit religion, and (3) whether the legislation fosters "an excessive government entanglement with religion." This tripartite standard not only was applied in *Lemon* and a companion case, *Tilton v. Richardson* (p. 1072), but also has since dominated the Court's Establishment Clause jurisprudence. Does the Court draw a convincing distinction between the facts of *Lemon* and *Tilton* to account for the different outcomes of these cases? As applied in succeeding cases, does the three-part *Lemon* test provide a clear sense of what does and what does not constitute an establishment of religion?

**LEMON V. KURTZMAN**

Supreme Court of the United States, 1971
403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745

**BACKGROUND & FACTS** Pennsylvania and Rhode Island enacted programs of aid to church-affiliated elementary and secondary schools. Pennsylvania reimbursed nonpublic schools for the cost of teachers' salaries, textbooks, and instructional materials on secular subjects, such as math, modern foreign languages, physical science, and physical education. These schools were required to keep records of the separate costs associated with each "secular educational service." Textbooks and instructional materials had to be approved by the state superintendent of public instruction, and the legislation prohibited reimbursement for any course containing "subject matter expressing religious teaching, or the morals or forms of worship of any sect." About $5 million was expended annually under the law.

The Rhode Island law paid directly to teachers in nonpublic elementary schools a salary supplement up to 15 percent of their annual salary. The supplement paid was not to exceed the maximum salary paid to teachers in the state's public schools. To be eligible for the salary supplement, they had to teach in a nonpublic school where the per capita pupil expenditure was less than the average for the state's public schools, they had to teach only secular subjects using the same materials as the public schools, and they had to agree not to teach a course on religion during the period they received the benefits. More than 20% of the students in these two states attended nonpublic schools, and of these, well over 90% went to schools operated by the Roman Catholic church.

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Lemon, the plaintiff in the Pennsylvania case, and DiCenso, the plaintiff in the Rhode Island cases, were taxpayers who sued various state officials in federal district courts, challenging the statutes as abridging the Religion Clauses of the First Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment. A three-judge federal district court dismissed Lemon’s complaint, but a similarly constituted federal panel sitting in Rhode Island struck down that state’s aid plan. These cases were consolidated for argument with Tilton v. Richardson (p. 1072). The opinions of Justices Brennan and White appear with the opinions in Tilton and are applicable both here and there.

Mr. Chief Justice BURGER delivered the opinion of the Court.

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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 * * *; finally, the statute must not foster “an excessive government entanglement with religion.” * * *

[The Pennsylvania and Rhode Island] statutes * * * 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. * * *

* * * 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. * * * 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.

[The holding in Walz 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. * * * Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. * * * 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.

* * *

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. * * * Here we find that both statutes foster an impermissible degree of entanglement.
(A) Rhode Island Program

* * *

The church schools involved in the program are located close to parish churches. * * * The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. * * *

* * * This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. * * * We cannot, however, refuse * * * to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

In our view the record shows these dangers are present to a substantial degree. * * *

* * *

Several teachers testified, however, that they did not inject religion into their secular classes. * * * But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher’s responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. * * * Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

* * * The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion * * *. To ensure that no trespass occurs, the State has
therefore carefully conditioned its aid with pervasive restrictions. * * *

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. * * *

(B) PENNSYLVANIA PROGRAM

* * *

[T]he 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. * * *

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. 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. * * * 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. * * *

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. * * * 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. * * *

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropria-
tions and the likelihood of larger and larger
demands as costs and populations grow. * * *

* * * Under our system the choice has
been made that government is to be entirely
excluded from the area of religious instruc-
tion 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 inevi-
table, lines must be drawn.

The judgment of the Rhode Island
District Court * * * is affirmed. The
judgment of the Pennsylvania District
Court * * * is reversed, and the case is
remanded. * * *

Mr. Justice MARSHALL took no part in
the consideration or decision of [Lemon].

** TILTON V. RICHARDSON **

Supreme Court of the United States, 1971
403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790

** BACKGROUND & FACTS **

Title I of the Higher Education Facilities Act of 1963 provided aid for the construction of college and university buildings and facilities solely for secular educational purposes. In order to receive the loans and grants available, applicant schools were required to give assurances that no facility constructed with such funds would be used “for sectarian instruction or as a place of religious worship, or * * * primarily in connection with any part of the program of a school or department of divinity.” The federal government retained an interest in the buildings and facilities for 20 years, and, if a college or university violated the statutory conditions during that period, the government would be entitled to recover funds. Four church-affiliated schools in Connecticut receiving funds under the Act were the focus of attention in this suit brought by Tilton and other U.S. citizens and taxpayers, residents of Connecticut, to enjoin Secretary of Health, Education, and Welfare Elliot Richardson from administering the Act. The taxpayers attacked the constitutionality of the Act via the Establishment Clause. A three-judge U.S. district court sustained the constitutionality of the Act, finding that neither its purpose nor its effect promoted religion. Tilton and the other taxpayers sought review by the Supreme Court.

Mr. Chief Justice BURGER announced the
judgment of the Court and an opinion in which
Mr. Justice HARLAN, Mr. Justice STEWART
and Mr. Justice BLACKMUN join.

* * *

We are satisfied that Congress intended
the Act to include all colleges and universi-
ties regardless of any affiliation with or
sponsorship by a religious body. * * *
[As
used in the Act,] “institutions of higher
education” must be taken to include
church-related colleges and universities.

We consider four questions: First, does
the Act reflect a secular legislative purpose?
Second, is the primary effect of the Act to
advance or inhibit religion? Third, does the
administration of the Act foster an excessive
government entanglement with religion?
Fourth, does the implementation of the
Act inhibit the free exercise of religion?

The stated legislative purpose * * *
expresses a legitimate secular objective
entirely appropriate for governmental action.

* * *

The Act * * * authorizes grants and loans
only for academic facilities that will be used
for defined secular purposes and expressly
prohibits their use for religious instruction,
training, or worship. These restrictions have been enforced in the Act’s actual adminis-
tration, and the record shows that some church-related institutions have been re-
quired to disgorge benefits for failure to obey them.

Finally, this record fully supports the findings of the District Court that none of the four church-related institutions in this case has violated the statutory restrictions. The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes.

We * * * perceive one aspect in which the statute’s enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion. If a recipient institution violates any of the statutory restrictions on the use of a federally financed facility, § 754(b)(2) permits the Government to recover an amount equal to the proportion of the facility’s present value that the federal grant bore to its original cost.

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act [but only this single provision].

We next turn to the question of whether excessive entanglements characterize the relationship between government and church under the Act.

There are generally significant differences between the religious aspects of churchrelated institutions of higher learning and parochial elementary and secondary schools.

There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.
The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides. * * *

Government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution’s expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in Lemon and DiCenso. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena. * * * The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed.

* * * Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs. * * * Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in Walz or the provision of textbooks upheld in Allen.

We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part * * * providing a 20-year limitation on the religious use restrictions. * * * We remand to the District Court with directions to enter a judgment consistent with this opinion.

* * *

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MARSHALL concur, dissenting in part.

* * * The Federal Government is giving religious schools a block grant to build certain facilities. The fact that money is given once at the beginning of a program rather than apportioned annually as in Lemon and DiCenso is without constitutional significance. The First Amendment bars establishment of a religion. * * *

Mr. Justice BRENNAN.

I agree that the judgments in [DiCenso] must be affirmed. In my view the judgment in [Lemon] must be reversed outright. I dissent in [Tilton] insofar as the plurality opinion and the opinion of my Brother WHITE sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act of 1963. * * * In my view that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.

* * *

Mr. Justice WHITE, concurring in the judgments in [Lemon and Tilton] and dissenting in [DiCenso].

* * *

The decision of the Court is * * * surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion forbidden by the First Amendment. * * *

It is enough for me that the States and the Federal Government are financing a
separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

The Court * * * creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

Although Chief Justice Burger forcefully asserted in Walz that absolute rules were inadequate in addressing the complexity of Establishment Clause cases, some observers—reminiscent of Justices Black and Douglas dissenting in Allen—charged that the increasing parameters of permissible state support after Lemon and Tilton reflected "the entering edge of the wedge." Other critics, such as Justice Stevens, argued that, quite apart from whether the Court's decisions set dangerous precedents, they had become hair-splitting exercises defying any hope of consistency or predictability. Instead of staying the course, Justice Stevens sounded the call for a return to the "'high and impregnable' wall between church and state" announced in the Court's Everson opinion.

Relying on the Lemon-Tilton framework in Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753 (1975) and Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 1593 (1977), the Court upheld furnishing secular textbooks, standardized tests and their scoring, and diagnostic and therapeutic services—in other words, "nonideological" support—but struck down providing instructional equipment (projectors, films, and periodicals) and field trip services that could be put to an ideological use. Moreover, the Court in Meek objected to the "massive" amount of direct aid given.

In Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973), the Court invalidated (1) direct money grants to qualifying nonpublic schools (primarily in low-income, urban areas) for the maintenance and repair of school facilities and equipment to assure the health, welfare, and safety of pupils; (2) tuition reimbursements of $50 to $100 to parents earning less than $5,000 a year whose children attended nonpublic schools; and (3) tax credits to parents ineligible to receive tuition reimbursements whose children attended nonpublic schools. All three of these provisions, the Court concluded, failed the "effects" test. But, in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 100 S.Ct. 840 (1980), the Court sustained a New York law that reimbursed private schools for the actual costs incurred in meeting certain state-mandated requirements including "the requirements of the state's pupil evaluation system, the basic educational data system, Regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state-prepared examination and reporting procedures." The support scheme "did not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests" and it provided a system by which payments of state funds would be audited to ensure that only the actual costs incurred in providing the covered secular services were reimbursed out of state funds. The four dissenters argued that "the aid * * * constitute[d] a direct subsidy of the operating costs of the sectarian school that aids the school as a whole and * * * therefore directly advance[d] religion in violation of the Establishment Clause * * *.”

Whether due to the changing composition of the Court or the difficulty in applying the three-part Lemon-Tilton test, increasingly 5–4 votes became the norm in the decision of
In Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216 (1985), the Court struck down two programs—Shared Time and Community Education—aimed at supplementing the core curriculum offered students in private schools. The public school district paid the personnel who conducted courses in the two programs and furnished supplies and materials. Although the Shared Time program offered courses in such secular subjects as math, reading, music, art, and physical education and were taught by full-time public school employees, those classes were taught during the regular school day in rooms located within and leased from the private school. The Community Education program offered voluntary courses at the end of the school day in a wide variety of subjects (such as arts and crafts, humanities, chess, home economics, and Spanish), some of which were taught in public schools and some of which were not. That program hired as instructors (and, therefore, at public school district expense) teachers who were employed full-time in private schools. The Court concluded the challenged programs had the effect of promoting religion in three ways: (1) the state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they taught might subtly or overtly indoctrinate students in religious views at public expense; (2) the provision of secular, state-aided instruction within the religious school buildings conveyed a message of state support for religion; and (3) the magnitude of state aid subsidized the religious functions of the parochial schools by taking over a substantial part of the instructional expense for secular subjects.

Decided together with Ball was Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232 (1985). At issue in that case was the constitutionality of a New York City program that provided remedial education to economically and educationally disadvantaged private school children. As in Ball, the instructors who were paid from public funds taught in the private school buildings. In addition to paying the salaries of the public school personnel who taught the courses, the program provided supplies and materials. Unlike the programs in Ball, however, the New York City program had a system of monitoring the content of these publicly funded classes to prevent the intentional or unintentional inculcation of religious beliefs. A bare majority of the Justices in Aguilar concluded that the required monitoring to ensure that no religious beliefs were being disseminated amounted to "excessive entanglement" by the state in the religious schools.

Running in the opposite direction was the Court’s decision in Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S.Ct. 2462 (1993), eight years later. At issue in that case was a public school district’s refusal on First Amendment grounds to provide a sign-language interpreter for a deaf teenager attending a Catholic high school. His parents argued that the federal Individuals With Disabilities Education Act required the district to provide the interpreter and that the First Amendment did not prohibit such assistance. A five-Justice majority held that programs that neutrally provide benefits to a broad class of citizens without regard to religion are not readily subject to challenge under the Establishment Clause just because sectarian institutions may incidentally receive a benefit. The fact that a public employee, here a sign-language interpreter, would be present in a sectarian school did not itself render this kind of aid unconstitutional. The Court reasoned that the child was the primary beneficiary. The decision in Zobrest, however, really did not sit well with the Court’s previous rulings in Aguilar and Ball. In Agostini v. Felton, which follows, the Court reexamined those rulings and substantially altered its Establishment Clause jurisprudence dealing with state aid to parochial schools.
AGOSTINI v. FELTON
Supreme Court of the United States, 1997

BACKGROUND & FACTS
Under a federally funded program, Title I of the Elementary and Secondary Education Act of 1965, New York City ran a remedial education program aimed at economically disadvantaged and educationally deprived children. A substantial majority of these children attended parochial schools. The program provided materials and supplies, and the instructors teaching in the private schools were also paid from public funds. In Aguilar v. Felton, the Supreme Court held that the pervasive monitoring that would be required amounted to excessive entanglement. In this suit, the New York City Board of Education sought relief from the permanent injunction resulting from Aguilar. Among other things, the board contended that the added cost of complying with the injunction—in leasing fixed and mobile sites away from parochial schools and in transporting students—meant that there was much less money available for providing remedial instruction to the students who needed it. Taxpayers, arguing that reestablishing on-site instruction would reopen the same First Amendment concern that led them to oppose the board’s action in the first place, challenged the city’s suit. A federal district court concluded that the Supreme Court’s decision in Aguilar settled the matter and said it was still good law. The board argued that Aguilar had been undercut by subsequent Supreme Court decisions, notably Zobrest. A federal appeals court affirmed the judgment against the board, and the Supreme Court granted the board’s petition for certiorari.

Justice O’CONNOR delivered the opinion of the Court. * * *

Distilled to essentials, the Court’s conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making. Additionally, in Aguilar there was a fourth assumption: that New York City’s Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Our more recent cases have undermined the assumptions upon which Ball and Aguilar relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. * * * Likewise, we continue to explore whether the aid has the “effect” of advancing or inhibiting religion. What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to Aguilar have, however, modified in two significant respects the approach we use to assess indoctrination. First, * * * Zobrest * * *
expressly rejected the notion—relied on in Ball and Aguilar—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. Zobrest also implicitly repudiated another assumption on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible “symbolic link” between government and religion.

** Second, we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid. In Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 106 S.Ct. 748 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." * * * The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State’s issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so “only as a result of the genuinely independent and private choices of” individuals. * * *

Zobrest and Witters make clear that, under current law, the Shared Time program in Ball and New York City’s Title I program in Aguilar will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in Ball to reach a contrary conclusion is no longer valid. * * * We do not see any perceptible difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school’s campus and one receiving instruction in a van parked just at the school’s curbside. * * *

What is most fatal to the argument that New York City’s Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and Aguilar implied that providing the services off-campus is entirely consistent with the Establishment Clause. * * * Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. Accordingly, contrary to our conclusion in Aguilar, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.
Before and since [the Ball and Aguilar] decisions, we have sustained programs that provided aid to all eligible children regardless of where they attended school. See, e.g., Everson v. Board of Ed. of Ewing, 330 U.S. 1, 16–18, 67 S.Ct. 504, 511–513 (1947) (sustaining local ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses); Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 243–244, 88 S.Ct. 1923, 1926–1927 (1968) (sustaining New York law loaning secular textbooks to all children); Mueller v. Allen, 463 U.S. 388, 398–399, 103 S.Ct. 3062, 3068–3069 (1983) (sustaining Minnesota statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); Witters, 474 U.S., at 487–488, 106 S.Ct., at 751–752 (sustaining Washington law granting all eligible blind persons vocational assistance); Zobrest, 509 U.S., at 10, 113 S.Ct., at 2467–2468 (sustaining section of IDEA providing all “disabled” children with necessary aid).

Applying this reasoning to New York City’s Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. * * *

We turn now to Aguilar’s conclusion that New York City’s Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. * * *

It is simplest to recognize why entanglement is significant and treat it—as we did in Walz—as an aspect of the inquiry into a statute’s effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, * * * and we have always tolerated some level of involvement between the two. Entanglement must be “excessive” before it runs afoul of the Establishment Clause. * * *

The pre-Aguilar Title I program does not result in an “excessive” entanglement that advances or inhibits religion. * * *

The Court’s finding of “excessive” entanglement in Aguilar rested on three grounds: (i) the program would require “pervasive monitoring by public authorities” to ensure that Title I employees did not inculcate religion; (ii) the program required “administrative cooperation” between the Board and parochial schools; and (iii) the program might increase the dangers of “political divisiveness.” * * *

Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an “excessive” entanglement. * * *

In Aguilar, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after Zobrest we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. * * *

To summarize, New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the
premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. * * *

[Nor can this program * * * reasonably be viewed as an endorsement of religion. * * *

Accordingly, we must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law.

***

For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its * * * order.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to [*]parr * * * dissenting.

***

*** I believe Aguilar was a correct and sensible decision * * * The State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement. * * *

***

These principles were violated by the programs at issue in Aguilar and Ball, as a consequence of several significant features common to both[***] * * * each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary and secondary education, like reading and mathematics; while their services were termed "supplemental," the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide, * * * while the programs offered aid to nonpublic school students generally (and Title I went to public school students as well), participation by religious school students in each program was extensive, * * * and, finally, aid under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice * * *.

What, therefore, was significant in Aguilar and Ball about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. * * * What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.

What was true of the Title I scheme as struck down in Aguilar will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw. If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any ostensibly secular subject in any religious school. * * *

It may be objected that there is some subsidy in remedial education even when it takes place off the religious premises, some subsidy, that is, even in the way New York City has administered the Title I program after Aguilar. * * * The off-premises teaching is arguably less likely to open the
door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cut-backs in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains. On top of that, the difference in the degree of reasonably perceptible endorsement is substantial. Sharing the teaching responsibilities within a school having religious objectives is far more likely to telegraph approval of the school’s mission than keeping the State’s distance would do.  

***As the Court observed in Ball, “[t]he symbolism of a union between church and state [effected by placing the public school teachers into the religious schools] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.” ***  

[If a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the Aguilar–Ball line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.  

***  

In Agostini, the Court recast the Lemon test from being a three-part inquiry (whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion) to a two-part test comprised of only the first and second factors with entanglement considered relevant to determining a statute’s effect. Three years later, in Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000), the Justices applied this modified test and upheld Chapter 2 of the federal Educational Consolidation and Improvement Act of 1981, which provided for the distribution of library and media materials and computer hardware and software through state educational agencies (SEA) to local educational agencies (LEA). Although the law provided for the lending of such materials to public and private schools to support only “secular, neutral and nonideological” educational programs, opponents of the aid program challenged it as a violation of the Establishment Clause because it directly aided pervasively sectarian private schools.  

Under the statute, a participating school’s enrollment determined the amount of aid it received. A plurality, speaking through Justice Thomas, therefore concluded that the program did not “ha[ve] the effect of advancing religion,” that it “d[id] not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of school children, and does not provide aid for impermissible content.” Nor did the program “define its recipients by reference to religion.” Purporting to rely on Agostini, Justice Thomas said:  

Whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.* * *  

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and atheist are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. * * * [If the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, * * * then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. * * *
Since enrollment was the criterion and the decision where to send their children to school rested with the parents the amount of aid received was, in the plurality’s view, a matter of private choice. In other words, the aid followed the child, not the religion.

Both Justices O’Connor and Breyer concurred in the judgment; that is they voted to uphold the statute but refused to endorse the plurality’s views. Speaking for both of them, Justice O’Connor wrote:

[The] plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. * * * [This] is troubling * * *.

***

*** I believe the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. * * * In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable, to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion. That the amount of aid received by the school is based on the school’s enrollment does not separate the government from the endorsement of the religious message. * * * In contrast, when government aid supports a school’s religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, “[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.” * * * Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

[The] distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies * * * If, as the plurality contends, a per-capita-aid program is identical in relevant constitutional respects to a true private-choice program, then there is no reason that, under the plurality’s reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization. And, because actual diversion is permissible under the plurality’s holding, the participating religious organizations (including churches) could use that aid to support religious indoctrination. * * * [T]he plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

*** I would decide today’s case by applying the criteria set forth in Agostini.

Because the parties challenging the constitutionality of the Chapter 2 program did not question its secular purpose or its creation of excessive entanglement, the only live issue was “whether the program results in governmental indoctrination or defines its recipients by reference to religion.” Justice O’Connor continued:

The Chapter 2 program * * * bears the same hallmarks of the New York City Title I program that we * * * [sustained] in Agostini. First, * * * Chapter 2 aid is distributed on the basis of neutral, secular criteria. The aid is available to assist students regardless of whether they attend public or private nonprofit religious schools. Second, the statute requires participating SEAs and LEAs to use and allocate Chapter 2 funds only to supplement the funds otherwise available to a religious school. * * * Chapter 2 funds must in no case be used
to supplant funds from non-Federal sources. * * * Third, no Chapter 2 funds ever reach the coffers of a religious school. Like the Title I program considered in Agostini, all Chapter 2 funds are controlled by public agencies—the SEAs and LEAs.* * * The LEAs purchase instructional and educational materials and then lend those materials to public and private schools. * * * With respect to lending to private schools under Chapter 2, the statute specifically provides that the relevant public agency must retain title to the materials and equipment. * * * Together with the supplantation restriction, this provision ensures that religious schools reap no financial benefit by virtue of receiving loans of materials and equipment. Finally, the statute provides that all Chapter 2 materials and equipment must be "secular, neutral, and nonideological." * * * That restriction is reinforced by a further statutory prohibition on "the making of any payment . . . for religious worship or instruction." * * *

Justices Stevens, Souter, and Ginsburg dissented. In addition to objecting to the plurality's effort to define neutrality as the practical equivalence of constitutionality, the dissenters noted that several other lines of enquiry previously used to evaluate government aid programs had been omitted from consideration here: "First, we have noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, we have identified two important characteristics of the method of distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, we have found relevance in at least five characteristics of the aid itself: its religious content; its cash form; its divertibility or actual diversion to religious purposes; its supplantation of traditional items of religious school expense; and its substantiality." In the dissenters' view, failure to consider such factors amounted to "a break with consistent doctrine" that was "unequaled in the history of Establishment Clause interpretation." Finally, the dissenters argued that the easy divertibility of the aid to serve religious purposes and the lack of any effective monitoring system to prevent it constitutionally doomed the Chapter 2 program.

The new weight assigned to neutrality and parental choice expanded the permissiveness with which the Court viewed government aid programs. It dramatically transformed Establishment Clause jurisprudence in a decidedly nonpreferentialist direction and away from separationist principles. This became especially evident two years later when the Court had occasion to pass upon the constitutionality of school voucher programs. Zelman v. Simmons-Harris, which follows, is a watershed decision because it puts the seal of constitutional approval on an aid program that is controversial not only for Establishment Clause reasons but because it legitimizes what its critics see as a major threat to the future of public education. It had long been apparent that Justice O'Connor's vote was critical in the decision of church-state cases, as in so many other areas of constitutional law; the decision in Simmons-Harris makes it obvious. In his dissenting opinion, Justice Souter traces the pattern of development in Establishment Clause jurisprudence and, with the other dissenters, calls for a return to the separationist principles Everson had boldly proclaimed. But, in their call for a return to Everson (see p. 1051), what seems to have gone unnoticed was that from the start the Court had set out on a contradictory course. As Justice Jackson had warned in his Everson dissent 55 years earlier, the Court's decision in that case was fundamentally inconsistent with its opinion. Jackson had written:

[*The undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their conmingling in educational matters. * * *]

It is of no importance * * * whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a
Church and it can no more tax its citizens to furnish free carriage to those who attend a
Church. The prohibition against establishment of religion cannot be circumvented by a
subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction
and indoctrination.

To many critics, it seemed apparent that in Simmons-Harris, as in Mitchell v. Helms, the
much-touted “wall of separation” between church and state at last had been breached—and
ultimately engulfed—by “the child benefit theory.”

ZELMAN V. SIMMONS-HARRIS
Supreme Court of the United States, 2002
536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604

BACKGROUND & FACTS Cleveland’s public schools, among the worst
in the country, were under a court order that placed them under state control. The
Ohio legislature enacted the Pilot Project Scholarship Program to give Cleveland’s
school children, largely from low income and minority families, educational choices
they otherwise would not have had since their economic circumstances destined them
go only to inner-city schools. The program provides two kinds of aid to parents:
tuition aid to attend a participating public or private school of the parents’ choosing,
and tutorial aid for students who remain enrolled in public school. Any private
school, including religious schools, may participate in the program and accept
program students as long as it is in the city and meets state standards. Participating
private schools must agree not to discriminate on the basis of race, religion, or ethnic
background, and not to teach or foster unlawful behavior or hatred toward any race,
religion, or ethnicity. Any public school in an adjacent school district may also
participate and, if it does, it receives a $2,250 tuition grant per program student plus
state funding attributable to these additional students.

Tuition aid is distributed to parents on the basis of financial need. Families with
incomes below 200% of the poverty level have a priority and may receive 90% of
private school tuition up to the $2,250 maximum. For these poorest students,
participating private schools may not charge a co-payment greater than $250. For
other families, the program pays 75% of the tuition to a maximum of $1,875, but
there is no co-payment cap. Where tuition aid is used depends wholly on where the
parent chooses to enroll the child. If parents choose a private school, checks from the
state are made payable to the parents who then sign them over to the school they
select. Tutorial aid provides assistance to hire registered tutors for students who decide
to remain in public school. Students from low-income families receive 90% of the
amount charged or a maximum of $360; other students receive 75% of that amount.

Parents of Cleveland’s school children have a number of options: (1) they can
remain in public school and take advantage of tutorial assistance; (2) they can select a
private school, religious or otherwise; (3) they can choose a community school (a
school funded by public money with its own school board that has academic
independence to hire its own teachers and set its own curriculum); and (4) they can
opt for a magnet school (a public school operated by a local school board that
emphasizes a particular subject area, teaching method, or service to students). Of the
56 private schools qualifying for the scholarship program, 82% had a religious
affiliation. None of the adjacent public school districts chose to participate. Of the
3,700 students participating in the scholarship program, 96% enrolled in religious
affiliated schools.
Doris Simmons-Harris and other taxpayers brought suit against Susan Zelman, the Ohio Superintendent of Public Instruction, challenging the voucher program on the grounds that permitting parents to purchase education for their children at religious schools with state funds violated the Establishment Clause. Both a federal district court and a federal appellate court held the program to be a violation of the First Amendment, and the state successfully petitioned the Supreme Court for certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

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, 521 U.S. 203, 222–223, 117 S.Ct. 1997 (1997). 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.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 106 S.Ct. 748 (1986); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462 (1993). 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.

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 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. 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.

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.

It is so ordered.

Justice O’CONNOR, concurring.

The Cleveland program provides voucher applicants from low-income families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. In contrast, the State provides community schools $4,318 per pupil and magnet schools, on average, $7,097 per pupil. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999–2000. Although just over one-half as many students attended community schools as religious private schools on the state fisc, the State spent over $1 million more—$9.4 million—on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools.
Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, the corporate income tax in many States, and property taxes in all 50 States; and clergy qualify for a federal tax break on income used for housing expenses. In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. Finally, the Federal Government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools.

Justice SOUTER portrays [our] inquiry as a departure from Everson. A fair reading of the holding in that case suggests quite the opposite. Justice Black’s opinion for the Court held that the “[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.” How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the Lemon test surely does not betray Everson.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in Everson v. Board of Education which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent: “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.” The Court has never in so many words repudiated this statement, let alone, in so many words, overruled Everson.

Today, however, the majority holds that the Establishment Clause is not offended by Ohio’s Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.

How can a Court consistently leave Everson on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring Everson that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today’s decision on those criteria.

[The Court’s Establishment Clause] cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular,
activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and free choice in directing it, are shown to be nothing but examples of verbal formalism.

Although it has taken half a century since Everson to reach the majority's twin standards of neutrality and free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

In order to apply the neutrality test, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as $2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity: "The program permits the participation of all schools within the district, [as well as public schools in adjacent districts], religious or nonreligious." The majority then finds confirmation that "participation of all schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, thus showing there is not favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more.

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public, schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority has transformed the question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single
private secular school as an alternative to the religious school. And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases.

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported.

Everson’s statement is still the touchstone of sound law. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle.

Justice BREYER, with whom Justice STEVENS and Justice SOUTER join, dissenting.

[The Establishment Clause avoids religious strife, not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.]

How is the “equal opportunity” principle to work—without risking the “struggle of sect against sect”? School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program’s criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

The voucher program here insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so?

The program also insists that no participating school “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” And it requires the State to “revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation” of the program’s rules. As one amicus argues, “it is difficult to imagine a more divisive activity” than the appointment of state officials as referees to determine whether a particular religious doctrine “teaches hatred or advocates lawlessness.”

How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics...
that are of current popular interest—say, the conflict in the Middle East or the war on terrorism? * * * Efforts to respond to these problems not only will seriously entangle church and state, * * * but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation’s minds and spirits. * * *

* * * In a society composed of many different religious creeds, I fear that this present departure from the Court’s earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation’s social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, * * * I respectfully dissent.

The ruling in Zelman, however, was far from the complete victory voucher advocates thought they had won. Amendments added during the latter half of the nineteenth century to the constitutions of 37 states prohibit government aid to private or religious schools. In Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307 (2004), two years later, the Court took up the next question—whether a state constitutional provision that prohibited the spending of public funds to aid religious institutions, practices, or instruction violated the First Amendment. Davey, a student pursuing a degree in theology and whose career goal was pastoral ministry, was denied scholarship support from Washington’s “Promise Scholars” program (a program of state aid helping talented and needy students) because a provision of the state constitution declared, “No public money or property shall be appropriated or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.” In all other respects, Davey met the academic and financial requirements for scholarship funding. He argued that denial of benefits constituted viewpoint discrimination in violation of the First Amendment and abridged the free exercise of religious belief. In Locke v. Davey, the Supreme Court rejected these arguments and upheld the state ban.

Speaking for seven Justices, Chief Justice Rehnquist observed that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” This degree of latitude he described as the “play in the joints” of the two Religion Clauses. He explained that, under Simmons-Harris, “the link between government funds and religious training is broken by the independent and private choice of recipients. * * *

As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology * * *. [Emphasis supplied.] The question in this case, however, was whether Washington could prohibit public funding of religious instruction without violating the Free Exercise Clause.

Unlike the ordinance struck down in Church of the Lukumi Babalu Aye, Inc. v. Hialeah (p. 1123), which “made it a crime to engage in certain kinds of animal slaughter,” Rehnquist characterized Washington’s “disfavor of religion * * * [as] a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. * * * And it does not require students to choose between their religious belief and securing a government benefit. * * * The State has chosen merely to fund a distinct category of instruction.” Noting that “the Washington Constitution draws a more stringent line than that drawn by the United States Constitution,” Rehnquist observed that “[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one
of the hallmarks of an ‘established religion.’ ” He concluded: “The State’s interest in not funding the pursuit of devotional degrees * * * places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.” Justices Scalia and Thomas dissented on grounds that such exclusion from a program of public benefits “facially discriminate[d] against religion.”

Whither Lemon?
The three-part Lemon test grew out of Establishment Clause cases that dealt with the constitutionality of government subsidies. As the Court came to address controversies of very different sorts—those involving displays on government property that had a religious component, for example, or those involving a requirement that equal classroom time be provided to religion-based accounts when scientific explanations were given for natural phenomena—the Lemon test became the target of escalating criticism. Lemon’s critics might be grouped into three discrete (but not necessarily mutually-exclusive) categories: There were those—the non-preferentialists—who entirely disagreed with its separationist assumptions, in particular its premise that government should be neutral on the matter of religion (although they agreed government must be neutral about favoring one religion over another). There were those who thought Lemon’s component elements were unhelpfully vague or too difficult to apply, for example, in determining whether government had acted with a primarily religious purpose or whether the policy resulted in “excessive entanglement.” Finally, there were those who thought that Lemon was useful for judging the constitutionality of a given program of financial aid but was of no help when it came to other kinds of controversies. The cases presented or discussed in the following pages illustrate these criticisms.

In Edwards v. Aguillard below, the Court turned its attention to a Louisiana statute that prohibited the teaching of evolution in public schools unless “Creationism” was also taught. To Justice Brennan, speaking for the Court, the “balanced treatment” of issues in the curriculum was a ruse for legislation that sought to advance a religious point of view and in that sense was little different from previous attempts by fundamentalists to outlaw the teaching of evolution. Speaking for himself and Chief Justice Rehnquist, another nonpreferentialist, Justice Scalia argued that the Court had misread the purpose of the statute and then went on to criticize the Lemon test for institutionalizing an examination of the legislators’ motives, something that had been rejected as improper in a host of other cases.

EDWARDS V. AGUILARD
Supreme Court of the United States, 1987
482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510

BACKGROUND & FACTS Louisiana’s “Creationism Act” prohibited teaching the theory of evolution in the state’s public elementary and secondary schools unless it was accompanied by instruction in the theory of “creation science.” As defined in the statute, the theories included “scientific evidences for [creation and evolution] and inferences from those scientific evidences.” Aguillard and others, parents, teachers, and religious leaders, brought suit against Governor Edwin Edwards for declaratory and injunctive relief and attacked the statute as an establishment of religion in violation of the First and Fourteenth Amendments. A federal district court granted the plaintiffs summary judgment, and a federal appeals court affirmed, whereupon the state sought review by the U.S. Supreme Court.
Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act (Creationism Act) is facially invalid as violative of the Establishment Clause of the First Amendment.

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.

Therefore, in employing the three-pronged Lemon test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools.

Lemon’s first prong focuses on the purpose that animated adoption of the Act. A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, or advancement of a particular religious belief. In this case, the petitioners have identified no clear secular purpose for the Louisiana Act.

True, the Act’s stated purpose is to protect academic freedom. Even if “academic freedom” is read to mean “teaching all of the evidence” with respect to the origin of human beings, the Act does not further this purpose.

It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: “My preference would be that neither [creationism nor evolution] be taught.” Such a ban on teaching does not promote—the provision of a comprehensive scientific education.

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public schoolteachers from teaching any scientific theory. The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it.

The Alabama statute held unconstitutional in Wallace v. Jaffree is analogous. In Wallace, the State characterized its new law as one designed to provide a one-minute period for meditation. We rejected that stated purpose as insufficient, because a previously adopted Alabama law already provided for such a one-minute period. Thus, in this case, as in Wallace, “appellants have not identified any secular purpose that was not fully served by [existing state law] before the enactment of [the statute in question].” 472 U.S., at 59, 105 S.Ct. at 2491.

Furthermore, the goal of basic “fairness” is hardly furthered by the Act’s discriminatory preference for the teaching of creation science and against the teaching of evolution. Similarly, research services...
are supplied for creation science but not for evolution. * * * Only "creation scientists" can serve on the panel that supplies the resource services. The Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but fails to protect those who choose to teach evolution or any other non-creation science theory, or who refuse to teach creation science. * * *

If the Louisiana legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creation science." * * *

[We need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968), which also involved a facial challenge to a statute regulating the teaching of evolution. In that case, the Court reviewed an Arkansas statute that made it unlawful for an instructor to teach evolution or to use a textbook that referred to this scientific theory. Although the Arkansas anti-evolution law did not explicitly state its predominate religious purpose, the Court could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible. * * * After reviewing the history of anti-evolution statutes, the Court determined that "there can be no doubt that the motivation for the [Arkansas] law was the same as other anti-evolution statutes: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." * * *

* * * In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in Epperson, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. * * *

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. * * * Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

* * * The judgment of the Court of Appeals therefore is Affirmed.

* * *

Justice SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST] joins, dissenting.

* * * The Louisiana Supreme Court has never been given an opportunity to interpret the Balanced Treatment Act, State officials have never attempted to implement it, and it has never been the subject of a full evidentiary hearing. We can only guess at
its meaning. We know that it forbids instruction in either "creation-science" or "evolution-science" without instruction in the other, * * * but the parties are sharply divided over what creation science consists of. * * *

At least at this stage in the litigation, it is plain to me that we must accept appellants' view of what the statute means. To begin with, the statute itself defines "creation-science" as "the scientific evidences for creation and inferences from those scientific evidences." * * * (emphasis added). * * *

* * * It is clear, first of all, that regardless of what "legislative purpose" may mean in other contexts, for the purpose of the Lemon test it means the "actual" motives of those responsible for the challenged action. The Court recognizes this, * * * as it has in the past * * *. Thus, if those legislators who supported the Balanced Treatment Act in fact acted with a "sincere" secular purpose, * * * the Act survives the first component of the Lemon test, regardless of whether that purpose is likely to be achieved by the provisions they enacted.

* * * (The majority's invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana Legislature had no secular purpose. It is important to stress that the purpose forbidden by Lemon is the purpose to "advance religion." * * * Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Notwithstanding the majority's implication to the contrary, * * * we do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. * * * To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.

If one adopts the obviously intended meaning of the statutory terms "academic freedom," there is no basis whatever for concluding that the purpose they express is a "sham." * * * To the contrary, the Act pursues that purpose plainly and consistently. It requires that, whenever the subject of origins is covered, evolution be "taught as a theory, rather than as proven scientific fact" and that scientific evidence inconsistent with the theory of evolution (viz., "creation science") be taught as well. * * *
The Act’s reference to “creation” is not convincing evidence of religious purpose. The Act defines creation science as “scientific evidence[...].” * * * and Senator Keith and his witnesses repeatedly stressed that the subject can and should be presented without religious content. * * * We have no basis on the record to conclude that creation science need be anything other than a collection of scientific data supporting the theory that life abruptly appeared on earth. * * *

* * * Perhaps what the Louisiana Legislature has done is unconstitutional because there is no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that “creation science” is a body of scientific knowledge rather than revealed belief. * * *

* * * While it is possible to discern the objective “purpose” of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. * * *

* * * Given the many hazards involved in assessing the subjective intent of governmental decisionmakers, the first prong of Lemon is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case. * * *

* * * I think it time that we * * * abandon Lemon’s purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the amendment, and, as today’s decision shows, has wonderfully flexible consequences * * *

In the latest round of controversy over the teaching of evolution, fundamentalist Christian advocates repackaged Creationism as “Intelligent Design” (ID) and sought to require its presentation in high school biology courses as an alternative hypothesis for the explanation of life. After the majority of members on a local school board adopted a policy that required drawing students’ attention to it whenever the theory of evolution was taught, objecting parents brought suit challenging the policy. In Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D.Pa. 2005), a federal district court, applying Edwards v. Aguillard, held that ID did not constitute a competing scientific theory at all but “a particular version of Christianity” and that requiring its presentation in public school violated the Establishment Clause. ID posits that biological life is so complex it must have been planned by some intelligent source, although its proponents say they refrain from identifying the intelligent designer as God. In a stinging rebuke to the contention that the aim was merely to alert students to the existence of an alternative scientific theory, the judge said that the proponents of ID had lied about, and tried to conceal, their motives. He went on to observe that “the religious nature of intelligent design would be readily apparent to an objective observer, adult or child.” A subsequent election of school board members resulted in the defeat of practically all of the board members who had voted for ID; the new board then voted to remove it from the curriculum and against appealing the judge’s decision. New York Times, Sept. 26, 2005, pp. A1, A14; Dec. 21, 2005, pp. A1, A21; Jan. 4, 2006, p. A13.

Other instances of religion-related speech sponsored by government involved holiday displays. Again struggling mightily to apply the Lemon test, in Lynch v. Donnelly (p. 1096) and Allegheny County v. American Civil Liberties Union (p. 1098), the Court split on whether a municipally-sponsored nativity scene passed constitutional muster. Addressing
the constitutionality of Texas’s display of the Ten Commandments in Van Orden v. Perry (p. 1101) more than a decade and a half later, however, the Court upheld placement of the monument on public property but ignored the Lemon test entirely.

**NOTE—LYNCH v. DONNELLY**

For more than 40 years, the City of Pawtucket, Rhode Island, annually erected on parkland owned by a nonprofit organization a Christmas display that includes a lifesize crèche or Nativity scene in addition to a Santa Claus house, a Christmas tree, and a banner reading “Seasons Greetings.” A suit filed in federal district court challenged the city’s display of the Nativity scene as a violation of the Establishment Clause. The district court held that the city’s display of the crèche violated the First and Fourteenth Amendments, and a federal appeals court affirmed.

In Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984), the Supreme Court reversed, holding that notwithstanding the religious significance of the Nativity scene, the city did not violate the Establishment Clause. Speaking for a bare majority, Chief Justice Burger began from the premise that the frequently used Jeffersonian metaphor of a “wall” of separation between church and state did not accurately describe the practical aspects of the relationship between the two. Drawing upon the Framers’ intent and a history of American practices, such as the invocation of God’s blessing at public functions, the employment of chaplains to offer daily prayers in Congress and the state legislatures, the reference to “One nation under God” in the Pledge of Allegiance, and the exhibition of paintings with religious themes in the National Gallery of Art, the Chief Justice observed that the Establishment Clause mandates “accommodation,” not simply tolerance of religion. He rejected as “simplistic” the notion that the First Amendment required “a rigid, absolutist view of the Establishment Clause” that would entail “mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith” and result in “hostility” or “callous indifference” to religion. Instead, the Chief Justice affirmed as the applicable standard the three-part test previously announced by the Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), on the grounds it struck the appropriate hospitable traditional balance between church and state and was more compatible with “our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas * * *.”

Chief Justice Burger reasoned that the city had a secular purpose for including the Nativity scene in the Christmas display despite the fact that it has religious significance. Addressing the first element of the tripartite test announced in Lemon, the Chief Justice observed, “Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” Although “[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking,” it was “only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.” The city’s inclusion of the crèche, said the Chief Justice, cannot be divorced from the context of a Christmas holiday display. The Nativity scene simply depicts the historical origin of that holiday, and “[i]n sufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.” The Chief Justice continued:

* * * The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The District Court’s inference, drawn from the religious nature of the crèche, that the City has no secular purpose was, on this record, clearly erroneous.

*To conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an
endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, * * * and the tax exemptions for church properties sanctioned in Walz [v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409 (1970)]. * * *

We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. * * *

In a dissenting opinion in which Justices Marshall, Blackmun, and Stevens joined, Justice Brennan took aim particularly at the majority's characterization of the city's interest as "secular." In response Justice Brennan said in part:

* * * I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. * * * In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a crèche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the crèche's singular religiosity, or that the City's annual display reflects nothing more than an "acknowledgement" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. Indeed, our remarkable and precious religious diversity as a nation * * * which the Establishment Clause seeks to protect, runs directly counter to today's decision.

* * *

When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some repose from pre-holiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step. Because it is clear that the celebration of Christmas has both secular and sectarian elements, it may well be that by taking note of the holiday, the government is simply seeking to serve the same kinds of wholly secular goals—for instance, promoting goodwill and a common day of rest—that were found to justify Sunday Closing laws in McGowan. * * * But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, * * * government brings to the forefront the theological content of the holiday, and places the prestige, power and financial support of a civil authority in the service of a particular faith.

The crèche in this context simply cannot be viewed as playing the same role that an ordinary museum display does. * * * The Court seems to assume that forbidding Pawtucket from displaying a crèche would be tantamount to forbidding a state college from including the Bible or Milton's Paradise Lost in a course on English literature. But in those cases the religiously-inspired materials are being considered solely as literature. The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression. * * *

In this case, by contrast, the crèche plays no comparable secular role. Unlike the poetry of Paradise Lost which students in a literature course will seek to appreciate primarily for aesthetic or historical reasons, the angels, shepherds, Magi and infant of Pawtucket's nativity scene can only be viewed as symbols of a particular set of religious beliefs. It would be another matter if the crèche were displayed in a museum setting, in the company of other religiously-inspired artifacts, as an example, among many, of the symbolic representation of religious myths. In that setting, we would have objective guarantees that the crèche could not suggest that a particular faith had been singled out for public favor and recognition. The effect of Pawtucket's crèche, however, is not confined by any of these limiting attributes. * * *
NOTE—ALLEGHENY COUNTY v. AMERICAN CIVIL LIBERTIES UNION

In another Christmas display case five years later, the Court ruled differently. The litigation concerned two recurring holiday displays located on public property in downtown Pittsburgh. The first of these was a crèche depicting the Nativity scene, which was placed on the Grand Staircase of the Allegheny County Courthouse. The crèche was donated by the Holy Name Society, a Roman Catholic group, and bore a sign so identifying it as the donor. At the crest of the manger was an angel bearing a banner that proclaimed “Gloria in Excelsis Deo” which means “Glory to God in the Highest.” The second holiday display was an 18-foot menorah, which stood next to the city’s 45-foot Christmas tree outside the City-County Building. Beneath the Christmas tree was a sign bearing the mayor’s name and containing text that declared the display to be the city’s “salute to liberty.” The menorah, which was owned by a Jewish group, was stored, erected, and removed each year by the city. A local chapter of the American Civil Liberties Union (ACLU) brought suit, challenging the displays as a violation of the Establishment Clause. Relying on Lynch v. Donnelly, a federal district court denied relief, but was reversed by a federal appeals court, which held that the displays constituted a governmental endorsement of Christianity and Judaism under the test set forth in Lemon v. Kurtzman.

In Allegheny County v. American Civil Liberties Union, 492 U.S. 573, 109 S.Ct. 3086 (1989), the Supreme Court upheld the constitutionality of the menorah display but not that of the crèche. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy voted to uphold both displays; Justices Brennan, Marshall, and Stevens concluded both displays violated the Establishment Clause; and Justices Blackmun and O’Connor saw a difference between the displays, but did not agree entirely on the reasons for doing so. The trio of Brennan, Marshall, and Stevens saw the crèche and menorah as undeniably religious symbols whose placement in public buildings constituted religious endorsement in clear violation of the principle separating church and state. Speaking for the foursome that would have sustained both displays, Justice Kennedy minimized the difference between use of the crèche and the menorah and argued that there was "no realistic risk that the crèche or the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion." In addition to concluding that the Court's previous decision in Lynch v. Donnelly controlled this case, much of his opinion was devoted to excoriating the three-pronged Lemon test, which he charged was unworkable and reflected "an unjustified hostility toward religion.* * *" Turning the issue around, Justice Kennedy argued that enforcing a reading of the First Amendment that required the government to remain purely secular was itself a prescription of orthodoxy. He wrote:

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum.* * *

In an opinion that announced the judgment of the Court, Justice Blackmun concluded that the crèche display ran afoul of that prong of the Lemon test that prohibited any practice that would “advance [or] inhibit religion in its principal or primary effect.” Whether “advance” was defined as “endorse,” “prefer,” “favor,” or “promote,” the banner over the manger announced a patently Christian message, and its placement on public property amounted to clear preference and endorsement. As to the menorah, Justice Blackmun concluded that, in its “particular physical setting,” the combined display of it with the Christmas tree and sign saluting liberty did not endorse either the Christian or the Jewish religion, but recognized that both Christmas and Chanukah are part of the same winter-holiday season, which has achieved a secular status in our society. Moreover, the especially prominent placement of the Christmas tree, now a clearly secular symbol, coupled with
the lack of a more secular alternative to the menorah, undercut any message of endorsement and instead made the point that the season was celebrated in different ways. And the mayor’s sign emphasized that the display was illustrative of liberty and reinforced the theme of cultural diversity.

Finally, Justice Blackmun took exception to Justice Kennedy’s spirited criticisms of the Lemon test, “accusations” that he observed “could be said to be as offensive as they are absurd.” Summing up his central point, he wrote:

Justice Kennedy’s accusations are shot from a weapon triggered by the following proposition: if government may celebrate the secular aspects of Christmas, then it must be allowed to celebrate the religious aspects as well because, otherwise, the government would be discriminating against citizens who celebrate Christmas as a religious, and not just a secular, holiday. * * * This proposition, however, is flawed at its foundation. The government does not discriminate against any citizen on the basis of the citizen’s religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.

A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed. * * *

He concluded, “It is thus incontrovertible that the Court’s decision today, premised on the determination that the crèche display on the Grand Staircase demonstrates the county’s endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.”

Although agreeing with the conclusions reached by Justice Blackmun, Justice O’Connor wrote separately to express disagreement particularly with what she termed “Justice Blackmun’s new rule” that “an inference of endorsement arises every time government uses a symbol with religious meaning if a ‘more secular alternative’ is available * * *.” Calling this standard “too blunt an instrument” for useful Establishment Clause analysis, she preferred to rest her conclusion on the approach she articulated in her earlier concurring opinion in Lynch v. Donnelly. That approach rejected any practice by which government endorsed religion because, quoting her earlier concurring opinion, it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” In turn, whether government’s use of an object with religious meaning has the effect of endorsing religion depends on the context, “what viewers may fairly understand to be the purpose of the display.” In the present case, then, according to Justice O’Connor, the crèche display amounted to the use of a religious object in a way that sent a religious message while the placement of the menorah in the display outside conveyed a secular message, notwithstanding the fact that a menorah is an object with religious meaning.

In contrast to Lynch v. Donnelly and Allegheny County, which involved displays erected by government, Ohio had reserved the ground surrounding the state capitol as a “public forum” for private individuals and groups to express their views. When the Ku Klux Klan sought to display a cross on that site, the state board in charge of overseeing the space denied permission on the grounds that such a display so near the seat of government would be perceived as state endorsement of religion. On the other hand, the Klan argued that denying the permit discriminated against the expression of religious views. In Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 115 S.Ct. 2440 (1995), a fragmented Court held the Klan was constitutionally entitled to display the cross. A plurality opinion penned by Justice Scalia (who also spoke for Chief Justice Rehnquist and Justices Kennedy and Thomas) reasoned that while Ohio might impose content-neutral time, place, and manner requirements for displays, any regulation of expressive content had to survive strict scrutiny. While “compliance with the Establishment Clause is a state
interest sufficiently compelling to justify content-based restrictions on speech,” a ban on displaying unattended religious symbols in a state-sponsored public forum was not required by the Establishment Clause because purely private speech in a traditional or designated public forum does not, without more, imply “governmental favoritism.” Justices O’Connor, Souter, and Breyer concurred because alternatives short of the flat ban on displaying the cross were available to deal with the government endorsement issue. In their view, either of the following more “narrowly drawn” alternatives would have sufficed to deal with the problem: “The Board *** could have granted the application subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference” of governmental endorsement; or “the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.”

The pivotal vote in these and other Establishment Clause cases was usually cast by Justice O’Connor. As indicated in the note on Lynch v. Donnelly, she thought that the constitutionality of the displays was more satisfactorily addressed by asking whether the government’s involvement was likely to be perceived by a reasonable observer as an endorsement of religion. In a concurring opinion in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004), she summarized what has come to be known as the “endorsement test”:

When a court confronts a challenge to government-sponsored speech or displays, *** the endorsement test “captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’” ***

Endorsement *** “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *** In order to decide whether endorsement has occurred, a reviewing court must keep in mind two crucial and related principles.

First, because the endorsement test seeks “to identify those situations in which government makes adherence to a religion relevant . . . to a person’s standing in the political community,” it assumes the viewpoint of a reasonable observer. *** Nearly any government action could be overturned as a violation of the Establishment Clause if a “heckler’s veto” sufficed to show that its message was one of endorsement. *** (“There is always someone who *** might perceive a particular action as an endorsement of religion”). Second, because the “reasonable observer” must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape. ***

*** The Court has permitted government, in some instances, to refer to or commemorate religion in public life. *** Although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation’s origins. *** It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today. ***

Facially religious references can serve other valuable purposes in public life as well. *** Such references “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” ***
Government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”). * * *

Although other members of the Court may not explicitly identify their analysis of government-speech situations in terms of whether there has been an “endorsement” of religion, much of what they say, as in the Van Orden case which follows, can be described as some version of it.

**VAN ORDEN V. PERRY**

Supreme Court of the United States, 2005
545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607

**BACKGROUND & FACTS** Among the 21 historical markers and monuments surrounding the state capitol building in Austin, Texas, is a six-foot by three-and-a-half-foot monolith inscribed with the Ten Commandments. The monument was donated by the Fraternal Order of Eagles. Thomas Van Orden regularly encountered the monument on his trips to and from the state law library located nearby. Van Orden sued Governor Rick Perry, seeking both a declaration that display of the monument on state grounds violated the Establishment Clause and an order requiring its removal. A federal district court ruled for the state and held that the state had a legitimate secular purpose in recognizing the Eagles for their work in reducing juvenile delinquency and that, given the history, purpose, and context of the monument, a reasonable observer would not conclude it endorsed religion. After a federal appellate court affirmed the judgment, Van Orden successfully sought certiorari from the Supreme Court.

Chief Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which Justice SCALIA, Justice KENNEDY, and Justice THOMAS join.

The question here is whether the Establishment Clause of the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. * * *

* * *

**A. THE ESTABLISHMENT CLAUSE**

* * * [G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”). * * *

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* * *

**A. THE ESTABLISHMENT CLAUSE**

10. Decided with Van Orden was a companion case, McCreary County, Kentucky v. American Civil Liberties Union, 545 U.S. 844, 125 S.Ct. 2722 (2005), which dealt with a county courthouse display of the Ten Commandments in the company of smaller-size excerpts from other documents, such as the Declaration of Independence and “The Star Spangled Banner” with their religious references highlighted, such as the Declaration’s “endowed by their Creator” passage. Applying Lemon, the Court, by a 5-4 vote, found that the display had primarily a religious, not a secular, purpose. The display was a much-revised version of the original one, which included only the Ten Commandments. The legislature’s authorizing resolution for the original display acknowledged Jesus Christ as “the Prince of Ethics.” A third revision of the display, adopted after the counties had changed legal counsel—and characterized by the Court as a litigating tactic—supplied a title for the collection, “Foundations of American Law and Government,” and offered an ostensibly secular purpose, “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our law and government.” The Court was unpersuaded that any of the revisions cured the unconstitutional purpose.
grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.

***

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor’s tour of our Nation’s Capital. ***

Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. *** [But] simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

***

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose.

As evidenced by Stone’s almost exclusive reliance upon two of our school prayer cases, * * (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963), and Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962)), it stands as an example of the fact that we have “been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” Edwards v. Aguillard, 482 U.S. 578, 583–584, 107 S.Ct. 2573 (1987). *** Indeed, Edwards v. Aguillard recognized that Stone—along with Schempp and Engel—was a consequence of the “particular concerns that arise in the context of public elementary and secondary schools.” *** Neither Stone itself nor subsequent opinions have indicated that Stone’s holding would extend to a legislative chamber * * or to capitol grounds.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in Stone, where the text confronted elementary school students every day. Indeed, Van Orden * * apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in Schempp and Lee v. Weisman [505 U.S. 577, 112 S.Ct. 2649 (1992)]. Texas has treated her Capitol grounds monuments as representing the several strands in the State’s political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas’ display of this monument violates the Establishment Clause of the First Amendment.

The judgment of the Court of Appeals is affirmed.

***

Justice THOMAS, concurring.

***

There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop
to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.

Justice BREYER, concurring in the judgment.

*** The government must avoid excessive interference with, or promotion of, religion. * * * But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. * * * Such absolutism is not only inconsistent with our national traditions but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

The case before us is a borderline case. * * * On the one hand, the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message, but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets’ message to predominate.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency. The Eagles’ consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscores the group’s ethics-based motives. The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments’ message.

As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged. And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.

The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state.
focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

* * *

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates a religious message.

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

* * *

This case is not about historic preservation or the mere recognition of religion. The issue is obfuscated rather than clarified by simplistic commentary on the various ways in which religion has played a role in American life and by the recitation of the many extant governmental "acknowledgments" of the role the Ten Commandments played in our Nation's heritage. The mere compilation of religious symbols, none of which includes the full text of the Commandments and all of which are exhibited in different settings, has only marginal relevance to the question presented in this case.

* * *

The principle that guides my analysis is neutrality. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians.

* * *

The evil of discriminating today against atheists, "polytheists[,] and believers in unconcerned deities." is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, forbids Texas from displaying the Ten Commandments monument the plurality so casually affirms.

* * *

[Justice O'CONNOR dissented "for essentially the reasons given by Justice SOUTER as well as the reasons given in [her] concurrence in McCreary County v. American Civil Liberties Union."

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, dissenting.

* * *


"The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."

* * *

[A] pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones. In this case, moreover, the text is presented to give particular prominence to
the Commandments' first sectarian reference, "I am the Lord thy God." That proclamation is centered on the stone and written in slightly larger letters than the subsequent recitation. To ensure that the religious nature of the monument is clear to even the most casual passerby, the word "Lord" appears in all capital letters (as does the word "am"), so that the most eye-catching segment of the quotation is the declaration "I AM the LORD thy God." *** What follows, of course, are the rules against other gods, graven images, vain swearing, and Sabbath breaking. ***

To drive the religious point home, and identify the message as religious to any viewer who failed to read the text, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ. Nothing on the monument, in fact, detracts from its religious nature ***. It would therefore be difficult to miss the point that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it, with both code and conception of God being rightly understood as the inheritances specifically of Jews and Christians. ***

***

When the plurality *** confront[s] Stone, it tries to avoid the case's obvious applicability by limiting its holding to the classroom setting. *** But Stone *** [did nothing of the sort]. [T]he schoolroom was beside the point *** and that is presumably why the Stone Court failed to discuss the educational setting, as other opinions had done when school was significant. *** Stone did not, for example, speak of children's impressionability or their captivity as an audience in a school class. *** Accordingly, our numerous prior discussions of Stone have never treated its holding as restricted to the classroom.

Nor can the plurality deflect Stone by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in Stone, where the text confronted elementary school students every day." *** Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in Stone was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it. ***

***

Constructing constitutional tests appropriate to significantly different contexts is neither new nor remarkable. Broad constitutional principles, such as those prohibiting unreasonable searches and seizures, guaranteeing due process, or ensuring equal protection of the laws, cannot be applied directly to a set of facts in a case without some mediating standard that provides more concrete guidance for judgment. Perhaps no one has summarized quite as well or as succinctly the pitfalls of the "one size fits all" approach than Justice O'Connor:

It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. ***

But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.
And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. * * * Lemon has, with some justification, been criticized on this score.

Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like “primary effect … that neither advances nor inhibits religion” and “entanglement,” * * * acquire more and more complicated definitions which stray ever further from their literal meaning. * * *

[A]nother danger * * * is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with Lemon.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. * * * Different categories of Establishment Clause cases * * * call for different approaches. Some cases * * * involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics * * * seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. * * *

* * *

The slide away from Lemon’s unitary approach is well under way. A return to Lemon, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. * * * If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be * * * more consensus on each of the narrow tests than there has been on a broad test. And abandoning the Lemon framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

The case law will better be able to evolve * * * if it is freed from the Lemon test’s rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.11

B. THE FREE EXERCISE OF RELIGIOUS BELIEF

In what seem to be equally absolute terms, the First Amendment also prohibits government from abridging the free exercise of religious belief. An early and significant attempt by the Court to sketch out the contours of the Free Exercise Clause came in Reynolds v. United States, 98 U.S. (8 Otto) 145, 25 L.Ed. 244 (1878). In that case, the Court was asked to rule on the application of federal legislation making bigamy a crime in any federal territory. George Reynolds, a Mormon with several wives, resided in Utah. Speaking for the Court, Chief Justice Waite sustained the constitutionality of the statute in the face of its conflict with Mormon teachings. He did so by distinguishing the province of belief from that of action. Said the Chief Justice, “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” However, as we saw when we considered the parameters of free speech, this distinction is

somewhat simplistic and equivocal because the two dimensions can be closely intertwined. (The Mormon church, it is worth noting, later revised its stand on polygamy.)

In Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197 (1934), the Court had little difficulty sustaining the constitutionality of a California law that required students attending its state university to take a course on military science and tactics over the objection of Hamilton and others whose religious beliefs did not countenance war or military training. However, the Court turned a more sympathetic ear in a series of First Amendment cases brought by Jehovah’s Witnesses during the later 1930s and 1940s. Although most of these presented free speech—rather than freedom of religion—questions, the Court did hold that the free exercise guarantee was applicable to the states through the Due Process Clause of the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940). In that case, the Court unanimously reversed a Witness’s breach-of-the-peace conviction for stopping passers-by on the street and playing a phonograph record with a religious message. Cantwell was also charged with not having first obtained a permit, and his conviction on that count was also reversed. In Hamilton, incorporation of the free exercise guarantee appeared a matter of dictum; in Cantwell, the Court so held.

In Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Warren Court replaced the belief-practice distinction as the litmus of governmental regulation with strict scrutiny. In Sherbert, a Seventh Day Adventist was dismissed by her employer for refusing to work on Saturday, the Sabbath Day in her faith. When she was subsequently refused work at other textile plants on the same grounds, she applied for unemployment compensation benefits. The South Carolina Employment Security Commission denied her request for benefits because it found she was ineligible under a provision of the state unemployment compensation act that provided that one who is “able to work and ** is available for work” cannot receive benefits “[i]f ** he has failed, without good cause ** to accept available suitable work when offered him by the employment office or the employer.” The U.S. Supreme Court, reversing a state court ruling upholding the commission's denial of benefits, found the asserted state interest (“a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work” might “dilute the employment compensation fund” and “also hinder the scheduling by employers of necessary Saturday work”) insufficiently compelling to override Sherbert’s First Amendment right.

In Thomas v. Indiana Employment Security Review Board, which follows, the Supreme Court reviewed and applied the approach adopted in Sherbert. It also canvassed an array of principles encompassed by the free exercise guarantee. Dissenting in Thomas, Justice

Rehnquist argued that the Court’s approach to the two Religion Clauses has caused unnecessary problems, especially the potential for the two clauses to collide. He urged a more restrained reading of both clauses as the remedy to avert the sort of collision spotlighted by Chief Justice Burger in Walz (p. 1065). But is Justice Rehnquist’s approach itself free of costs, or does it simply impose different sorts of costs? Presumably, what he had in mind is illustrated by the Court’s decisions in McGowan v. Maryland (p. 1063) and Braunfield v. Brown (p. 1111, footnote 13). Do these decisions seem preferable to the more expansive reading of the two Religion Clauses adopted by the Court?

**Thomas v. Indiana Employment Security Review Board**

Supreme Court of the United States, 1981
450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624

**BACKGROUND & FACTS** Thomas, a Jehovah’s Witness, who was employed by the Blaw-Knox Foundry and Machinery Company, was transferred about a year after he was hired from the roll foundry, whose function was to fabricate sheet steel for industrial purposes, to a department that was engaged in the manufacture of turrets for military tanks. After checking to see whether it might be possible to transfer to another department that was not engaged in armaments production and finding that all of the other company departments were directly involved in the manufacture of weapons, Thomas asked for a layoff. When the request was denied, he quit, saying that he could not work on the production of weapons without violating his religious beliefs.

After leaving Blaw-Knox, he applied for unemployment compensation from the State of Indiana. At an administrative hearing on his application for benefits, the hearing referee determined (1) that Thomas’s religious beliefs specifically precluded work in weapons production; (2) that Thomas had indeed left work for religious reasons; and (3) that the reason Thomas had ended his employment was not a “good cause [arising] in connection with [his] work,” as required by Indiana’s unemployment compensation law. A state appellate court ordered the state review board to grant Thomas the benefits, since to deny them would improperly burden his free exercise of religious belief. The Indiana Supreme Court, however, reversed this judgment and denied him the benefits on grounds (1) that his decision to quit was “a personal-philosophical choice rather than a religious choice”; (2) that denying him unemployment compensation created only an indirect burden on his First Amendment right, which was outweighed by the state’s interest in preserving the financial integrity of the insurance fund and in not encouraging workers to leave their jobs for personal reasons; and (3) that awarding unemployment compensation to an individual who terminated his employment for reasons such as Thomas gave would violate the Establishment Clause. Thomas subsequently sought review of this decision by the U.S. Supreme Court.

Chief Justice BURGER delivered the opinion of the Court. We granted certiorari to consider whether the State’s denial of unemployment compensation benefits to the petitioner, a Jehovah’s Witness who terminated his job because his religious beliefs forbade participation in the production of armaments, constituted a violation of his First Amendment right to free exercise of religion. * * *

* * *
The judgment under review must be examined in light of our prior decisions, particularly Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963).

Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. * * * The determination of what is a “religious” belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

In support of his claim for benefits, Thomas testified:

“Q. And when it comes to actually producing the tank itself, hammering it out; that you will not do. * * *

“A. That’s right, that’s right when * * * I’m daily faced with the knowledge that these are tanks. * * *

* * *

“A. I really could not, you know, conscientiously continue to work with armaments. It would be against all of the * * * religious principles that * * * I have come to learn.” * * *

Based upon this and other testimony, the referee held that Thomas “quit due to his religious convictions.” The Review Board adopted that finding, and the finding is not challenged in this Court.

The Indiana Supreme Court apparently took a different view of the record. It concluded that “although the claimant’s reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was.” In that court’s view, Thomas had made a merely “personal philosophical choice rather than a religious choice.”

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was “struggling” with his beliefs and that he was not able to “articulate” his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to “working for United States Steel or Inland Steel * * * producing the raw product necessary for the production of any kind of tank * * * [because I] would not be a direct party to whoever they shipped it to [and] would not be * * * chargeable in * * * conscience.” * * *

The court found this position inconsistent with Thomas’ stated opposition to participation in the production of armaments. But, Thomas’ statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is “struggling” with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The Indiana court also appears to have given significant weight to the fact that another Jehovah’s Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was “scripturally” acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.
The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. * * * On this record, it is clear that Thomas terminated his employment for religious reasons.

Here, as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from Sherbert * * *

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

The mere fact that the petitioner’s religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. * * *

The purposes urged to sustain the disqualifying provision of the Indiana unemployment compensation scheme are two-fold: (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for “personal” reasons; and (2) to avoid a detailed probing by employers into job applicants’ religious beliefs. * * *

There is no evidence in the record to indicate that * * * [detailed] inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner’s position. Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas’ religious liberty. Accordingly, Thomas is entitled to receive benefits unless, as the state contends and the Indiana court held, such payment would violate the Establishment Clause.

The respondent contends that to compel benefit payments to Thomas involves the state in fostering a religious faith. There is, in a sense, a “benefit” to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religious Clauses which the Court resolved in Sherbert:

“In holding as we do, plainly we are not fostering the ‘establishment’ of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.” Sherbert v. Verner, * * * 374 U.S., at 409, 83 S.Ct., at 1796. * * *

Reversed.

Justice REHNQUIST, dissenting.

The Court correctly acknowledges that there is a “tension” between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Although the relationship of the two clauses has been the subject of much commentary, the “tension” is a fairly recent vintage, unknown at the time of the framing and adoption of the
First Amendment. The causes of the tension, it seems to me, are three-fold. First, the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two clauses, since such legislation touches the individual at so many points in his life. Second, the decision by this Court that the First Amendment was “incorporated” into the Fourteenth Amendment and thereby made applicable against the States, Stromberg v. California, 283 U.S. 599, 51 S.Ct. 532 (1931); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940), similarly multiplied the number of instances in which the “tension” might arise. The third, and perhaps most important, cause of the tension is our overly expansive interpretation of both clauses. By broadly construing both clauses, the Court has constantly narrowed the channel * * * through which any state or federal action must pass in order to survive constitutional scrutiny.

**

The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the “tension” between the two clauses, it does little to help resolve that tension or to offer meaningful guidance to other courts which must decide cases like this on a day-by-day basis. Instead, it simply asserts that there is no Establishment Clause violation here and leaves tension between the two Religion Clauses to be resolved on a case-by-case basis. ** ** I believe that the “tension” is largely of this Court’s own making, and would diminish almost to the vanishing point if the clauses were properly interpreted.

Just as it did in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Court today reads the Free Exercise Clause more broadly than is warranted. As to the proper interpretation of the Free Exercise Clause, ** I would accept the decision of Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144 (1961), 13 and the dissent in Sherbert. In Braunfeld, we held that Sunday Closing laws do not violate the First Amendment rights of Sabbatarians. Chief Justice Warren explained that the statute did not make unlawful any religious practices of appellants; it simply made the practice of their religious beliefs more expensive. We

13. Braunfeld and other merchants brought suit against Philadelphia’s police commissioner to enjoin enforcement of Pennsylvania’s Sunday Closing Law, As Orthodox Jews whose religious tenets forbade conduct of any commercial activity each week from nightfall Friday until nightfall Saturday, they asserted that the additional prohibition of doing business on Sunday impaired their ability to earn a living and thus resulted in a penalty to them solely because of their religious beliefs. The Court affirmed a federal district court judgment dismissing the complaint. As a later opinion of the Court summarized the holding in Braunfeld. Despite the fact that it made the plaintiffs “religious beliefs more expensive” * * * the statute was nevertheless saved by a countervailing factor * * * a strong state interest in providing one uniform day of rest for all workers.” That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable.” Sherbert v. Verner, 374 U.S. 398, 408–409, 83 S.Ct. 1790, 1796 (1963). Speaking for a four-Justice plurality in Braunfeld, Chief Justice Warren wrote:

”The statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law’s effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.”
concluded that "to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."**

Likewise in this case, it cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits because he was a Jehovah's Witness. Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. **

I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so. **

The Court's treatment of the Establishment Clause issue is equally unsatisfying. Although today's decision requires a State to provide direct financial assistance to persons solely on the basis of their religious beliefs, the Court nonetheless blandly assures us, just as it did in Sherbert, that its decision "plainly" does not foster the "establishment" of religion. ** I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our prior Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a State did violate the Establishment Clause. **

In recent years the Court has moved away from a mechanistic "no-aid-to-religion" approach to the Establishment Clause and has stated a three-part test to determine the constitutionality of governmental aid to religion. See Lemon v. Kurtzman, 403 U.S. 602, 91 S.Crt. 2105 (1971); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 772–773, 93 S.Ct. 2955, 2965 (1973). **

It is not surprising that the Court today makes no attempt to apply those principles to the facts of this case. If Indiana were to legislate what the Court today requires—an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons—the statute would "plainly" violate the Establishment Clause as interpreted in such cases as Lemon and Nyquist. First, although the unemployment statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose. It would grant financial benefits for the sole purpose of accommodating religious beliefs. Second, there can be little doubt that the primary effect on the proviso would be to "advance" religion by facilitating the exercise of religious belief. Third, any statute including such a proviso would surely "entangle" the State in religion far more than the mere grant of tax exemptions, as in Walz, or the award of tuition grants and tax credits, as in Nyquist. By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is sincerely held. Otherwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it. **

I believe the reach of the Establishment Clause is limited to "government support of proselytizing activities of religious sects by throwing the weight of secular authorities behind the dissemination of religious tenets." Conversely, governmental assistance which does not have the effect of "inducing" religious belief, but instead merely "accommodates" or
implements an independent religious choice does not impermissibly involve the govern-
ment in religious choices and therefore does not violate the Establishment Clause of the
First Amendment. I would think that in this case, as in Sherbert, had the state voluntarily
chosen to pay unemployment compensation benefits to persons who left their jobs
for religious reasons, such aid would be constitutionally permissible because it
redounds directly to the benefit of the individual. * * *

* * *

The following Supreme Court decision in Wisconsin v. Yoder, like the decisions in
Sherbert and Thomas, reflects the application of strict scrutiny to vindicate the free exercise
guarantee. As Chief Justice Burger wrote in Thomas, “The mere fact that * * * [a] religious
practice is burdened by a governmental program does not mean an exception
accommodating [the] practice must be granted,” but—continuing this time in Yoder—“a
regulation neutral on its face may, in its application, nonetheless offend the constitutional
requirement for government neutrality if it unduly burdens the free exercise of religion.”
The guarantee of free exercise cannot be absolute in the face of laws of general applicability,
but where neutral legislation substantially burdens free exercise, it triggers strict scrutiny.
An absolute guarantee would create a specially favored class, but the preferred position of
religious freedom strikes the balance between favoritism and burden by imposing more
exacting examination of the statute. Thus, free exercise can be seen, as one scholar has put
it, as a special variety of equal protection focusing on religious discrimination.14 Why did
Wisconsin’s interest in requiring the Yoder children to continue attending school in
accordance with state law not amount to a compelling interest?

WISCONSIN V. YODER
Supreme Court of the United States, 1972
406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15

BACKGROUND & FACTS Wisconsin law compels children to attend
either public or private school until they are 16 years old. Jonas Yoder and other
members of the Amish church, however, refused to send their children, ages 14 and 15,
to school beyond the eighth grade. Subsequent to a complaint filed by an administrator
of the local school district, a county court found Yoder and the other parents to be in
violation of the law and fined them $5 each. In response to the charges, the parents
asserted that the compulsory school attendance law violated their First and Fourteenth
Amendment rights, and the state stipulated to the sincerity of the defendants’ beliefs
that they risked not only censure by their community, but also the prospect of salvation
for themselves and their children by continuing to send them to school. The
Wisconsin Supreme Court reversed the convictions, and the state sought review by the
U.S. Supreme Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

***

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school and higher education generally because the values it teaches are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing, a life of "goodness," rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation, rather than integration with contemporary worldly society.

Formal high school education beyond the eighth grade is also contrary to Amish beliefs because it places Amish children in an environment hostile to Amish beliefs and takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

***

[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

***

** A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every
person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.

However, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. * * *

The unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. * * *

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long established program of informal vocational education would do little to serve those interests. * * * It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. * * *

Contrary to the suggestion of the dissenting opinion of Mr. Justice DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. * * *

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed
desires to the contrary. * * * On this record we neither reach nor decide * * * [that].

* * *

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. * * *

* * *

Affirmed.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, concurring.

* * *

[There is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents. Only one of the children testified. The last two questions and answers on her cross-examination accurately sum up her testimony:

“Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of your religion?
“A. Yes.
“Q. That is the only reason?
“A. Yes.” (Emphasis supplied.)

This record simply does not present the interesting and important issue discussed in part * * * of the dissenting opinion of Mr. Justice DOUGLAS. * * *

Mr. Justice DOUGLAS, dissenting in part.

* * *

* * * If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views. * * * As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.

Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder (Jonas Yoder’s daughter) has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder’s views may not be those of [the other children whose parents are involved here].

* * *

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an ocean geographer. To do so he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperilled in today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student’s judgment, not his parent’s, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is
hamessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

***

Justice Douglas also took exception to Chief Justice Burger’s statement in Yoder that Thoreau’s “choice was philosophical and personal rather than religious, and that such belief does not rise to the demands of the Religion Clauses,” which arguably invited the conclusion that constitutional protection extended only to the exercise of beliefs associated with organized religion. Douglas drew support for a much broader definition of religion from the Court’s rulings in the conscientious objector cases from the Vietnam War era that turned on the meaning of “religious training and belief” as used in the Selective Service Act. As Justice Clark explained for a unanimous Court in United States v. Seeger, 380 U.S. 163, 176, 85 S.Ct. 850, 859 (1965):

Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. * * *

This view was clarified and perhaps enlarged—but by less than a majority of the Justices—five years later in Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792 (1970). In that case, a plurality included within the term religion “beliefs that are purely ethical or moral in source and content,” as distinguished from self-interested or political views. Logically enough, the Court had little difficulty subsequently concluding in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828 (1971), that conscientious objection to participating in only one particular war did not qualify.

The Court’s recent decision in Employment Division, Department of Human Resources of Oregon v. Smith, which follows, appears to be a radical rewriting of free exercise law. The increasing power of nonpreferentialists on the Court has led to an abandoning of strict scrutiny and its replacement—to use Justice O’Connor’s words—by “the single categorical rule that if prohibiting the exercise of religion *** is *** merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.’ ” The decision in Smith reflected a startling shift in the jurisprudence of the Religion Clauses, and one that critics feared would significantly lessen the freedom enjoyed by smaller religious groups who lacked legislative clout. As compared with that afforded by strict scrutiny, what protection for free exercise do you think can be expected to follow from the application of the approach announced by the Court in Smith? To what extent does the holding in Smith, when considered together with the dissents in such cases as Jaffee, Aguillard, Allegheny County, and Thomas appear to favor rewriting the law of the Religion Clauses to benefit the largest and most mainline religious groups in the country? If, as the Court suggested in the penultimate paragraph of its opinion, the balancing of interests is undesirable in free exercise cases, what makes free exercise cases different from any other kind of cases the Court decides? Finally, to the extent that Justice Scalia, speaking for the Court in Smith, accepted the strict scrutiny analysis applied in Yoder only because some “other constitutional protection” was implicated, namely “the right of parents *** to direct the education of their children,” does this contradict what Justices Rehnquist and Scalia told us
elsewhere about only recognizing rights that appear in the text of the Constitution? If one
purports to believe in strictly construing the Constitution and criticizes other members of the
Court for recognizing rights that have their source outside the document, where does one find
“the right of parents * * * to direct the education of their children”?

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES
OF OREGON V. SMITH
Supreme Court of the United States, 1990
494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876

BACKGROUND & FACTS Smith and another were fired by a drug
treatment organization because they used peyote, a hallucinogenic drug, during
religious ceremonies of their Native American church. The Oregon Department of
Human Resources subsequently denied their applications for unemployment
compensation on the basis of a state law that disqualifies from such benefits employees
terminated for work-related misconduct. An intermediate state appellate court ruled
that this determination by the agency violated the Free Exercise Clause of the First
Amendment, and the Oregon Supreme Court affirmed. After granting certiorari, the
U.S. Supreme Court remanded the case for a determination as to whether state law
proscribed the sacramental use of peyote. On remand, the Oregon Supreme Court held
that the use of peyote in religious ceremonies did violate the state’s drug laws and again
concluded that such a prohibition amounted to a violation of the Free Exercise Clause,
whereupon the U.S. Supreme Court granted certiorari a second time.

Justice SCALIA delivered the opinion of
the Court.

This case requires us to decide whether
the Free Exercise Clause of the First
Amendment permits the State of Oregon
to include religiously inspired peyote use
within the reach of its general criminal
prohibition on use of that drug, and thus
permits the State to deny unemployment
benefits to persons dismissed from their jobs
because of such religiously inspired use.

* * *
* * * The free exercise of religion means,
first and foremost, the right to believe and
profess whatever religious doctrine one
desires. Thus, the First Amendment obvi-
ously excludes all “governmental regulation
of religious beliefs as such,” Sherbert v.
Verner, 374 U.S., at 402, 83 S.Ct., at 1793.
The government may not compel affirma-
tion of religious belief, see Torcaso v.
Watkins, 367 U.S. 488, 81 S.Ct. 1680
(1961), punish the expression of religious
doctrines it believes to be false, United
States v. Ballard, 322 U.S. 78, 86-88, 64
S.Ct. 882, 886-87 (1944), impose special
disabilities on the basis of religious views or
religious status, see McDaniel v. Paty, 435
U.S. 618, 98 S.Ct. 1322 (1978) or lend its
power to one or the other side in contro-
versies over religious authority or dogma, see
Presbyterian Church v. Hull Church, 393
(1969); Kedroff v. St. Nicholas Cathedral,
344 U.S. 94, 95-119, 73 S.Ct. 143, 143-
56 (1952); Serbian Eastern Orthodox Diocese
v. Milivojevich, 426 U.S. 696, 708-725, 96

But the “exercise of religion” often
involves not only belief and profession but
the performance of (or abstention from)
physical acts: assembling with others for a
worship service, participating in sacramen-
tal use of bread and wine, proselytizing,
abstaining from certain foods or certain
modes of transportation. * * * [A] state
would be “prohibiting the free exercise [of
religion]” if it sought to ban such acts or
abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, * * * contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. * * * We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. * * * As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–595, 60 S.Ct. 1010, 1012–1013 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities * * ."

We first had occasion to assert that principle in Reynolds v. United States, 98 U.S. 145, 25 L.Ed. (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." * * *

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." * * *

In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. * * * In Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v. United States, 401 U.S. 437, 461, 91 S.Ct. 828, 842 (1971), we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision * * * [along this line] was United States v. Lee, 455 U.S., at 258–261, 102 S.Ct., at 1055–1057. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge
the tax system because tax payments were spent in a manner that violates their religious belief.***

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see Cantwell v. Connecticut, 310 U.S., at 304–307, 60 S.Ct., at 903–905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573, 64 S.Ct. 717 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). ***

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. ***

*** It is not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. *** But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Because respondents’ ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed. It is so ordered.

Justice O’Connor, with whom Justice BRENAN, Justice MARSHALL, and Justice BLACKMUN join as to Part I II, concurring in the judgment.

Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause. The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable. *** But a law that prohibits certain conduct—conduct that happens to be an

*Although Justice BRENAN, Justice MARSHALL, and Justice BLACKMUN join Part I II of this opinion, they do not concur in the judgment. [Footnote by Justice O’Connor.]
act of worship for someone—manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion.* * *

To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. * * * Instead, we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

* * * The compelling interest test effectuates the First Amendment’s command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests “of the highest order.” Yoder, * * * 406 U.S., at 215, 92 S.Ct., at 1533. * * *

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. * * * A State that makes criminal an individual’s religiously motivated conduct burdens that individual’s free exercise of religion in the severest manner possible, for it “results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.” Braunfeld, * * * 366 U.S., at 605, 81 S.Ct., at 1147. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The Sherbert compelling interest test applies in both kinds of cases. * * * * * * The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. * * *

III

The Court’s holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

* * *

[T]he critical question in this case is whether exempting respondents from the State’s general criminal prohibition “will unduly interfere with fulfillment of the governmental interest.” * * * Although the question is close, I would conclude that uniform application of Oregon’s criminal prohibition is “essential to accomplish” * * * its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. * * * Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote. * * *
For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. * * *

***

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

***

* * * It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. * * *

***

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. * * *

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. * * * [Some] Schedule I drugs have lawful uses * * * [such as the medical and research uses of marijuana.]

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns. * * *

***

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. * * * Peyote simply is not a popular drug, its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. * * *

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. * * * Some religious claims * * * involve drugs such as marijuana and heroin, in which there is significant

15. A footnote elsewhere in the dissent observed: "The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See * * * E. Anderson, Peyote: The Divine Cactus 161 (1980) ("The eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, The Peyote Way, at 98 ("Many find it bitter, inducing indigestion or nausea")."
illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. * * *

For these reasons, I conclude that Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the State’s drug laws cannot justify its denial of unemployment benefits. * * *

The lenient constitutional examination accorded the statute in Smith, of course, was conditioned on its neutral, across-the-board applicability to conduct and its incidental burdening of a religious practice. However, legislation aimed at burdening a religious practice or having that as its principal effect would still trigger strict scrutiny. Such was the case in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993), which presented a challenge to the constitutionality of municipal ordinances aimed at impeding the practice of the Santeria religion. Members of the church’s congregation, mostly Cuban exiles who settled in South Florida, engaged in animal sacrifice as one of the religion’s principal forms of devotion. After the church leased land and announced plans to construct a religious center in Hialeah, the city council held an emergency session and passed several ordinances that: (1) noted the city’s concern with religious practices that appeared to be contrary to the public morals, peace, and safety and declared the city’s opposition to such practices; (2) incorporated the state’s anticruelty laws and forbade the unnecessary or cruel killing of animals (interpreted to include killings for religious reasons); and (3) prohibited the possession, sacrifice, or slaughter of animals if the animal was killed in any type of ritual, but exempted licensed food establishments and kosher slaughter. Lower federal courts had upheld the ordinance on the grounds that preventing cruelty to animals and protecting the public health amounted to compelling reasons and these objectives could not be achieved by ordinances more narrowly drawn than those imposing the absolute prohibition.

Speaking for the Court, Justice Kennedy began by observing that “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” The fact that “[t]he ordinances * * * define[d] ‘sacrifice’ in secular terms, without referring to religious practices” did not settle the matter because “[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt” and the record in this case clearly disclosed that “suppression of the Santeria worship service was the object of the ordinances * * *.” The text of the law, its real operation, and statements made at the time the city council adopted the ordinances—taken together—revealed a pattern of hostility to the religion. The purpose was not an otherwise legitimate concern for “the suffering or mistreatment visited upon the sacrificed animals” or “health hazards from improper disposal.” Justice Kennedy thought the “pattern of exemptions” from the ordinances “contribute[d] to a religious gerrymander”:

* * * Ordinance 87–71 * * * prohibits the sacrifice of animals, but defines sacrifice as “to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.” The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter * * *. The net result of the gerrymander is
that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering * * * not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Ordinance 87-52 * * * applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others * * *.

Ordinance 87-40 incorporates the Florida animal cruelty statute * * *. Its prohibition is broad on its face, punishing "[w]hoever . . . unnecessarily . . . kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. * * * Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city *** deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. * * * There is no indication * * * that * * * hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases * * * decided under * * * [the state animal cruelty statute] concludes that the use of live rabbits to train greyhounds is not unnecessary. * * * Thus, religious practice is being singled out for discriminatory treatment. * * *

The legitimate governmental interests, in protecting the public health and preventing cruelty to animals, Justice Kennedy pointed out, could have been addressed "by restrictions stopping far short of a flat prohibition on all Santeria sacrificial practice." For example, if improper disposal was the worry, Hialeah "could have imposed a general regulation on the disposal of organic garbage." The "broad ordinances" enacted "prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health." As for punishing the possession of animals for the purpose of sacrifice, "regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern" about animal welfare. Since Hialeah's ordinance, then, was "not neutral or not of general applicability," and could not otherwise survive strict scrutiny due to its overbreadth, it violated the First Amendment.

Chief Justice Rehnquist and Justice Scalia, although agreeing with the judgment of the Court, dissociated themselves from the majority opinion's examination of the city council members' motives in adopting the ordinance. Justices Blackmun, O'Connor, and Souter concurred in the judgment of the Court but disapproved any citation to, or application of, the Smith case because they continued to disagree with the doctrine announced in it.

Justice Blackmun, relying on Sherbert, thought the Hialeah case was "an easy one to decide." Although the Court has had very little difficulty deciding, for example, that religious groups are not exempt from the requirement that they collect applicable taxes on sales of their publications (Jimmy Swaggart Ministries, Inc. v. Board of Equalization of California, 493 U.S. 378, 110 S.Ct. 688 (1990)), Justice Blackmun was surely correct in suggesting that "[a] harder case would be presented if petitioners were requesting an exemption from a generally applicable * * * law that sincerely pursued the goal of protecting animals from cruel treatment."

16. Indeed, the Court has ruled that exempting published periodicals that advocate a religious faith from payment of generally applicable sales tax violates the Establishment Clause (by burdening nonbeneficiaries and providing a subsidy to religion) unless the exemption is to remove a significant state-imposed deterrent to the free exercise of religious belief. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S.Ct. 890 (1989).
The Supreme Court’s decision in the Smith case, however, was questioned by more than just some members of the Court. In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, to overturn the substance of the Supreme Court’s ruling and restore the compelling interest test, as previously set forth in the Sherbert and Yoder decisions. The standard adopted by the Court in Smith had been criticized as discriminating in favor of the country’s mainline religious groups and against smaller, more peripheral groups. In § 2 of the Act, Congress determined that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; * * * governments should not substantially burden religious exercise without compelling justification; * * * in Employment Division v. Smith * * * the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and * * * the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” On the basis of these findings, § 3 of the Act provided that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability * * [unless] it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Section 6(a) of the Act stated that the Act “applie[d] to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.” The Act also made clear that the legislation was not to be construed as affecting interpretation of the Establishment Clause. Congress based the statute on its legislative power under § 5 of the Fourteenth Amendment to enforce the amendment’s guarantee of “liberty” contained in the Due Process Clause.

In City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997), a divided Court declared the statute unconstitutional, at least with respect to action by the states. Citing previous rulings, the majority concluded that the amendment-enforcing power did not authorize Congress to pass general legislation but corrective legislation, that is laws which are necessary and proper to counteract statutes passed by the states that the amendment prohibits them from adopting. Speaking for the six-Justice majority, Justice Kennedy observed:

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Marbury v. Madison, 5 U.S. (1 Cranch), at 177, 2 L.Ed., at 73. Under this approach, it is difficult to conceive of a principle that would limit congressional power. * * * Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. (Discussion of Congress’s amendment-enforcing power can be found in Chapter 3. For a fuller presentation of City of Boerne v. Flores, see p. 117.)

Although the RFRA, mandating strict scrutiny in free exercise cases, is inapplicable to the states, it does limit the intrusion of federal programs, regulations, and laws on the free exercise of religious belief. Congress’s authority over federal policies doesn’t rest on any amendment-enforcing power but on its legislative power under Article I. Just as surely as Congress can enact a criminal law or a program to tax and spend, so it can recognize limitations on the reach of its legislative authority. In Gonzales v. Centro Espirita
Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S.Ct. 1211 (2006), the Court sustained an RFRA-based challenge to federal drug laws mounted by adherents of a religious sect that used a hallucinogenic tea in its rite of religious communion. An ingredient in the tea was listed as a controlled substance regulated by federal law. The 130-member group sought an injunction against the Attorney General to block the federal government’s seizure (and ban on the importation) of the tea.
CHAPTER 14

EQUAL PROTECTION OF THE LAWS

When a legislative body enacts public policy, it inescapably creates legal categories. Its judgment about who is entitled to receive what service, who is to be accorded what treatment, or who is to be taxed at what rate singles out this or that group for some kind of attention. As such, legal categories necessarily discriminate. The interesting question that we turn to when we consider the Fourteenth Amendment’s guarantee to all citizens of equal protection of the laws is what are and are not permissible bases for the creation of legal categories.

We say that categories that are constructed along impermissible lines “invidiously discriminate.” The Fourteenth Amendment was passed to eradicate such invidious discrimination, yet the term is far from self-defining. Certainly, the Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth—intended to identify race as an impermissible basis for the construction of legal categories. But does this include categories in law that operate to the advantage of African-Americans rather than to their detriment? Does discrimination on the basis of race also include discrimination on the basis of ethnicity? Prejudicial distinctions often characterize the treatment of individuals on the basis of other characteristics that are theirs by happenstance, such as alienage, gender, indigency, illegitimacy, and age. Are these factors constitutionally invidious as well? And if some are, are all legal distinctions drawn along such lines prohibited? If not, what circumstances permit them?

Before the Supreme Court embraced strict scrutiny as a principal mode of constitutional interpretation, questions of this sort would have been largely academic. Even racial discrimination, the traditional prototype of invidious discrimination, was regarded as constitutional in many contexts. With the rise of strict scrutiny after the 1950s, the answers to these questions became relevant, varied, and rather complex. Just as the Court’s interest in strict scrutiny resulted in a larger number of rights being denominated “fundamental,” so it expanded the sorts of classifications in law that were considered “suspect.” The justification for strict scrutiny is described in Chapter 2 and in the essay, “The Modes of Constitutional Interpretation,” which appears at the end of the second paperback volume. This chapter presents an overview of the Supreme Court’s treatment of suspect classifications. Naturally, it begins with discrimination on the basis of race.
A. RACIAL DISCRIMINATION

The Doctrine of “Separate but Equal”

In at least two instances following the adoption of the Fourteenth Amendment in 1868, the Supreme Court clearly acknowledged the purpose of the amendment as abolishing racial discrimination. One of these was the decision in the Slaughterhouse Cases (p. 473). The other was the Court’s opinion in Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1879). In that case, Strauder, a black man, sought to have his murder trial removed to a federal court, since West Virginia law did not permit African-Americans to be eligible for service on petit juries. The Supreme Court sustained Strauder’s request and, through Justice Strong, said:

The words of the amendment * * * contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal distinctions, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. * * *

The very fact that colored people are singled out and expressly denied by statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others.

Thus, when the Court came to decide Plessy v. Ferguson in 1896, the Court could hardly be said to be writing on a clean slate. As you read Plessy, then, you will want to determine on what basis the Court could possibly uphold Plessy’s conviction under a Louisiana statute denying nonwhites access to certain train cars reserved for whites without overruling Strauder.

**PLESSY v. FERGUSON**

Supreme Court of the United States, 1896
163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256

**BACKGROUND & FACTS** Because the rise of Populism resulted in a severe political split between more well-to-do whites and poorer whites, African-Americans were in a position to hold the balance of power in the South during the last quarter of the nineteenth century. Although racism was an enduring feature of Southern society, the specter of blacks as key political players fueled policies by the white power structure to disenfranchise them and to drive a greater social wedge between them and the poor whites with whom they economically had much in common. Several of the mechanisms used to prevent African-Americans from voting are detailed in South Carolina v. Katzenbach (p. 1217). Policies enforcing racial segregation aimed at increasing and maintaining a social wedge between poor whites and blacks to prevent any alliance. It was in this context that the Louisiana legislature in 1890 enacted a statute requiring railroad companies to provide equal, but separate, accommodations for whites and blacks. The law made it a criminal offense for anyone to insist on occupying a seat reserved for passengers of another race.

Plessy, who was seven-eighths white and one-eighth African-American, refused to relinquish a seat assigned to a white passenger. During the course of his trial, Plessy petitioned the state supreme court to enjoin the trial judge, John Ferguson, from continuing the proceedings against him. The court rejected his petition, whereupon Plessy brought the case to the U.S. Supreme Court on a writ of error.
Plessy argued that the 1890 law violated the guarantees of the Thirteenth and Fourteenth Amendments.

Mr. Justice BROWN * * * delivered the opinion of the court.

***

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. * * *

***

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 re-establish a state of involuntary servitude. * * *

***

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 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 have 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.

One of the earliest of these cases is that of Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this court.

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. 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.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is therefore affirmed.

Mr. Justice BREWER did not hear the argument or participate in the decision of this case.

Mr. Justice HARLAN dissenting.

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.
The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country was declared by the fifteenth amendment.

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.

In view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Fifty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.
Plessy and its doctrine of “separate but equal” facilities for blacks is significant, however, for reasons other than mere inconsistency with clear precedents. It is most important because it provided the legalistic smoke screen behind which an exploitive society operated for the next six decades; while things were separate, they were rarely, if ever, equal. The Court, if not responsible in fact for the oppression and further economic and social decline of African-Americans after 1896, was at least a willing rationalizer.

What is interesting from the standpoint of constitutional interpretation is the way in which the Court rationalized the acceptability of this new policy and, indeed, how the sociological method of the Court’s justification repeated itself in succeeding decades until in the end it brought down the “separate but equal” standard itself. In short, the materials on racial discrimination not only ask us to consider the constitutionality of color as a categorizing device, but also invite us to examine the role of sociology in judicial decisions.

When the Court handed down its decision in Brown v. Board of Education (Brown I) in 1954, critics of the decision assailed the Court for letting its ruling be guided by social science hypotheses instead of legal reasoning. Indeed, some writers have suggested that Brown I in overruling Plessy failed to state any principle at all, but rested merely on sociological citations. You will want to reach your own conclusion on this issue. Nevertheless, it is interesting to note—especially in light of all the flak that the Court took for citing those social science studies—that the Court in Plessy can be seen as equally influenced by the sociological beliefs of its age. Indeed, you may want to consider the prospect that the only difference in justification offered for the social policies that the Court announced at those different times was that the Plessy Court was imbued with the sociological theories of its time—that racial antagonisms were rooted in immutable human instincts and could not be legislated away—while the Brown Court tended to accept the prevalent twentieth-century sociological view that racial prejudice is caused by environmental factors. Given these premises, weren’t both Courts, then, practitioners of “social engineering”?

The relevance of sociology to judicial justification is also underscored in a series of post-Plessy cases, which ultimately ended in undermining the “separate but equal” standard. As time went by, it was no accident that attention came to be focused on the constitutionality of segregation in education, since the socializing function of the schools was the linchpin of racial oppression in society. It groomed the white students for leadership and the black students to “stay in their place.” Though the Court never questioned the Plessy standard, it came repeatedly to ask how equal separate facilities were. Increasingly, the Court was driven to scrutinize the material equality of disparate facilities until it finally acknowledged in Sweatt v. Painter, a case involving professional education, that preparation for an occupation depended not merely on equal facilities, but also on those priceless intangibles such as experiences that were open only to white students—experiences that could only be gained through interaction with, not isolation from, others. Education that denied the opportunity for such interaction could not be equal, no matter how good the material indices.

**Sweatt v. Painter**

Supreme Court of the United States, 1950

339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114

**Background & Facts**

Homan Sweatt was denied admission to the University of Texas Law School because he was an African-American. He brought suit against Theophilis Painter and other school officials to compel the university to admit him. The trial court denied the relief sought after extending the case six months to allow Texas time to provide a law school for African-American students. Sweatt refused to
Mr. Chief Justice VINSON delivered the opinion of the Court.

* * *

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

* * *
We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion. Reversed.

The alternative justification of resting exclusively upon principle is epitomized in Justice Harlan’s dissenting opinion in Plessy. Writing foursquare in the tradition of Strauder, Harlan suggested the Court take judicial notice of what was common knowledge—that the purpose of this discrimination was the oppression of African-Americans and was thus counter to the intent of the Fourteenth Amendment. Said Justice Harlan, the Louisiana statute must fall because “[o]ur Constitution is color blind, and neither knows nor tolerates classes among citizens.” Moreover, Harlan was an acute social observer. Note how he characterizes the majority’s justification for separate facilities as something which today we call a “self-fulfilling prophecy,” and consider, too, the accuracy of his observation that the “equal” in “separate but equal” was going to turn out to be little more than eyewash.

The Brown Decision

The Court, in Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944), one of its decisions upholding the internment of Japanese Americans during World War II, declared “that all restrictions which curtail the civil rights of a single racial group are immediately suspect” and “courts must subject them to the most rigid scrutiny.” It was not until Brown v. Board of Education (p. 1135), ten years later, however, that the Court struck down state-imposed racial segregation in public education. But the Court’s conclusion in Brown, that the “separate but equal” treatment of the races in public schools was unconstitutional because it generated feelings of inferiority in black schoolchildren, caused problems. Enterprising segregationists, like those in Stell v. Savannah-Chatham County Board of Education (p. 1138), presented empirical evidence to show that, if generating feelings of inferiority was the problem, integration rather than segregation was much more apt to lead to that result. According to the federal appeals court, what was wrong with the segregationist argument accepted by the district court in Stell? As articulated by the appeals court, the reason for rejecting segregation is the same principle declared by Justice Harlan dissenting in Plessy. Why did the Court not adopt Harlan’s principle as the basis for its decision in Brown? Although there is substantial evidence that the framers of the Fourteenth Amendment did not intend to abolish segregated schools1 and thus the Court declined to “turn the clock back to 1868 when the Amendment was adopted,” by itself this did not require the Court to become enmeshed in discussing the psychological effects of separate treatment. Evidence of the Court’s decision-making in the Brown case suggests that the Harlan position was rejected because it would have entailed comparing the purpose of segregation with the purpose of the Fourteenth Amendment, and this could not be done without accusatory overtones. In order to attract the votes necessary for a unanimous opinion, which required avoiding such overtones,” and in the hope that a more Lincoln-like posture of “malice toward none” might

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1. Alexander Bickel, “The Original Understanding and the Segregation Decision,” in Politics and the Warren Court (1965), pp. 211–261. For advocates of original intent, the evidence mustered by Bickel creates a troublesome problem—as Judge Robert Bork discovered in the hearings on his ill-fated Supreme Court nomination: whether to stick by the intent of the amendment’s framers and conclude that Brown was wrongly decided or accept the school desegregation decision and contrive some explanation as to why the intent of the amendment’s framers is to be disregarded.

2. See Richard Kluger, Simple Justice (1976), ch. 25.
facilitate the South’s compliance, Chief Justice Warren opted for a neutral and detached discussion of segregation’s effects, yet such effects could not be discussed without reference to some behavioral evidence.

**Brown v. Board of Education of Topeka I**

Supreme Court of the United States, 1954

347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873

**BACKGROUND & FACTS**

The facts are set out in the opinion below.

Mr. Chief Justice WARREN delivered the opinion of the Court.

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 have 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, 163 U.S. 537, 16 S.Ct. 1138 (1896). 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 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, * * * [339 U.S. 629, 70 S.Ct. 850 (1950)], 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, * * * [339 U.S. 637, 70 S.Ct. 853 (1950)], 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 racially 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 language in 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.


4. See Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, concerning the Due Process Clause of the Fifth Amendment. [Footnote by the Court.]

5. “(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

“(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

“5 On the assumption on which question 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

“(a) should this Court formulate detailed decrees in these cases;

“(b) if so, what specific issues should the decrees reach;

“(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

“(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?” [Footnote by the Court.]
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. It is so ordered. Cases ordered restored to docket for further argument on question of appropriate decrees.

**NOTE**—*Stell v. Savannah-Chatham County Board of Education*

The perils of resting the *Brown* decision on the causal connection between racial segregation and feelings of inferiority in African-American schoolchildren soon became evident. When black plaintiffs sued to dismantle racial segregation in the public school system of Savannah, Georgia, the school board responded with empirical evidence purporting to show that, if instilling feelings of inferiority in black children was what made racial segregation unconstitutional, comparative evidence of scholastic aptitude and performance between black children and white children showed it was much more likely that integration, rather than segregation, would engender such feelings. The school board’s arguments were eagerly accepted by a sympathetic federal district judge in *Stell v. Savannah-Chatham County Board of Education*, 220 F.Supp. 667 (S.D.Ga. 1963), who brushed aside the plaintiffs’ effort to dismantle the existing dual system.

Judge Scarlett began by rejecting any contention that the disparity in performance between black and white students was attributable to greater resources available to whites, declaring that the schools “were equal in all respects except as to a slight advantage in favor of the Negro teaching staff in terms of graduate training and salaries.” He then turned to the evidence of student aptitude and performance. Beginning in 1954, the school district administered tests “covering general intelligence, reading and arithmetic achievement, and mental maturity.” The judge found that “[t]he psychometric-test results * * * conclusively demonstrated that the differences between white and Negro students in learning abilities and school performance varied in increasing degree from the preschool period to the completion of high school.” The differences between the two racial groups “were consistent on all types of tests and increased with chronological age at a predictable and constant rate.” Judge Scarlett observed that “[t]he Negro overlap of the median white scores dropped from approximately 15 percent in the lowest grades to 2 per cent in the highest, and indicated that the Negro group reached an educational plateau approximately four years before the white group. When a special control group was selected for identity of age and intelligence quotient in the lower grades, the Negro students lagged by two to four years when the entire group reached the twelfth grade.”

The court concluded that “[t]hese differences in test results * * * were not the result of the educational system or of the social or economic differences in status or in environment of the students” both because similar results were reported in other parts of the county and because the disparity in test results remained “even after the socio-economic factors of the test students had[d] been equated.” Thus, the Court attributed the difference in test results between black and white students “to hereditary factors, predictably resulting from a difference in the physiological and psychological characteristics of the two races.” Of “the 20-point difference in maturity-test results between Negro and white students in Savannah-Chatham County,” the court concluded that only “a negligible portion can be attributed to environmental factors.” According to Judge Scarlett, there was “no evidence whatsoever * * * to show that racial integration of the schools could reduce these differences.” Such differences were therefore “inherent in the individuals” and “an unchangeable fact.”

In light of this empirical evidence, the court concluded that “[f]ailure to attain the existing white standards would create serious psychological problems of frustration on the part of the Negro child” and would lead to “tension-creating anti-social behavior.” Thus, integration, instead of removing
feelings of inferiority, would in fact generate them. “The congregation of two substantial and identifiable student groups in a single classroom under circumstances of distinct group identification and varying abilities,” said the court, “would lead to conflict impairing the educational process.” In addition to rejecting “[t]otal group integration” because it “would seriously injure both white and Negro students * * * and adversely affect the educational standards and accomplishments of the public-school system,” the district judge also discounted “selective integration” of “certain superior Negro children” on the grounds that they “would not only lose their right of achievement in their own group but would move to a class where they would be inescapably conscious of social rejection by the dominant group.” Under such circumstances, said the court, “the children involved, while able to maintain the rate of the white class at first, would according to all of the test results, thereafter tend to fall farther back each succeeding term.” Thus, “selective integration would cause substantial and irremovable psychological injury both to the individual transferee and to other Negro children.” In light of all this and of the “damaging loss of race identification” among blacks that would occur due to integration, the district court concluded that “[t]he classification of children in the Savannah-Chatham County schools by division on the basis of coherent groups [i.e., race] having distinguishable educability capabilities is * * * a reasonable classification.”

On appeal, this decision was unanimously reversed by the U.S. court of appeals, 333 F.2d 55 (5th Cir. 1964). In addressing the question “whether a state is forbidden by the equal protection clause of the Fourteenth Amendment from reasonably classifying its children in schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic * * * with the result that the schools continue separate as to race,” the appeals court began by declaring that “the District Court was bound by the decision * * * in Brown” because “no inferior federal court may refrain from acting as required by that decision even if such a court should conclude that the Supreme Court erred as to its facts or as to the law.” Speaking for the court, Judge Griffin Bell said:

“The Savannah case ended then [with Brown I and II] and there it must end now. We do not read the major premise of the decision of the Supreme Court in the first Brown case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal. This being our interpretation of the teaching of that decision, it follows that it would be entirely inappropriate for it to be rejected or obviated by this court. * * *

In this connection, it goes without saying that there is no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes upon a uniformly administered program, but race must not be a factor in making the assignments. However, this is a question for educators and not courts.

The real fallacy, Constitutionwise, of the classification theory is that many of the Negro pupils overlap many of the white pupils in achievement and aptitude but are nevertheless to be segregated on the basis of race. They are to be separated, regardless of how great their ability as individuals, into schools with members of their own race because of the differences in test averages as between the races. Therein is the discrimination. The individual Negro student is not to be treated as an individual and allowed to proceed along with other individuals on the basis of ability alone without regard to race.

The Supreme Court subsequently denied certiorari, 379 U.S. 933, 85 S.Ct. 332 (1964).”

Since the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the Court had to deal with segregation in the District of Columbia public schools separately. In Bolling v. Sharpe, decided at the same time as Brown I, the Court, reiterating the principles articulated in Korematsu, found the practice violative of the Due Process Clause of the Fifth Amendment. How convincingly do you think the Court established the principle that a denial of equal protection might also result in a denial of due process? The answer to this question is significant, since the Court in later years would use this same line
of argument to fasten standards of equal protection on national legislation, even though, as we have said, the Fourteenth Amendment does not apply to the national government.

NOTE—BOLLING V. SHARPE

A companion case to Brown, Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954), raised a constitutional challenge to racial segregation in the public schools of the District of Columbia. The Court was confronted with a dilemma: The Equal Protection Clause is directed at the states, not the federal government, yet to strike down racial segregation everywhere else in the country, but to let it persist in the nation’s capital would be—to use the Court’s language—“unthinkable.” A unanimous Court held that racial segregation in the public schools of Washington, D.C., violated the Due Process Clause of the Fifth Amendment. Again speaking for the Court, Chief Justice Warren reasoned:

[The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. * * *

Although the Court has not assumed to define “liberty” with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

Aside from the justification it offered for its ruling in Brown, the Court ran into serious problems of compliance. Following its 1954 decision on the merits of the controversy, the Court set the case for reargument the following Term as to the remedy. As a consequence, the Court ordered in Brown II that desegregation proceed with “all deliberate speed.” Since one of the prerequisites of compliance is a clear understanding of what is commanded, how well do you think the Court informed local school boards, lower federal judges, and state officials what would constitute compliance with the decision? In other words, when would people know they were fully obeying the Court’s order? Would the standard have been clearer had the Court commanded integration rather than desegregation?

BROWN V. BOARD OF EDUCATION OF TOPEKA II

Supreme Court of the United States, 1955
349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083

BACKGROUND & FACTS The facts are set out in the opinion below.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state,
or local law requiring or permitting such
discrimination must yield to this principle.
There remains for consideration the manner
in which relief is to be accorded.

Full implementation * * * may require
solution of varied local school problems.
School authorities have the primary respon-
sibility for elucidating, assessing, and solving
these problems; courts will have to consider
whether the action of school authorities
constitutes good faith implementation of
the governing constitutional principles.
Because of their proximity to local condi-
tions and the possible need for further
hearings, the courts which originally heard
these cases can best perform this judicial
appraisal. Accordingly, we believe it appro-
priate to remand the cases to those courts.

In fashioning and effectuating the de-
crees, the courts will be guided by equitable
principles. Traditionally, equity has been
characterized by a practical flexibility in
shaping its remedies and by a facility for
adjusting and reconciling public and private
needs. These cases call for the exercise of
these traditional attributes of equity power.
At stake is the personal interest of the plain-
tiffs in admission to public schools as soon as
practicable on a nondiscriminatory basis. To
effectuate this interest may call for elimina-
tion of a variety of obstacles in making the
transition to school systems operated in
accordance with the constitutional princi-
ples set forth in our [previous] decision.
Courts of equity may properly take into
account the public interest in the elimina-
tion of such obstacles in a systematic and
effective manner. But it should go without
saying that the vitality of these constitu-
tional principles cannot be allowed to yield
simply because of disagreement with them.

While giving weight to these public and
private considerations, the courts will re-
quire that the defendants make a prompt and
reasonable start toward full compliance with
our [previous] ruling. Once such a start has
been made, the courts may find that
additional time is necessary to carry out the
ruling in an effective manner. The burden
rests upon the defendants to establish that
such time is necessary in the public interest
and is consistent with good faith compliance
at the earliest practicable date. To that end,
the courts may consider problems related to
administration, arising from the physical
condition of the school plant, the school
transportation system, personnel, revision of
school districts and attendance areas into
compact units to achieve a system of
determining admission to the public schools
on a nonracial basis, and revision of local
laws and regulations which may be necessary
in solving the foregoing problems. They will
also consider the adequacy of any plans the
defendants may propose to meet these
problems and to effectuate a transition to a
racially nondiscriminatory school system.
During this period of transition, the courts
will retain jurisdiction of these cases.

The judgments below, except that in the
Delaware case, are accordingly reversed and
the cases are remanded to the District Courts
to take such proceedings and enter such
orders and decrees consistent with this
opinion as are necessary and proper to admit
to public schools on a racially nondiscrimi-
natory basis with all deliberate speed the
parties to these cases. The judgment in the
Delaware case—ordering the immediate
admission of the plaintiffs to schools previ-
ously attended only by white children—is
affirmed on the basis of the principles
stated in our [previous] opinion, but the
case is remanded to the Supreme Court of
Delaware for such further proceedings as that
Court may deem necessary in light of this
opinion.

It is so ordered.

* * *

Some critics—including Justice Black in a now-historic television interview that he gave
in December 1968—suggested that including the reservation of "with all deliberate speed"
Looking back at it now, it seems to me that it’s delayed the process of outlawing segregation. It seems to me, probably, with all due deference to the opinion and my brethren, all of them, that it would have been better—maybe—I don’t say positively—not to have that sentence. To treat that case as an ordinary lawsuit and force that judgment on the counties it affected that minute. That’s true, that it would have only been one school and each case would have been only one case. But that fitted into my ideas of the Court not making policies for the nation. Did the Court encourage disobedience to its order by this and other things it said in Brown II? We need not document here the disappointment, delay, and frustration that set in following the 1955 implementation decision and that continued until the Court announced 14 years later in Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29 (1969), that, "[A]llowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. * * * [E]very school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." Through it all the Court remained unanimously committed to the goal of dismantling segregated schools, emphasizing its commitment on one occasion, in Cooper v. Aaron in 1958, with an opinion unprecedented for its authorship by all nine Justices. Compliance, however, was dependent upon the continued and aggressive support of others: Presidents like Kennedy and Johnson, ready and willing to send in federal marshals or troops to force compliance; an active Attorney General like Robert Kennedy, persistently filing suits against segregated districts; a federal agency like HEW, willing to cut off federal school aid to noncomplying areas; ever-present interest groups such as the NAACP, which provided financial help, lawyers, and research support to black plaintiffs bringing suit to challenge segregated facilities; and a lower federal judiciary whose members had to withstand enormous community pressures.

**Cooper v. Aaron**

Supreme Court of the United States, 1958

358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5

**BACKGROUND & FACTS** In February 1958, William Cooper, along with other members of the Little Rock School Board and the superintendent of schools, filed a petition in federal district court for a two-and-one-half-year postponement of their program for school desegregation. They argued that public hostility to desegregation was so intense that Central High School could no longer offer a sound educational program. To end the disruption they proposed that John Aaron and other African-American students who had enrolled in the school in September 1957 under the plan be transferred to segregated schools. The controversy in this case arose out of attempts by the governor of Arkansas and the state legislature to frustrate the implementation of the board’s court-approved desegregation program.

In an effort to comply with the Supreme Court’s decisions in Brown v. Board of Education, school officials had devised a plan in 1955 that called for complete desegregation of the school system by 1963. The first stage of the plan scheduled the admission of nine African-American students to Central High School on September 3, 1957. There were several indications that the plan would succeed. From discussions with citizen groups, the school board was able to conclude that the large majority of citizens thought that desegregation was in the best interests of the students. The
mayor believed that the police force was adequate to deal with any incidents, and up until two days prior to the opening of school, there had been no crowds gathering or threats of violence. State government officials, however, had already adopted measures designed to maintain segregated schools in the state. In 1956, an amendment was added to the Arkansas Constitution that required the General Assembly to oppose "in every constitutional manner" the Supreme Court decisions in the two Brown cases. In February 1957, the legislature passed laws making attendance at racially mixed schools voluntary and establishing a State Sovereignty Commission. And finally, on September 2, 1957, Governor Orval Faubus sent Arkansas National Guard units to Little Rock to prevent the nine students from attending the high school. This unsolicited action, which considerably escalated the opposition of the city's residents to the plan, prompted the board to request that African-American students not attend Central High School and to petition the federal district court for instructions. Although the district court ordered school officials to proceed with the desegregation program, the National Guard continued to prevent African-American students from attending the school. An investigation was ordered, hearings were held, and on September 20, the district court enjoined the governor and the National Guard from interfering with the plan. On September 23, African-American students attended the high school under police protection, but were withdrawn later that day when it became too difficult for the police to control crowds that gathered around the school. Two days later, the students were once again admitted, this time under the protection of federal troops sent to Little Rock by President Dwight Eisenhower to enforce the order of the federal district court.

It was because of these events and the general disruption of education in the school, which the board attributed to the actions of the governor and the General Assembly, that Cooper and the others petitioned the district court for the postponement. The district court ruled favorably on the petition and was reversed on appeal by the U.S. Court of Appeals for the Eighth Circuit, whereupon Cooper and the other school board members appealed.

Opinion of the Court by THE CHIEF JUSTICE [WARREN], Mr. Justice BLACK, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS, Mr. Justice BURTON, Mr. Justice CLARK, Mr. Justice HARLAN, Mr. Justice BRENNAN, and Mr. Justice WHITTAKER.

This case * * * raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954). That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in Brown v. Board of Education have been further challenged and tested in the courts. We reject these contentions.

We * * * accept[t] * * * [that] the School Board, the Superintendent of Schools, and their counsel * * * [have]
displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise accept the findings of the District Court as to the conditions at Central High School during the 1957–1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

[Nonetheless] the conditions are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court’s decision in the Brown case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: “The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.”

[Regardless] of the frustrating conditions which have confronted them, members of the school board, like the governor and the legislators, stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no “State” shall deny to any person within its jurisdiction the equal protection of the laws. “A State acts by its legislative, its executive, or its judicial, authorities. It can act in no other way, the constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.”

Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action; or whatever the guise in which it is taken. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted “ingeniously or ingenuously.”

[Although] what has been said is enough to dispose of the case[,] we should nonetheless answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the “supreme Law of the Land.” In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of Marbury v. Madison that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the
Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3 "to support this Constitution." * * *

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. * * *

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. * * * The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. * * * The basic decision in Brown was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.


The Scope and Duration of Desegregation

One of the most serious problems remaining was the question of how far the 1954–55 rulings should be carried. As the decisions in Swann v. Charlotte-Mecklenburg Board of Education (below) and Milliken v. Bradley (p. 1151) demonstrate, the Court reads the Equal Protection Clause to proscribe only de jure and not de facto segregation. De jure discrimination is state-imposed, while de facto separation of the races occurs because of the actions of private individuals, as in patterns of neighborhoods that result from the operation of the housing market. Proof of "intent to discriminate" is critical to establishing the occurrence of de jure segregation, for only intentional discrimination by the state on the basis of race violates the Fourteenth Amendment. An appreciation of this is critical to understanding the limits the Court has placed on remedies that can be legally fashioned by the federal courts. As the Court allows in Swann, it may be necessary for a district court to require busing in the achievement of racial balance among schools afflicted with de jure segregation so as to effectively dismantle a dual educational system.
BACKGROUND & FACTS

Under a desegregation plan approved by a federal district court in 1965 for the Charlotte-Mecklenburg school system in North Carolina, nearly 60% of the black students attended schools that were at least 99% African-American (approximately 71% of the students in the entire school system were white). James Swann and others initiated proceedings in federal district court, seeking further desegregation of the school system. The school board and a court-appointed expert, Dr. John Finger, each submitted a desegregation plan for approval. The district court accepted a modified version of the board's plan for the assignment of faculty and for the redrawing of attendance zone lines that assigned students to the various high schools and junior high schools, but the court accepted Finger's plan for the further desegregation of the system's elementary schools. The principal difference between the board plan and the Finger plan concerning the elementary schools was that Finger's approach required the busing of several hundred students in addition to redrawing attendance zone lines. The board objected to the imposition of busing and appealed the order. On appeal, a federal appellate court affirmed the district court's order with regard to the assignment of teachers and high school and junior high school students, but vacated that portion of the district court order dealing with the further desegregation of the elementary schools on the ground that it unreasonably burdened both the school system and the students. After further court proceedings and the consideration of additional desegregation plans on remand, the district court ordered the Finger plan to be put into effect, and both parties subsequently petitioned the Supreme Court for certiorari.

Mr. Chief Justice BURGER delivered the opinion of the Court.

* * *

These cases present us with the problem of defining in more precise terms than [before] the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once. * * *

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. * * *

By * * * 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. * * *

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. * * *

If school authorities fail in their affirmatory obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

* * *

The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000c et seq. The language and the history of Title IV
show that it was enacted not to limit but to define the role of the Federal Government in the implementation of the Brown I decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange “training institutes” for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate federal desegregation suits. Section 2000c(b) defines “desegregation” as it is used in Title IV:

“Desegregation” means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but “desegregation” shall not mean the assignment of students to public schools in order to overcome racial imbalance.”

Section 2000c-6, authorizing the Attorney General to institute federal suits, contains the following proviso:

“Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.”

[These] sections * * * only * * * insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. * * * There is no * * * intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called “de facto segregation,” where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act that provides us material assistance in answering the question of remedy for state-imposed segregation in violation of Brown I. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process. * * * Independent of student assignment where it is possible to identify a “white school” or a “Negro school” simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion Davis case, 402 U.S. 33, 91 S.Ct. 1289 (1971), the Mobile school board has argued that the Constitution requires that teachers be assigned on a “color blind” basis. It also argues that the Constitution prohibits district courts from
using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

***

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. ***

Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since Brown, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of “neighborhood zoning.” Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with “neighborhood zoning,” further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. ***

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) RACIAL BALANCES OR RACIAL QUOTAS.

***

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. ***

[T]he use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary
powers, as an equitable remedy for the particular circumstances. * * * [A] school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) [ELIMINATION OF]
ONE-RACE SCHOOLS.

**

The existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move. * * * The court orders in this and the companion Davis case now provide such an option.

(3) REMEDIAL ALTERING
OF ATTENDANCE ZONES.

**

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that
no rigid rules can be laid down to govern all situations.

(4) **TRANSPORTATION OF STUDENTS.**

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation’s public school children, approximately 39% were transported to their schools by bus in 1969–1970 in all parts of the country.

The District Court’s conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record. Thus the remedial techniques used in the District Court’s order were within that court’s power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take “not over 35 minutes at the most.” This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 13 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. * * *

* * * On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. * * *

At some point, these school authorities and others like them should have achieved full compliance with this Court’s decision in Brown I. The systems would then be “unitary” * * *

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. * * *

Judgment of Court of Appeals affirmed in part; order of District Court affirmed.
In a companion case decided the same day as Swann, the Supreme Court addressed the constitutionality of North Carolina’s Anti-Busing Law, which forbade the assignment of any student on the basis of race for the purpose of achieving racial balance in schools and prohibited any busing of pupils for the same purpose. In North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284 (1971), the Court held the statute unconstitutional because it interfered with the achievement of school desegregation. Some student assignments and busing for the purpose of imposing racial balance might well be necessary as a first step in dismantling a system of de jure segregation. While the eradication of de facto segregation was beyond the holding in Brown v. Board of Education, quotas in the assignment of students and busing them might well be the starting point of dismantling a dual system and replacing it with a unitary one. Writing for a unanimous Court, Chief Justice Burger said: “Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also race must be considered in formulating a remedy. * * * [T]he flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in Swann, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command * * * that all reasonable methods be available to formulate an effective remedy.” In short, “[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees.”

As the Court decrees in the Milliken case, which follows, it is never permissible for a district court to impose such a remedy on governmental units that have not themselves intentionally discriminated. However, as the dissenters in Milliken emphatically point out, a remedy so limited—in that case, one restricted to redrawing attendance zones and busing within the Detroit city limits—will become less and less meaningful, since urban areas have become increasingly populated by minorities, encircled by largely all-white suburbs. The continuing impact of residential segregation—long after a de jure segregated system has ceased to exist—is likewise apparent in Freeman v. Pitts (p. 1157). There the Court took up the question of just when federal court jurisdiction over a once-de jure segregated school system should end.

**Milliken v. Bradley**

Supreme Court of the United States, 1974
418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069

**Background & Facts** Ronald Bradley, other African-American students, and the Detroit branch of the NAACP brought a class action against Governor William Milliken, the state board of education, other state officials, and the city school board and superintendent, alleging racial segregation in the past and present operation of the Detroit public school system, particularly in the drawing of school district and attendance zone boundaries. This challenge was upheld by a federal district court, which, finding violations of constitutional rights by both city and state officials, ordered the Detroit school board to formulate desegregation plans for the city school system and ordered state officials to devise arrangements for a nondiscriminatory, unitary system of education for the three-county metropolitan area. The district court then permitted some 85 surrounding school districts, not original parties to the litigation and not themselves found to have engaged in
constitutional violations, to appear and present arguments relevant to the formulation of a regional plan for racial balance in the schools, but foreclosed any further argument on the merits. Acting on the premise that “school district lines are simply matters of political convenience and may not be used to deny constitutional rights,” the district court ultimately appointed a panel to devise a regional plan including the Detroit system and 53 of the 85 suburban districts. The court also ordered the city school board to acquire an additional 295 school buses for the purpose of transporting students to and from outlying districts. The U.S. Court of Appeals affirmed the substance of the district court’s ruling, but remanded the case for more extensive participation by the affected suburban districts and tentatively rescinded the order to the Detroit board concerning immediate acquisition of the additional buses. The governor and other state officials sought certiorari from the U.S. Supreme Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. The metropolitan area was then defined as Detroit plus 53 of the outlying school districts. * * *

* * *

The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. * * *

With no showing of significant violation by the 53 outlying school districts and no evidence of any inter-district violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court.

* * *

[The remedy * * * [must] designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on
this record the remedy must be limited to that system.

The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for White students residing in the Detroit district to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.

* * * Accepting, arguendo, the correctness of * * * [the lower court’s] finding of State responsibility for the segregated conditions within the city of Detroit, it does not follow that an interdistrict remedy is constitutionally justified or required. With a single exception, * * * there has been no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect. The boundaries of the Detroit School District, which are coterminous with the boundaries of the city of Detroit, were established over a century ago by neutral legislation when the city was incorporated; there is no evidence in the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining or perpetuating segregation of races. There is no claim and there is no evidence hinting that petitioners and their predecessors, or the 40-odd other school districts in the tri-county area—but outside the District Court’s “desegregation area”—have ever maintained or operated anything but unitary school systems. Unitary school systems have been required for more than a century by the Michigan Constitution as implemented by state law. Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district’s schools with those of the surrounding districts.

* * *

We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts affected the discrimination found to exist in the schools of Detroit. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.

Reversed and remanded.

Mr. Justice DOUGLAS, dissenting.

* * *

[A]s the Court of Appeals held there can be no doubt that as a matter of Michigan law the State herself has the final say as to where and how school district lines should be drawn.

When we rule against the metropolitan area remedy we take a step that will likely put the problems of the Blacks and our society back to the period that antedated the “separate but equal” regime of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138 (1896). The reason is simple.

The inner core of Detroit is now rather solidly black; and the blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in San Antonio
Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973). By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.

Today's decision given Rodriguez means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the Black schools are not only "separate" but "inferior."

So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 that Blacks could be segregated in public facilities provided they received equal treatment.

*** It is conceivable that ghettos develop on their own without any hint of state action. But since Michigan by one device or another has over the years created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, the State washes its hands of its own creations.

Mr. Justice WHITE, with whom Mr. Justice DOUGLAS, Mr. Justice BRENAN, and Mr. Justice MARSHALL join, dissenting.

* * *

Regrettfully, and for several reasons, I can join neither the Court's judgment nor its opinion. The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.

* * *

I am surprised that the Court, sitting at this distance from the State of Michigan, claims better insight than the Court of Appeals and the District Court as to whether an interdistrict remedy for equal protection violations practiced by the State of Michigan would involve undue difficulties for the State in the management of its public schools. In the area of what constitutes an acceptable desegregation plan, "we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 91 S.Ct. 1267, 1282 (1971). Obviously, whatever difficulties there might be, they are surmountable; for the Court itself concedes that had there been sufficient evidence of an interdistrict violation, the District Court could have fashioned a single remedy for the districts implicated rather than a different remedy for each district in which the violation had occurred or had an impact.

I am even more mystified how the Court can ignore the legal reality that the constitutional violations, even if occurring locally, were committed by governmental
entities for which the State is responsible and that it is the State that must respond to the command of the Fourteenth Amendment. An inter-district remedy for the infringements that occurred in this case is well within the confines and powers of the State, which is the governmental entity ultimately responsible for desegregating its schools. * * *

Finally, I remain wholly unpersuaded by the Court’s assertion that “the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” * * * In the first place, under this premise the Court’s judgment is itself infirm; for had the Detroit school system not followed an official policy of segregation throughout the 1950’s and 1960’s, Negroes and whites would have been going to school together. There would have been no, or at least not as many, recognizable Negro schools and no, or at least not as many, white schools, but “just schools,” and neither Negroes nor whites would have suffered from the effects of segregated education, with all its shortcomings. Surely the Court’s remedy will not restore to the Negro community, stigmatized as it was by the dual school system, what it would have enjoyed over all or most of this period if the remedy is confined to present-day Detroit; for the maximum remedy available within that area will leave many of the schools almost totally black, and the system itself will be predominantly black and will become increasingly so. Moreover, when a State has engaged in acts of official segregation over a lengthy period of time, as in the case before us, it is unrealistic to suppose that the children who were victims of the State’s unconstitutional conduct could now be provided the benefits of which they were wrongfully deprived. Nor can the benefits which accrue to school systems in which school children have not been officially segregated, and to the communities supporting such school systems, be fully and immediately restored after a substantial period of unlawful segregation. The education of children of different races in a desegregated environment has unhappily been lost along with the social, economic, and political advantages which accompany a desegregated school system as compared with an unconstitutionally segregated system. It is for these reasons that the Court has consistently followed the course of requiring the effects of past official segregation to be eliminated “root and branch” by imposing, in the present, the duty to provide a remedy which will achieve “the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.” It is also for these reasons that once a constitutional violation has been found, the District Judge obligated to provide such a remedy “will thus necessarily be concerned with the elimination of one-race schools.” These concerns were properly taken into account by the District Judge in this case. Confining the remedy to the boundaries of the Detroit district is quite unrelated either to the goal of achieving maximum desegregation or to those intensely practical considerations, such as the extent and expense of transportation, that have imposed limits on remedies in cases such as this. The Court’s remedy, in the end, is essentially arbitrary and will leave serious violations of the Constitution substantially unremedied.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

* * *

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

* * * The rippling effects on residential patterns caused by purposeful acts of segregation do not automatically subside at the school district border. With rare exceptions, these effects naturally spread through all the residential neighborhoods within a metropolitan area. * * *

The State must also bear part of the blame for the white flight to the suburbs which would be forthcoming from a Detroit-only decree and would render such
a remedy ineffective. Having created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, the State is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs. Indeed, by limiting the District Court to a Detroit-only remedy and allowing that flight to the suburbs to succeed, the Court today allows the State to profit from its own wrong and to perpetuate for years to come the separation of the races it achieved in the past by purposeful state action.

***

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation’s childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today’s holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.

Putting an end to de jure segregation, however, rarely spelled an end to de facto segregation because African-Americans and whites usually lived in different neighborhoods. The continuing impact of residential segregation thus meant that the races attended different schools because students usually attended schools in their neighborhoods. The efforts of some federal district courts to overcome this by requiring busing to achieve integration or racial balance, rather than the dismantling of de jure segregation, drew criticism from Justice Powell, himself a former school board president. Dissenting from the Court’s decision in Columbus Board of Education v. Pennick, 443 U.S. 449, 484–489, 99 S.Ct. 2941, 2990–2993 (1979), he discussed the public antagonism this generated and its attendant consequences:

Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence. In spite of the substantial costs often involved in relocation of the family or in resort to private education, experience demonstrates that many parents view these alternatives as preferable to submitting their children to court-run school systems.* * *

At least where inner-city populations comprise a large proportion of racial minorities and surrounding suburbs remain white, conditions that exist in most large American cities, the demonstrated effect of compulsory integration is a substantial exodus of whites from the system. * * * It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems.

Nor will this resegregation be the only negative effect of court-coerced integration on minority children. Public schools depend on community support for their effectiveness. When substantial elements of the community are driven to abandon these schools, their quality tends to decline, sometimes markedly. Members of minority groups, who have relied especially on education as a means of advancing themselves, also are likely to react to this decline in quality by removing their children from public schools. As a result, public school enrollment
increasingly will become limited to children from families that either lack the resources to choose alternatives or are indifferent to the quality of education. The net effect is an overall deterioration in public education, the one national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups. * * *

* * * The ultimate goal is to have quality school systems in which racial discrimination is neither practiced nor tolerated. It has been thought that ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations, a view to which I subscribe. The question that courts in their single-minded pursuit of racial balance seem to ignore is how best to move toward this goal.

For a decade or more after Brown, the courts properly focused on dismantling segregated school systems as a means of eliminating state-imposed discrimination and furthering wholesome diversity in the schools. Experience in recent years, however, has cast serious doubt upon the efficacy of far-reaching judicial remedies directed not against specific constitutional violations, but rather imposed on an entire school system on the fictional assumption that the existence of identifiable black or white schools is caused entirely by intentional segregative conduct, and is evidence of systemwide discrimination. * * *

* * * Proved discrimination by state or local authorities should never be tolerated, and it is a first responsibility of the judiciary to put an end to it where it has been proved. But many courts have continued also to impose wide-ranging decrees, and to retain ongoing supervision over school systems. Local and state legislative and administrative authorities have been supplanted or relegated to initiative-stifling roles as minions of the courts. Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect to a subject so inherently difficult and so politically sensitive, that the prospect of others confronting it seems inviting. Federal courts no longer should encourage this deference by the appropriate authorities—no matter how willing they may be to defer. Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education. * * *

* * * The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.

The Court’s decision in Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430 (1992), was sensitive to the problems noted by Justice Powell. In Pitts the Court confronted the question whether a federal district court had authority to relinquish supervision over a school district in incremental stages before full compliance with Brown had been achieved in all areas of school operation. In 1969, the DeKalb County, Georgia school system (DCSS) had been ordered to implement a neighborhood school plan to replace the former “freedom of choice” scheme in the assignment of students to schools. De jure black schools were closed and pupils were reassigned among the remaining neighborhood schools. Although the federal district court retained jurisdiction to monitor and supervise the elimination of the dual system, there were significant demographic shifts in the population over time. Out-migration from Atlanta by African-Americans resulted in the northern half of DeKalb County being predominantly white and the southern half of the county being predominantly black. Although 47% of the DCSS students were African-American, half attended schools that were over 90% black and more than three-fifths attended schools that had 20% more blacks than the systemwide average. A quarter of the whites attended schools that were more than 90% white and three-fifths went to schools that had 20% more whites than the systemwide average. Although a unitary system had been achieved with respect to transportation, physical facilities, extracurricular activities, and the assignment of students, vestiges of the dual system had not fully been eliminated from faculty assignments and the quality of education being offered to blacks and whites. A federal appeals court held
that the district court should retain jurisdiction over all aspects of the school system until full compliance was achieved, but the Supreme Court reversed. Justice Kennedy spoke for the Court. He explained:

* * * Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.

* * * One of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution.

Upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not directly traceable to constitutional violations.

* * *

* * * A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations. And with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision.

* * *

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

* * *

As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith. In light of its finding that the demographic changes in DeKalb County are unrelated to the prior violation, the District Court was correct to entertain the suggestion that DCSS had no duty to achieve systemwide racial balance in the student population.

* * *

The decision in Freeman reflected the influx of Reagan-Bush appointees during the 1980s which turned the sentiment of Justice Powell's Pennick dissent into the majority view. It was no longer likely that a sufficient number of Justices would be receptive to court-ordered quotas to counter the effect of residential segregation on the fiction that one-race schools were somehow the legacy of a previous de jure regime. Local school boards, in the South and elsewhere, then turned to the idea that a student's race might legitimately be considered so as to ensure diversity in the educational process. After all, if Brown was correct in its sociological premise that individuals were the products of their environment, then maintaining access to the viewpoints and experiences of other racial and ethnic groups was closely connected to the educational process. How could there be a significant exchange of ideas or an appreciation of other points of view if the individuals in the classroom were all drawn from a narrow social base? As you will see, in his defense of one
approach to affirmative action, Justice Powell in the Bakke case (p. 1172) recognized that race might be taken into account when public institutions of higher education make their admissions decisions. And in Grutter v. Bollinger (p. 1183), nearly three decades later, a majority of the Court still agreed with him. In Parents Involved in Community Schools v. Seattle School District No. 1, which follows, the Supreme Court considered whether public school boards could constitutionally offer that argument to maintain integrated schools.

Parents Involved in Community Schools v. Seattle School District No. 1*
Supreme Court of the United States, 2007
551 U.S. —, 127 S.Ct. 2738, 168 L.Ed.2d 508

BACKGROUND & FACTS The Supreme Court granted certiorari to consider the constitutionality of school-district policies that sought to maintain diversity in public schools by limiting student transfers on the basis of race or using race as a “tie-breaker” in the decision to admit students to particular schools. Parents Involved in Community Schools, a nonprofit organization of parents formed to fight Seattle’s high-school assignment plan, brought suit against the city school board. At the same time the Seattle case was argued to the Court, it heard a suit from Kentucky brought by the mother of a Louisville youngster who had been denied a transfer to his chosen kindergarten class. The district in that case had denied the transfer because the school he sought to leave needed to keep all of its white students to remain integrated according to the school board’s guidelines.

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to * * * Parts III-A and III-C, and an opinion with respect to Parts III-B and IV, in which Justices SCALIA, THOMAS, and ALITO join.

* * *

III-A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. * * * In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans * * * is “narrowly tailored” to achieve a “compelling” government interest. * * * * * * [O]ur prior cases * * * have recognized two interests that qualify as compelling. The first is * * * remedying the effects of past intentional discrimination. * * * Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree in 1975[,] * * * [but] the District Court that entered that decree dissolved it [in 2000], finding that Jefferson County had “eliminated the vestiges * * * of the former policy * * * and its pernicious effects” and thus had achieved “unitary” status. * * *

* * * We have emphasized that the harm remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that “the Constitution is not violated by racial imbalance in the schools, without more.” Milliken v. Bradley, 433 U.S. 267,
The second government interest we have recognized as compelling is the interest in student body diversity "in the context of higher education" as upheld in Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325 (2003), see p. 1183.

The entire gist of the analysis in Grutter was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in Grutter was only as part of a "highly individualized, holistic review." The point of the narrow tailoring analysis in which the Grutter Court engaged was to ensure that the use of racial classifications was indeed part of a "highly individualized, holistic review." The Grutter Court explained would be "patently unconstitutional." In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in Grutter; it is the factor.

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. Under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results is "broadly diverse."}

III-B

Perhaps recognizing that reliance on Grutter cannot sustain their plans, both school districts assert additional interests to justify their race-based assignments. Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in Grutter—it makes sense to promote that interest directly by relying on race alone.

The parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49
and 69 percent (within 10 percent of “the district minority average” of 59 percent).
*** In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be “equally above and below Black student enrollment systemwide”***. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County’s plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district *** drive the required “diversity” numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits ***.

*** We have many times over reaffirmed that “[r]acial balance is not to be achieved for its own sake.” Freeman v. Pitts, 503 U.S., at 494, 112 S.Ct., at 1447].*** Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” Miller v. Johnson, 515 U.S. 900, 911, 115 S.Ct. 2475, 2486 (1995) ***.

*** The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.” ***

III-C

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” *** and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. *** Jefferson County has failed to present any evidence that it considered alternatives ***.

IV

*** The parties and their amici debate which side is more faithful to the heritage of Brown, but the position of the plaintiffs in Brown was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” *** What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis? *** The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

Justice KENNEDY, concurring in part and concurring in the judgment.

*** Parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” *** is not sufficient to decide these cases. Fifty years of experience since Brown v. Board of Education *** should teach us that the problem before us defies so easy a
solution. School districts can seek to reach Brown’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. * * * To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that “[o]ur Constitution is color-blind” was most certainly justified in the context of his dissent in Plessy v. Ferguson, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146 (1896). * * * [A]s an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. * * * If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. * * * Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter, and the legal analysis changes accordingly.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, * * * each has failed to provide the support necessary for that proposition. * * *

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent’s permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent’s rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent’s rationale to the context of public schools. * * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a
district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including de facto segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play.

_IDe facto_ segregation is on the rise. It is reasonable to conclude that such segregation can create serious educational, social, and civic problems. Given the conditions in which school boards work to set policy, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

The plans before us satisfy the requirements of the Equal Protection Clause.
and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of Brown gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review—which are less burdensome, more egalitarian, and more effective than prior plans—continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined.

Second, since this Court’s decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races. From Swann to Grutter, this Court’s decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, “for unless our children begin to learn together, there is little hope that our people will ever learn to live together.” Milliken, 418 U.S., at 783, 94 S.Ct., at 3146 (Marshall, J., dissenting).

Third, the plans before us are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in Grutter, diversity in public primary and secondary schools—where there is even more to gain—must be, a fortiori, a compelling state interest. Even apart from Grutter, five Members of this Court agree that “avoiding racial isolation” and “achieving a diverse student population” remain today compelling interests. These interests combine remedial, educational, and democratic objectives.

Fourth, the plurality’s approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its “test” that the distinction loses practical significance. Consequently, the Court’s decision today slows down and sets back the work of local school boards to bring about racially diverse schools.

[What of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in Brown against segregation. But segregation policies did not simply tell schoolchildren “where they could and could not go to school based on the color of their skin”; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying “a state-mandated racial label.” But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

Finally, what of the hope and promise of Brown? [Brown] was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of
fine words on paper, but as a matter of everyday life in the Nation's cities and schools. * * * It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Today, almost 50 years * * * [after Brown was decided], attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. * * * [T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. * * *

* * * To invalidate the plans under review is to threaten the promise of Brown. * * * This is a decision that the Court and the Nation will come to regret.

Proving Discriminatory Intent

Proof of discriminatory intent is crucial to establishing the existence of de jure segregation. Although the Supreme Court has held in a few instances that discriminatory effect is itself sufficient to outlaw a practice, the Court has been reluctant to accept the broad proposition that simply showing a practice has a racially disparate impact is sufficient to justify relief. Were it to be otherwise, the de facto segregation apparent in the housing patterns of most metropolitan areas would be enough to warrant federal court intervention, which Swann has made clear it does not.

Sometimes official acts produce such invidious effects, of course, that the results readily disclose discriminatory intent. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886), for example, the Supreme Court struck down a San Francisco ordinance that compelled all laundries constructed of wood to obtain permission to operate from the board of supervisors while exempting laundries made of brick or stone. The board then denied permission to all the operators of wooden laundries. All of the laundries constructed of wood were operated by Chinese residents, while those made of brick or stone were run by Caucasians. The ordinance masqueraded as a fire safety measure, but it clearly was racially motivated. The effect was clear and, as the Court pointed out, the fire safety rationale was exceedingly unpersuasive since more than nine-tenths of the city's houses, which also had stoves, were made of wood, too. The Court, likewise, had little difficulty identifying as a racial gerrymander the legislation challenged in Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1962). In that case, the Alabama legislature passed an act that redefined the boundaries of Tuskegee from a square to a 28-sided figure that just happened to exclude from the city nearly all of its African-American voters, but no voters who were white. But cases like Yick Wo and Gomillion are rare.

Invidious discrimination requires proof of intent to discriminate, as the Court pointed out in McCleskey v. Kemp (p. 579), presented in Chapter 8, where the Court rejected the argument that a denial of equal protection could be established merely by showing that black defendants convicted of murdering white victims had a substantially greater likelihood of receiving the death penalty than any other racial combination of defendants and victims. As the Court indicates in Village of Arlington Heights v. Metropolitan Housing

Development Corp., following, the requisite proof of discriminatory intent must usually come from an appraisal of many factors. The rub, of course, lies in the fact that legitimate justifications can mask ugly motives. Consider Palmer v. Thompson (p. 1168) and the dilemma rapidly becomes apparent. How far can a court scrutinize a city’s decision to discontinue public services ostensibly on grounds of financial retrenchment or public safety and still avoid adopting the position Chief Justice Burger fears, that once a service is provided by government, its recipients necessarily have an unlimited claim to its future delivery?

Village of Arlington Heights v. Metropolitan Housing Development Corp.
Supreme Court of the United States, 1976
429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450

Background & Facts Arlington Heights, Illinois, is a suburb of Chicago. According to the 1970 census only 27 of the village’s 64,000 residents were African-American. The Metropolitan Housing Development Corporation (MHDC) contracted to purchase a tract within the boundaries of the village, contingent upon securing a zoning variance so that it could construct racially integrated low- and moderate-income housing. The Village Plan Commission declined to rezone the land in question from single-family dwelling (R-3) to multiple-family dwelling (R-5) apparently for two reasons: (1) The area had always been zoned single-family dwelling; and (2) it had been village policy to restrict multiple-family dwellings to act as a buffer zone between areas zoned commercial and those zoned single-family dwelling. No commercial or manufacturing areas lay adjacent to the tract in question.

When the village declined to rezone the land, MHDC and several minority individuals sued, contending that Arlington Heights was engaged in racial discrimination in violation of both the Equal Protection Clause and the Fair Housing Act of 1968. A federal district court awarded judgment to the village, concluding that the decision not to rezone resulted from a desire to protect property values and maintain the village’s current zoning plan. A federal appeals court reversed that judgment, finding that the ultimate effect of the decision not to rezone was racially discriminatory, whereupon Arlington Heights sought review by the Supreme Court.

Mr. Justice POWELL delivered the opinion of the Court.

Our decision in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial
Discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another,” * * * may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. * * * The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. * * * The specific sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker’s purposes. * * * For example, if the property involved here always had been zoned R–5 but suddenly was changed to R–3 when the town learned of MHDC’s plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. * * *

* * *

We also have reviewed the evidence. The impact of the Village’s decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. The area around the * * * property [to be purchased] has been zoned R–3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village’s rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.

The evidence does not warrant overturning the concurrent findings of both
Courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village’s decision.  

* * * 
Reversed and remanded.

Justice BRENNAN, WHITE, and MARSHALL voted to remand the case for reconsideration in light of the Court’s previous ruling in Washington v. Davis. Justice STEVENS did not participate.

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**PALMER V. THOMPSON**

Supreme Court of the United States, 1971  
403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438

**BACKGROUND & FACTS** In 1962, a federal district court ruled that continued operation of a number of public facilities on a segregated basis by the city government of Jackson, Mississippi, denied African-American residents equal protection of the laws. This decision was affirmed on appeal by the U.S. Fifth Circuit Court of Appeals. The city agreed to desegregate the public parks, auditoriums, golf courses, and city zoo, but the city council voted to close the city’s swimming pools. Hazel Palmer and other African-American residents of Jackson brought suit against the mayor, Allen Thompson, and others to force the reopening of the swimming pools on a desegregated basis. A federal district court denied relief, and its decision was affirmed by the U.S. court of appeals. The U.S. Supreme Court granted certiorari.

Mr. Justice BLACK delivered the opinion of the Court.

* * * 
Here there has unquestionably been “state action” because the official local government legislature, the city council, has closed the public swimming pools of Jackson. The question, however, is whether this closing of the pools is state action that denies “the equal protection of the laws” to Negroes. It should be noted first that neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools. Furthermore, this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities. * * *

Unless, therefore, * * * certain past cases require us to hold that closing the pools to all denied equal protection to Negroes, we must agree with the courts below and affirm.  

* * *

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. * * * But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. In Griffin [v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226 (1964)] * * * the State was in fact perpetuating a segregated public school system by financing segregated “private” academies. And in Gomillion [v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960)] the Alabama Legislature’s gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools
Petitioners have argued strenuously that a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action. This proposition is, of course, true. Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. But the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

* * *

The judgment is affirmed.

Mr. Chief Justice BURGER, concurring.

* * *

The elimination of any needed or useful public accommodation or service is surely undesirable and this is particularly so of public recreational facilities. Unfortunately the growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an equal protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of that important constitutional guarantee. To hold, as petitioners would have us do, that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that it may not be dropped would plainly discourage the expansion and enlargement of needed services in the long run.

* * * We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional.

Mr. Justice DOUGLAS, dissenting.

* * *

Closing of the pools probably works a greater hardship on the poor than on the rich; and it may work greater hardship on poor Negroes than on poor whites, a matter on which we have no light. Closing of the pools was at least in part racially motivated. And, as stated by the dissenters in the Court of Appeals:

"The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities."

* * *

I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing apartheid or because it finds life in a multi-racial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.

* * *
Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

* * * Our cases make it unquestionably clear * * * that a city or State may not enforce * * * a policy * * * [of] maintaining officially separate facilities for the two races. It is also my view, but apparently not that of the majority, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

***

It must be noted here that none of Jackson’s public recreational facilities was desegregated until after the appellate proceedings in Clark v. Thompson [the 1962 case] were fully concluded. * * * From the time of the trial court’s decision in Clark v. Thompson, the mayor of Jackson made public statements, of record in this case, indicating his dedication to maintaining segregated facilities. * * *

***

There is no dispute that the closing of the pools constituted state action. Similarly, there can be no disagreement that the desegregation ruling in Clark v. Thompson was the event that precipitated the city’s decision to cease furnishing public swimming facilities to its citizens. Although the secondary evidence of what the city officials thought and believed about the wisdom of desegregation is relevant, it is not necessary to rely on it to establish the causal link between Clark v. Thompson and the closings. The officials’ sworn affidavits, accepted by the courts below, stated that loss of revenue and danger to the citizens would obviously result from operating the pools on an integrated basis. Desegregation, and desegregation alone, was the catalyst that would produce these undesirable consequences. Implicit in this official judgment were assumptions that the citizens of Jackson were of such a mind that they would no longer pay the 10- or 20-cent fee imposed by the city if their swimming and wading had to be done with their neighbors of another race, that some citizens would direct violence against their neighbors for using pools previously closed to them, and that the anticipated violence would not be controllable by the authorities. Stated more simply, although the city officials knew what the Constitution required after Clark v. Thompson became final, their judgment was that compliance with that mandate, at least with respect to swimming pools, would be intolerable to Jackson’s citizens.

***

On the other hand, the Court concluded in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), that the use of peremptory challenges to remove African-Americans from sitting on a jury amounted to racial discrimination in the administration of justice proscribed by *Strauder*. Since peremptory challenges are the prerogative of a party at trial to remove an allotted number of prospective jurors without disclosing a reason, the Court’s ruling here seems to travel a different road. As contrasted with requesting the dismissal of prospective juror “for cause”—that is, for a good reason—showing invidious discrimination from a pattern of peremptory challenges suggests that racial discrimination can be established simply on the basis of the result. In Batson, the Court held that a *prima facie* case of racial discrimination could be made out simply by the prosecution’s use of its peremptories in the case at hand with the effect of creating an all-white jury. The defendant only needed to demonstrate that he or she was a member of a cognizable racial group and that the prosecution used its peremptory challenges with the plausible result that all persons of that race were dismissed from the jury. The burden then shifted to the prosecution to show that those jurors were not removed for racial reasons. The Court concluded that the Equal Protection Clause prohibited prosecutors from assuming that African-American jurors as a group would not be impartial in considering the case against an African-American defendant.
In Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991), the Court extended Batson to cases where the defendant and the excluded jurors were not of the same race. It held that a white defendant may also object to the prosecution’s use of peremptory challenges to remove all black prospective jurors. The Court reasoned that such racial discrimination injures the interest of a white defendant because he, too, has an interest in the integrity and fairness of criminal proceedings. In Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S.Ct. 2077 (1991), the Court further extended Batson to personal injury suits, reasoning that the Fourteenth Amendment is implicated in a civil suit between private parties because “state action” is implicated: Courts and juries are institutions of government and the system of peremptory challenges is governed by a set of statutes and administered by governmental officials, including the trial judge. Said the Court, “The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.” And in Georgia v. McCollom, 505 U.S. 42, 112 S.Ct. 2348 (1992), the Court held that peremptory challenges by the defense in criminal trials were governed by the same principle.

From challenges aimed at excluding a distinct racial group from the jury, the Court, in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994), extended the principle to cover gender-directed use of peremptories. Emphasizing that its ruling “did not imply the elimination of all peremptory challenges,” the Court observed that such gender-based use of peremptories caused harm not only to the litigants and the excluded jurors but to the community because of “the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that such state-sanctioned discrimination in the courtroom engenders.” Sex-based use of peremptories, Justice Blackmun observed, “invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.” The potential for such cynicism was great, he noted, “Where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity.” Discriminatory use of peremptory challenges, he argued, created the impression that the “‘deck has been stacked’ in favor of one side.”

Chief Justice Rehnquist and Justices Scalia and Thomas regularly dissented in these cases. In J.E.B., Justice Scalia found “it *** hard to see how any group is denied equal protection” when “all groups are subject to the peremptory challenge.” He found the procedure “even-handed” and argued that it would violate the Equal Protection Clause only “if both sides systematically struck individuals of the same group. ***” Instead, “[t]he pattern here *** displays not a systemic sex-based animus but each side’s desire to get a jury favorably disposed to its case.” He continued, “Women were not categorically excluded from juries because of doubt that they were competent; women were stricken from juries by peremptory challenge because of doubt that they were well disposed to the striking party’s case.” By contrast, Justice Thurgood Marshall, concurring in Batson nearly two decades earlier, argued that the only way to “end the *** discrimination that peremptories inject into the jury-selection process” was to “eliminate[e] peremptory challenges entirely.”

Affirmative Action or “Reverse Discrimination”

Last, but no means least, is the controversy about whether Brown forbids taking race into account even when the purpose is to aid members of groups historically disadvantaged by the use of racial criteria. The decision in Regents of the University of California v. Bakke, following, was the Court’s first attempt at addressing the constitutionality of affirmative action—what, from a minority point of view, might be called “benign” discrimination and what many whites refer to as “reverse” discrimination. Since Justice Powell cast the “swing vote” in the decision of the Bakke case and others, his view that racial quotas were
unconstitutional, but that race legitimately might be counted as a “plus” along with other factors in making admissions decisions, strongly influenced the Court’s rulings for more than a decade. Although it was regarded as a relevant consideration, a majority of the Justices adopted the position that affirmative action involved the use of a racial criterion and thus triggered strict scrutiny. This was in notable contrast to the views of Justices Brennan, White, Marshall, and Blackmun in Bakke that some form of scrutiny, less demanding than strict scrutiny but more than reasonableness, was appropriate in appraising the constitutionality of affirmative action problems.

As the decisions following Bakke show (pp. 1175–1176), several themes emerged. Generally, the Court disapproved of racial quotas unless they were needed to remedy intentional racial discrimination. Effects of historical discrimination were generally thought insufficient, although the Justices afforded Congress much wider latitude in this than it permitted the states and their political subdivisions. President Reagan’s appointment of Justice Kennedy to replace Justice Powell, who retired in 1987, tipped the balance, however. What followed was a much harder line on affirmative action, constitutionally speaking, which is readily apparent in City of Richmond v. J. A. Croson Co. (p. 1176). In an illuminating opinion, sometimes speaking for the Court and sometimes not, Justice O’Connor reviews many of the principles that have come to characterize the Court’s affirmative action decisions, the precise limits on the use of quotas, and the risks that use of affirmative action entails. Those Justices who had pushed for intermediate constitutional scrutiny in Bakke remained unconvinced.

**NOTE—REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE**

In order to guarantee that each entering class contained students from certain minority groups, the medical school of the University of California at Davis maintained two separate admissions programs. The school filled 84 of the 100 class positions through the regular admissions program, but set aside 16 positions to be filled through its special admissions program. Applicants were asked if they wanted to be considered as “economically and/or educationally disadvantaged” and as members of certain minorities (African-Americans, Chicanos, Asians, or American Indians). Applications of those deemed “disadvantaged” were forwarded to a special admissions committee, a majority of whose members were from minority groups. These special candidates for admission did not have to meet the regular 2.5 grade point average cutoff point that otherwise would have triggered summary rejection, and these applicants were not rated in competition with those candidates in the regular admissions program. Though numerous disadvantaged whites applied, none was admitted. A result of applying separate and preferential standards in filling the 16 positions was that a number of minority students were admitted with academic credentials of substantially poorer quality than a number of white applicants who were rejected through the regular admission process. Allan Bakke, a white applicant, was twice denied admission to the medical school. Since his credentials were of higher caliber by the University’s own standards than a number of the minority applicants admitted under the quota system, Bakke sued, alleging that he had been denied admission on grounds of race. The University filed a cross-complaint, seeking a declaratory judgment vindicating its affirmative action program. A state superior court held that the special admissions procedures constituted unlawful discrimination and violated Title VI, section 601 of the 1964 Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and a provision of the California Constitution, but refused to order Bakke’s

9. Discussion of Title VI has been omitted from all but Justice Stevens’s opinion in the summary of the Bakke decision that follows, since those Justices not subscribing to his opinion concluded that Title VI prohibits only those classifications that would violate the Equal Protection Clause.
admission, since, it concluded, he would not have been admitted even if there had been no special admissions program. The state supreme court, resting its decision solely on equal protection grounds, declared that the use of race in admissions procedures failed to survive "strict scrutiny" (because it was not the least restrictive means of furthering the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors who wanted to serve minority patients) and enjoined future use of racial criteria, but directed the trial court to order Bakke's admission because, it concluded, the university had failed to meet the burden of showing that he would not otherwise have been admitted.

With results that appeared to split the difference on affirmative action—and itself as well—the U.S. Supreme Court in Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978), struck down the special admissions program because "[i]t 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," but otherwise held that in college admissions programs "race or ethnic background may be deemed a 'plus' in a particular applicant's file * * *." Announcing the judgment of the Court in an opinion in which he spoke only for himself, Justice Powell joined Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens to reach the first result (and direct that Bakke be admitted) and with Justices Brennan, White, Marshall, and Blackmun to reach the second.

Since the rights created in the first section of the Fourteenth Amendment are "by its terms, guaranteed to the individual " and are thus "personal rights," Justice Powell began from the premise that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny." Reviewing the justifications proffered by the medical school for its special admissions program, he found only one which rose to the level of a compelling interest—"the attainment of a diverse student body." This interest, Justice Powell pointed out, implicated academic freedom, which "though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment." He continued, "[i]n arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."

But, he observed, "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." Such qualities, he explained, "could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." However, the special admissions program, which "focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity. " By contrast, "an admissions program * * * [which] operated * * * [so as] to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight" would contribute to diversity "without the factor of race being decisive * * *." Justice Powell concluded: "This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all

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consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar non-objective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Asserting at the outset that “racial classifications are not per se invalid under the Fourteenth Amendment,” a plurality, speaking through Justice Brennan, rejected the constitutional evaluation of racial and ethnic categories in terms of both the strict scrutiny approach, because “this case does not fit neatly into our prior analytic framework for race,” and the mere reasonableness standard, “because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications * * *.” The plurality chose instead to assess the constitutionality of the special admissions program in light of a framework “developed in gender discrimination cases but which carries even more force when applied to racial classifications,” namely, that “racial classifications designed to further remedial purposes *must* serve important governmental objectives and must be substantially related to the achievement of those objectives”; in other words, (1) “to justify such a classification an important and articulated purpose for its use must be shown,” and (2) “any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.”

With respect to the first of these elements, the plurality concluded that ‘Davis’ articulated purpose of remedying the effects of past social discrimination is * * * sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.” The plurality found such a basis existed. And, as to the second prong of the test, Justice Brennan explained that the special admissions program did “not * * * in any way operate[] to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together.” He continued, “Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon whites, in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.”

After ranging over a spectrum of inequalities that separate blacks from whites in American society—from infant mortality, to income, to unemployment, to representation in the professions—Justice Marshall, in a separate opinion, wondered aloud over the irony that “after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.” “It is unnecessary in 20th century America,” he urged, “to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.” “[F]earing that we have come full circle,” he likened the position of the Court, “again stepping in, this time to stop affirmative action programs of the type used by the University of California,” to the post–Civil War decisions in the Civil Rights Cases and Plessy v. Ferguson, which “destroyed movement toward complete equality.”

In another separate statement, Justice Blackmun found it “gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into
consideration as one factor, among many, in the administration of its admissions program," especially in view of the fact that "educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind." Although he "hope[d] that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past," he concluded: "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy."

Another plurality, speaking through Justice Stevens, concluded that "[t]he University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the medical school because of his race." Justice Stevens explained: "The plain language of the statute requires affirmation of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted." And he added: "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. As succinctly phrased during the Senate debate, under Title VI it is not 'permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin.'" Consistent with "[c]lear settled practice to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground" and in view of the fact that "there is no outstanding injunction forbidding any consideration of racial criteria in processing applications," Justice Stevens observed it was, therefore, "perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."

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<td>United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721 (1979)</td>
<td>The Court upheld a collective bargaining agreement that voluntarily aimed at overcoming a company's nearly all-white craft work force by requiring that at least half of the trainees in a in-plant training program be black until the proportion of blacks in the craft work force matched the proportion of blacks in the local work force. Despite the wording of Title VII of the Civil Rights Act of 1964, the affirmative action program was consistent with the spirit of the Act.</td>
<td>5-2; Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not participate.</td>
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<td>Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758 (1980)</td>
<td>Congress's enactment of a 10% quota of construction contracts to minority businesses was within its authority under either the Commerce Clause or section 5 of the Fourteenth Amendment.</td>
<td>6-3; Justices Stewart, Rehnquist, and Stevens dissented.</td>
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11. Section 601 of the Civil Rights Act of 1964 provides: "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."
### OTHER CASES ON AFFIRMATIVE ACTION—CONTINUED

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<td>Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 1576 (1984)</td>
<td>Setting aside least seniority as a basis for laying-off workers and substituting race was something not contained in an existing consent decree and was unjustified unless black employees could prove they individually had been victims of discrimination. Mere membership in a disadvantaged class was insufficient reason for departing from a last-hired-is-first-fired policy.</td>
<td>6–3; Justices Brennan, Marshall, and Blackmun dissented.</td>
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<td>Wygant v. Jackson Board of Education, 467 U.S. 267, 106 S.Ct. 1842 (1986)</td>
<td>Layoffs were to be conducted on a last-hired-is-the-first-fired basis, provided that the proportion of minority teachers released was never to be less than the percentage of minority teachers employed when the layoffs began. Such preferred protection of minority teachers was unconstitutional.</td>
<td>5–4; Justices Brennan, Marshall, Blackmun, and Stevens dissented.</td>
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<td>Local 28, Sheet Metal Workers International Association v. EEOC, 478 U.S. 421, 106 S.Ct. 3019 (1986)</td>
<td>A federal court order imposing a 29% non-white membership goal (reflective of the proportion of nonwhites in the local work force) on a union and its apprenticeship committee for discrimination against nonwhite workers in selection, training, and admission of members to union was upheld, and the contempt citation and fine for violation of the order were affirmed.</td>
<td>5–4; Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissented.</td>
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<td>United States v. Pardue, 480 U.S. 149, 107 S.Ct. 1053 (1987)</td>
<td>A requirement that 50% of promotions throughout the Alabama state troopers were to go to blacks, if qualified blacks were available, was upheld after a showing of 40 years of pervasive and systematic discrimination by that state agency.</td>
<td>5–4; Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissented.</td>
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<td>Johnson v. Transportation Agency, Santa Clara Country, 485 U.S. 630, 108 S.Ct. 1442 (1987)</td>
<td>A voluntarily adopted affirmative action program for minorities and women that considered sex as one factor in making hiring and promotion decisions until proportions of minorities and women roughly resembled that in local work force, but which did not use quotas, did not violate Title VII of 1964 Civil Rights Act.</td>
<td>6–3; Chief Justice Rehnquist and Justices White and Scalia dissented.</td>
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**City of Richmond v. J. A. Croson Co.**

Supreme Court of the United States, 1989

488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854

**BACKGROUND & FACTS**

J. A. Croson Company, a mechanical heating and plumbing contractor bidding on a city construction job, brought suit challenging the constitutionality of a city ordinance requiring recipients of city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or
more “minority business enterprises” (MBEs). This set-aside policy was enacted by the Richmond city council after a public hearing and was based on a study that showed that, although the population of the city was 50% African-American, less than 1% of the city’s prime construction contracts had gone to minority-owned-and-operated businesses during the period from 1978 to 1983. The ordinance defined an MBE as a business located anywhere in the country that was 51% owned and controlled by African-American, Spanish-speaking, Asian, Indian, Eskimo, or Aleut citizens. The plaintiff contractor argued that the racial quota contained in the ordinance violated the Equal Protection Clause of the Fourteenth Amendment. The city defended the ordinance on the basis of the Supreme Court’s ruling in Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758 (1980), which upheld a 10% set-aside for minority-controlled businesses contained in the Public Works Employment Act of 1977. In rejecting a challenge to that legislation based on the equal protection component of the Fifth Amendment’s Due Process Clause, the Court declined to accept the proposition that Congress was required to act in a “wholly ‘color-blind’” fashion and emphasized the considerable deference that was due Congress proceeding under either the Commerce Clause or section 5 of the Fourteenth Amendment. Based on Fullilove, a federal district court sustained the validity of the Richmond ordinance, but this judgment was ultimately reversed by a federal appellate court, whereupon the city appealed to the U.S. Supreme Court.

Justice O’CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE [REHNQUIST] and Justice WHITE join, and an opinion with respect to Parts III-A and V, in which THE CHIEF JUSTICE, Justice WHITE and Justice KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment’s guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. ***

**

II

***

Appellant argues “[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not.” ***

What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to “enforce” may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See Katzenbach v. Morgan, 384 U.S., at 651, 86 S.Ct., at 1723 * * * *. See also South Carolina v. Katzenbach, 383 U.S. 301, 326, 86 S.Ct. 803, 817 (1966) * * *.

That Congress may identify and redress the effects of society-wide discrimination does not mean that * * * the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. * * * The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the
States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. * * *

III

[A] If the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. * * *

III

A

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). As this Court has noted in the past, 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, 334 U.S. 1, 22, 68 S.Ct. 836, 846 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. * * *

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. * * *

We thus reaffirm the view that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. * * *

III

B

[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." * * *

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." * * *

The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. * * *

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim [in Bakke] that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.
It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as “identified discrimination” would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

The District Court relied upon five predicate “facts” in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city’s population; (4) there were very few minority contractors in local and state contractors’ associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

None of these “findings,” singly or together, provide a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry.

The District Court accorded great weight to the fact that the city council designated the Plan as “remedial.” But the mere recitation of a “benign” or legitimate purpose for a racial classification, is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

When a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals. A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced.

In the employment context, where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

In this case, the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.

The city and the District Court also relied on evidence that MBE membership in local contractors’ associations was extremely low. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference...
of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. * * *  

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for “remedial relief” for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. * * * We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. * * * It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.

If a 30% set-aside was “narrowly tailored” to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this “remedial relief” with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation. * * *

IV

* * *

[The city’s only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. * * * Under Richmond’s scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

V

* * *

* * * Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

* * *

* * * This litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past
wrongdoers and to fashion remedies that
will create the conditions that presumably
would have existed had no wrong been
committed. * * *

Instead of engaging in a debate over the
proper standard of review to apply in
affirmative-action litigation, I believe it is
more constructive to try to identify the
characteristics of the advantaged and disad-
vantaged classes that may justify their
disparate treatment. * * * In this case, that
approach convinces me that, instead of
carefully identifying the characteristics of
the two classes of contractors that are
respectively favored and disfavored by its
ordinance, the Richmond City Council has
merely engaged in the type of stereotypical
analysis that is a hallmark of violations of
the Equal Protection Clause. * * *

Justice SCALIA, concurring in the
judgment.

At least where state or local action
is at issue, only a social emergency rising to
the level of imminent danger to life and
limb—for example, a prison race riot,
requiring temporary segregation of inmates
—can justify an exception to the
principle embodied in the Fourteenth
Amendment that “[o]ur Constitution is
color-blind, and neither knows nor tolerates
classes among citizens,” Plessy v. Ferguson,
163 U.S. 537, 559, 16 S.Ct. 1138, 1146
(1896) (Harlan, J., dissenting) * * *.

In my view there is only one circum-
stance in which the States may act by race to
“undo the effects of past discrimination”: where that is necessary to eliminate their
own maintenance of a system of unlawful
racial classification. If, for example, a state
agency has a discriminatory pay scale
compensating black employees in all posi-
tions 20% less than their nonblack
counterparts, it may assuredly promulgate
an order raising the salaries of “all black
employees” by 20%. * * * This distinction
explains our school desegregation cases, in
which we have made plain that States and
localities sometimes have an obligation to
adopt race-conscious remedies. * * *

A State can, of course, act “to undo the
effects of past discrimination” in many
permissible ways that do not involve classifi-
cation by race. In the particular field of state
contracting, for example, it may adopt a
preference for small businesses, or even for
new businesses—which would make it easier
for those previously excluded by discrimina-
tion to enter the field. Such programs may
well have racially disproportionate impact,
but they are not based on race. And, of
course, a State may “undo the effects of past
discrimination” in the sense of giving the
identified victim of state discrimination that
which it wrongfully denied him—for exam-
ple, giving to a previously rejected black
applicant the job that, by reason of discrimi-
nation, had been awarded to a white
applicant, even if this means terminating
the latter’s employment. In such a context,
the white job-holder is not being selected for
disadvantageous treatment because of his
race, but because he was wrongfully awarded
a job to which another is entitled. That is
worlds apart from the system here, in which
those to be disadvantaged are identified
solely by race.

Justice MARSHALL, with whom Justice
BRENNAN and Justice BLACKMUN join,
dissenting.

* * * The essence of the majority’s
position is that Richmond has failed to
catalogue adequate findings to prove that
past discrimination has impeded minorities
from joining or participating fully in
Richmond’s construction contracting indus-
try. I find deep irony in second-guessing
Richmond’s judgment on this point. As
much as any municipality in the United
States, Richmond knows what racial dis-

A. RACIAL DISCRIMINATION

1181
supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and * * * exhaustive and widely publicized federal * * * studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

[T]oday's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. * * *

* * * Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important interest. * * *

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. * * *

* * * The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. * * * But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through its own decision-making, it served an interest of the highest order.

* * * The fact that just .67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." * * * That no one who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

* * * Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. * * * A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. * * *

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. * * * By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the
tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation’s history and continues to scar our society. * * *

It is too late in the day to assert seriously that the Equal Protection Clause prohibits States * * * from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

The appointment of Justice Thomas by President Bush in 1991 to replace Justice Marshall cemented a durable majority for a constitutional position that could only be described as highly skeptical of affirmative action. Six years after its decision in Croson that strict scrutiny was required in evaluating the constitutionality of affirmative action policies established by state and local governments, the Court ended its more deferential constitutional posture for reviewing federal affirmative action programs. Initially, the Court had taken the view that Congress’s amendment-enforcing power, contained in § 5 of the Fourteenth Amendment, afforded wider legislative authority to enact benign race-conscious programs than the police power possessed by the states and their political subdivisions. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 115 S.Ct. 2097 (1995), a narrow majority of the Court held that “federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest” for essentially the same reasons that led to its conclusion in Croson. In reaching this conclusion, the majority reasoned that, as to legal classifications on the basis of race, “the equal protection component” of the Fifth Amendment did not permit a standard less demanding than strict scrutiny to be applied. At issue in Adarand was the constitutionality of a congressional statute that required most contracts let by federal agencies to contain a clause giving the prime contractor a financial incentive to hire subcontractors certified by the Small Business Administration as small businesses controlled by minorities or economically disadvantaged individuals.

If the decisions in Croson and Adarand made it clear that quota systems adopted to remedy the effects of past general societal discrimination could never clear the hurdle of strict scrutiny, what about the constitutionality of Justice Powell’s position in Bakke that race could still be used as “a plus factor” in making academic admissions decisions? The rulings in Croson and Adarand revealed a Court growing deeply skeptical about the constitutionality of affirmative action programs and Justice Powell, after all, had spoken only for himself in Bakke when he concluded that maintaining diversity in the classroom constituted a compelling justification for taking race into account as one of many factors.

In two University of Michigan cases eight years after Adarand, a bare majority of the Court reaffirmed the constitutionality of Powell’s position. The University of Michigan Law School considered race (for African-Americans) or ethnicity (for Hispanics and Native Americans) as one of many factors in evaluating candidates for admission but did not make it decisive. The university’s College of Literature, Science, and Arts (LSA), on the other hand, awarded a flat 20 points on its 150-point scale to minority applicants, with a minimum scale score of 100 qualifying a candidate for admission. The Supreme Court upheld the law school’s affirmative action approach to admission in Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325 (2003), but struck down the college’s method in Gratz v. Bollinger, 539 U.S. 244, 123 S.Ct. 2411 (2003).
Writing for the majority in Grutter, Justice O’Connor pointed out that “[c]ontext matters when reviewing race-based governmental action” and “[n]ot every decision influenced by race is equally objectionable.” In short, strict scrutiny need not necessarily be fatal when applied to affirmative action programs. Whatever the language used in past opinions, she added, “[w]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.” While “outright racial balancing” is “patently unconstitutional,” she argued that the law school’s “good faith” pursuit of classroom diversity was entitled to “deference.” She accepted the law school’s argument that the admission of a “critical mass” of minority students was essential to preserving student diversity and “the educational benefits that diversity is designed to produce,” such as “‘cross-racial understanding’ [that] helps to break down racial stereotypes,” “‘enables [students] to better understand persons of different race’” and “‘better prepares students for an increasingly diverse workforce and society.’” While admission of enough minority students was essential to the achievement of a “critical mass,” Justice O’Connor emphasized that this did not amount to imposing a quota because it did not set aside a fixed number or percentage of class slots. But she noted that race-conscious programs cannot go on forever and “all governmental use of race must have some stopping point.” She anticipated that the law school would “terminate its race-conscious admissions program as soon as practicable,” and added, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

The dissenters in Grutter (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) were puzzled at how the majority could: (1) apply strict scrutiny yet adopt a posture of “deference”; (2) approve the attainment of a “critical mass” in minority admissions (by definition, a minimum number essential to achieve the goal of diversity) and not have it be a quota; and (3) validate the notion of “critical mass” in minority admissions as a means of attaining classroom diversity without any evidence to justify the strikingly different number of African-American students admitted compared to the number of Hispanic and Native American students. (Only half as many Hispanics as African-Americans—and only a fifth as many Native Americans—were admitted to achieve a “critical mass” of such students.)

Speaking for the majority in Gratz with respect to the college’s method, Chief Justice Rehnquist wrote, “[T]he LSA’s automatic distribution of 20 points has the effect of making ‘the factor of race * * * decisive’ for virtually every minimally qualified under-represented minority applicant * * *.” It was both the mechanical, across-the-board award of 20 points to minority individuals solely because of their membership in a particular racial or ethnic group, plus the decisive effect of the automatic award that made the college’s admissions program unconstitutional. In short, the college’s approach failed to treat race or ethnicity simply as “a plus factor” to be considered along with many other factors in the evaluation of an applicant’s record.

Justices Souter and Ginsburg voted to sustain the college’s method on the grounds that there were no slots set aside and, unless there was something significant about the number 20, awarding 20 points for being a minority was not much different from awarding “20 points for athletic ability” or “10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.” True, as the federal government argued as amicus curiae, “Michigan could get student diversity * * * by guaranteeing admission to a fixed percentage of the top students from each high school” in the state, but the two Justices saw no reason why the college should be punished for achieving its diversity goal in a more forthright way. Justice Stevens, the third dissenter, thought the plaintiffs no longer had standing since they had decided to attend another school and “petitioners’ past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms.”
Since the Court in Grutter upheld the constitutionality of using race as "a plus factor" in academic admissions by a 5–4 vote, Justice O'Connor's subsequent retirement and her replacement by Justice Samuel Alito make it likely that the constitutionality of affirmative action hangs by the slenderest of threads. The future of affirmative action programs in Michigan, however, is much less unclear. In the November 2006 election, Michigan voters approved an amendment to the state constitution by a margin of 58%–42% that prohibited the state's public institutions from discriminating or granting preferential treatment on the basis of race, sex, or ethnicity. Thus, whatever the permissibility of affirmative action as a matter of federal constitutional law, affirmative action in Michigan is dead as a matter of state law.12

B. “PRIVATE” DISCRIMINATION AND THE CONCEPT OF “STATE ACTION”

The materials in the preceding section focused on the constitutionality of state-imposed discrimination. But what about discrimination that results from the actions of private individuals? It is generally conceded that the amendments to the Constitution do not protect persons from infringements of those rights by other individuals; they are binding only as against governmental invasion. Nevertheless, Congress may legislate protections against private discrimination pursuant to them, and the states have often taken similar action pursuant to their own constitutions. The principal problem we had with national legislation that endeavored to eradicate private discrimination was an initial hostile reception given by the Court. It took decades to recover ground lost by the early grudging interpretations given the Thirteenth and Fourteenth Amendments in the Civil Rights Cases of 1883. Only Justice Harlan gave sympathetic consideration to the kind of broad interpretation, particularly of the Thirteenth Amendment, that would have quickly and resolutely affirmed the constitutionality of such early legislation as the Civil Rights Acts of 1866 and 1875.

THE CIVIL RIGHTS CASES

Supreme Court of the United States, 1883
109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835

BACKGROUND & FACTS The Civil Rights Act of 1875 prohibited any person from denying a citizen "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of amusement * * *." In each of the five cases heard together under the above title, African-Americans were denied access to business establishments or facilities covered by the Act because of their race. The United States brought action against the persons guilty of violating the Act in four of the

12. The outcome of the ballot proposition on affirmative action in Michigan was similar to that in other states. In November 1996, California voters adopted Proposition 209 by a margin of 54%–46% ending affirmative action programs in that state. Although a federal district court found Proposition 209 to be in violation of federal constitutional law (because it structured the political process in a non-neutral manner, thus denying equal protection to minorities and women, and because it violated the Supremacy Clause since it conflicted with Title VII of the 1964 Civil Rights Act), this judgment was overturned on appeal, and the U.S. Supreme Court subsequently denied certiorari. See Coalition for Economic Equity v. Wilson, 946 F.Supp. 1480 (N.D.Cal. 1996), order vacated, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963, 118 S.Ct. 397 (1997). Two years after the passage of Proposition 209, voters in Washington adopted a similar ballot initiative by a larger margin, 59%–41%. 
cases, and in the fifth case, two individuals initiated proceedings against a railroad company. The cases came to the U.S. Supreme Court from U.S. circuit courts.

BRADLEY, J.

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. * * *

The first section of the fourteenth amendment * * * declares that "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 the laws." It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. * * * It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. * * * [T]he last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. * * * It does not authorize congress to create a code of municipal law for the regulation of private rights * * *. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. * * *

[U]ntil some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. * * * [T]he legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation * * * for counteracting such laws as the states may adopt or enforce * * *.

[t]he [law at issue here] * * * declare[s] that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states * * *.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. * * * It is repugnant to the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Civil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of
individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong * * * and may presumably be vindicated by resort to the laws of the state for redress. * * *

[T]he power of congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the thirteenth amendment, which abolishes slavery. * * * And it gives congress power to enforce the amendment by appropriate legislation.

This amendment, * * * by its own unaided force and effect * * * abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

... An act of refusal [of accommodations] has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. It would be running the slavery argument into the ground 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 theater, or deal with in other matters of intercourse or business. * * *

We are of opinion that no countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the constitution * * *.

* * *

HARLAN, J., dissenting. The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism. * * * Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing * * * rights * * * belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish * * *.

* * *

The thirteenth amendment * * * did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. * * * [I]t established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several states for such protection, in their civil rights, necessarily growing out of freedom, as those states, in their discretion, choose to provide? Were the states, against whose solemn protest the institution was destroyed, to be left perfectly free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights that inhere in a state of freedom? * * *

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the express power delegated to congress to enforce, by appropriate legislation, the thirteenth amendment, may be exerted by legislation of a
direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the very foundation of the civil rights act of 1866. **I submit, with all respect to my brethren, that its constitutionality is conclusively shown by their opinion. It is expressly conceded by them that the thirteenth amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that congress, by the act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the thirteenth amendment congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. **

Turning, then, to the Fourteenth Amendment, Justice HARLAN began, as the first stage of his argument, by focusing on the relationship between private property—such as the inns, public conveyances, and places of amusement described in the statute—and state regulation, noting that an agency of the state, namely local government, was implicated because it licenses and regulates such facilities. Said Justice HARLAN:

The doctrines of Munn v. Illinois [94 U.S. 113, 24 L.Ed. 77 (1877)] have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may therefore regulate, to some extent, the mode in which they shall be conducted, and consequently the public have rights in respect of such places which may be vindicated by the law. It is consequently not a matter purely of private concern.

Congress has not, in these matters, entered the domain of state control and supervision. It does not assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement shall be conducted or managed. It simply declares in effect that since the nation has established universal freedom in this country for all time, there shall be no discrimination, based merely upon race or color, in respect of the legal rights in the accommodations and advantages of public conveyances, inns, and places of public amusement.

Justice HARLAN was also of the opinion that Congress had broad legislative power under the Fourteenth Amendment. Tying his conclusion that "[t]he colored race is part of that public" and therefore has rights where private property is "clothed with a public interest" to Congress's power under § 5 of the Fourteenth Amendment to enforce the Privileges and Immunities Clause, he said:

It is, therefore, an essential inquiry what, if any, right, privilege, or immunity was given by the nation to colored persons when they were made citizens of the state in which they reside? Did the national grant of state citizenship to that race, of its own force, invest them with any rights, privileges, and immunities whatever? That they became entitled, upon the adoption of the fourteenth amendment, "to all privileges and immunities of citizens in the several
states,” within the meaning of section 2 of article 4 of the constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the constitution, they became entitled? To this it may be answered, generally, * * * that they are those which are fundamental in citizenship in a free government, “common to the citizens in the latter states under their constitutions and laws by virtue of their being citizens.” Of that provision it has been said, with the approval of this court, that no other one in the constitution has tended so strongly to constitute the citizens of the United States one people. * * *

* * *

But what was secured to colored citizens of the United States—as between them and their respective states—by the grant to them of state citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state. That, surely, is their constitutional privilege when within the jurisdiction of other states. And such must be their constitutional right, in their own state. * * *

Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same state. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the state, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. * * *

* * *

If, then, exemption from discrimination in respect of civil rights is a new constitutional right, secured by the grant of state citizenship to colored citizens of the United States, why may not the nation, by means of its own legislation of a primary direct character, guard, protect, and enforce that right? It is a right and privilege which the nation conferred. It did not come from the states in which those colored citizens reside. It has been the established doctrine of this court during all its history, accepted as vital to the national supremacy, that congress, in the absence of a positive delegation of power to the state legislatures, may by legislation enforce and protect any right derived from or created by the national constitution. * * *

* * *

“State Action” Under the Fourteenth Amendment

Because of the Supreme Court’s narrow initial interpretation of the Thirteenth Amendment—a position that was not reversed until 85 years later in Jones v. Alfred H. Mayer Co. (p. 1200)—attention was focused on the Fourteenth Amendment. To qualify for protection within the meaning of that amendment, those who were discriminated against had to show that the unequal treatment they received was the product of “state action,” that is, that it was somehow sanctioned or supported by the power and authority of the state. This proved to be a very frustrating and roundabout way to confront private discrimination. Yet, following a milestone decision by the Vinson Court in 1948 in Shelley v. Kraemer (p. 1190), the Court began expanding the concept of state action bit by bit. In the hands of the more activist Warren Court (1953–1969), the concept was expanded to what may seem extraordinary lengths (see p. 1194). How good a substitute do you think it was for the kind of position taken by Justice Harlan in 1883? Given the logic of a decision like Reitman v. Mulkey (see p. 1194), do there appear to be any limits to what might be considered “state action”? 
When the Court takes this incremental approach of using one constitutional provision to do the work that another provision should be doing, there are substantial risks of inconsistency and unevenness in the application of the distorted doctrine. Perhaps anticipating this problem, Chief Justice Warren noted elsewhere in his opinion for the Court in *Burton v. Wilmington Parking Authority* (p. 1192): “Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an ‘impossible task’ which ‘[t]his Court has never attempted.’” Chief Justice Warren concluded, “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” Apart from a case-by-case approach, this has meant that the decision whether certain conduct amounts to state action also turns on the nature and extent of the deprivation suffered. The problem is compounded when there has been a substantial change in the composition of the Court, as with the arrival of the four Nixon appointees (Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist) at the beginning of the 1970s. Compare the *Moose Lodge* case (p. 1195) with the Court’s previous decisions. The problem of inconsistency seems even worse in *Jackson v. Metropolitan Edison Co.* (p. 1196). Although Jackson is a case involving due process rather than equal protection, resolution of the “state action” question is crucial. Surely Justice Marshall makes a telling point when he asks whether the Court would reach the same conclusion about the absence of “state action” had the utility refused to serve certain customers because of their race.

Although the cases presented or cited in this section are principally from the 1960s and 1970s, there is little basis for concluding that “state action” questions comprise an area of constitutional law that is now dead. In a future likely to be marked by repeated attempts at shrinking the cost of government by deregulating the activities of the private sector and by turning over to private businesses functions once performed by government, there is good reason to believe that “state action” questions will be with us for a long time to come.

**Shelley v. Kraemer**  
Supreme Court of the United States, 1948  
334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161

**Background & Facts**  
This dispute involved purchase of a parcel of land by Shelley, an African-American, from one Fitzgerald in a St. Louis neighborhood where deeds held by three-quarters of the property owners contained a prohibition against sale of their land to buyers “of the Negro or Mongolian race.” The neighborhood restriction had been operative since 1911, when the holders of the properties agreed to a 50-year contract pledging not to sell to persons of the two races specified. Shelley purchased the property from Fitzgerald without knowing it was covered by the restrictive covenant. When he refused to reconsider the purchase after learning of the racial exclusion, Kraemer, a resident of the neighborhood whose deed bore a similar restriction, sued to restrain Shelley from taking possession of the property. The trial court held the covenant technically faulty, but was reversed on appeal by Kraemer to the Missouri Supreme Court. That court held the agreement valid, concluded that it violated no rights guaranteed by the U.S. Constitution, and
Mr. Chief Justice VINSON delivered the opinion of the Court.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.* * *

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be * * * "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property * * * against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. * * *

These covenants do not seek to proscribe any particular use of the affected properties. * * * [but] are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. * * *

But the present cases * * * do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against
merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. * * *

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. * * *

[The action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. * * *

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. * * *

Reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

BURTON V. WILMINGTON PARKING AUTHORITY

Supreme Court of the United States, 1961
365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45

BACKGROUND & FACTS The facts are set out in the opinion below.

Mr. Justice CLARK delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in "a purely private capacity" under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibitions contained in that Amendment. It also held that under 24 Del.Code § 1501, Eagle was a restaurant, not an inn, and that as such it "is not required [under Delaware law] to serve any and all persons entering its place of business." * * * On the merits we have concluded that the exclusion of appellant under the circumstances shown to be
present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Authority * * * is "a public body corporate and politic, exercising public powers of the State as an agency thereof." Its statutory purpose is to provide adequate parking facilities for the convenience of the public and thereby relieve the "parking crisis, which threatens the welfare of the community." * * *

***

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." * * * The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. * * * [T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

*** Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

* * *

Reversed and remanded.
[Justices FRANKFURTER, HARLAN, and WHITTAKER dissented.]
### Other Cases on “State Action” Decided by the Warren Court

<table>
<thead>
<tr>
<th>Case</th>
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<td>Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 (1963)</td>
<td>Even though a store manager may have acted on the basis of his own views when he ordered black customers to leave after they insisted on being served at an all-white lunch counter, conviction of the defendants for trespass could not stand where the city had on its books an ordinance requiring segregated restaurants; existence of the ordinance negated the presumption that the store manager acted on his own.</td>
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<td>Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122 (1963)</td>
<td>The conviction of black customers under a state criminal mischief statute for demanding service at an all-white lunch counter was overturned because the mayor and police chief had announced a policy of not tolerating any “sit-ins” to desegregate eating places.</td>
<td>8-1; Justice Harlan dissented.</td>
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<td>Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964)</td>
<td>The conviction of black and white defendants, who together had demanded service at an all-white restaurant and had refused to leave when asked, was overturned. The restaurant had refused service because it would not have been in compliance with state statutes that specified that “where colored persons are employed or accommodated,” separate toilet and washroom facilities must be provided. While these regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together.”</td>
<td>9-0.</td>
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<td>Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486 (1966)</td>
<td>Where, under conditions of a will controlling use of the property, the city was to utilize land as a park for the enjoyment of whites only, and where the park was maintained for years by the city, became an integral part of municipal activities, and was granted a tax exemption, the mere removal of the city as trustee and transfer of the land title to private trustees, without altering the fact that the city continued to care for and maintain the park, would not permit segregation in the park.</td>
<td>6-3; Justices Black, Harlan, and Stewart dissented.</td>
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<td>Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627 (1967)</td>
<td>Proposition 14, which was passed by public referendum, amended the California Constitution by prohibiting the state or any of its subdivisions from interfering with “the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses”; it did not merely effect repeal of existing open housing laws, but also “involve[d] the State in private racial discriminations to an unconstitutional degree” because “[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. * * * All individuals, partnerships, corporations and other legal entities, as well as their agents and representatives, * * * [would have been able to] discriminate with respect to their real property, which is defined as any interest in real property of any kind or quality, irrespective of how obtained or financed, and seemingly irrespective of the relationship of the State to such interests in real property. Only the State * * * [would have been] excluded with respect to property owned by it.”</td>
<td>5-4; Justices Black, Clark, Harlan, and Stewart dissented.</td>
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Leroy Irvis, a Negro, was refused service solely on account of his race by a branch of the Moose Lodge located in Harrisburg, Pennsylvania, to which he had been invited as a guest. Irvis subsequently sued for injunctive relief in a federal district court, charging that the discrimination was "state action" because the club possessed a liquor license issued by the Pennsylvania liquor board. The district court held the club's membership and guest policies to be racially discriminatory and ordered the club's liquor license revoked until these practices ceased. On Moose Lodge's petition, the Supreme Court granted certiorari. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972), the Supreme Court dismissed any challenge to the club's exclusionary membership policy on grounds that Irvis as a guest had no standing to challenge it and reversed the finding of "state action" in the discrimination to which he was subjected. Speaking for the six-man majority, Justice Rehnquist said:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

The Court then went on to distinguish the circumstances of this case from those in Peterson and Burton. In answer to the charge that by its "pervasive regulation" of licensees and the limited availability of the licenses, which produced a quasi-monopoly, the state had become a partner in the discrimination, Justice Rehnquist concluded:

However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. The limited effect of the prohibition against obtaining additional club licenses when the maximum number of retail licenses allotted to a municipality has been issued, when considered together with the availability of liquor from hotel, restaurant, and retail licensees falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole. We therefore hold that, with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter "State action" within the ambit of the Equal Protection Clause of the Fourteenth Amendment.

Justice Brennan dissented in an opinion in which Justice Marshall joined. Quoting generously from the lower court opinion, Justice Brennan found liquor regulation substantially different from other types of state licensing and thus justifying a finding of "state action." In sum, he said:

When Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge bar. Liquor licensing laws are only incidently revenue measures; they are primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee's business. Very few, if any, other licensed businesses experience such complete state involvement. Yet the Court holds that that involvement does not constitute "state action" making the Lodge's refusal to serve a guest liquor solely because of his race a violation of the Fourteenth Amendment. The vital flaw in the Court's reasoning is its complete disregard of the fundamental value underlying the "state action" concept.

Justice Douglas dissented in a separate opinion.
BACKGROUND & FACTS

Metropolitan Edison Company, a privately owned corporation delivering electric power and operating under a certificate from the Pennsylvania Public Utilities Commission, terminated service to Catherine Jackson. Several years before, her electric service had been discontinued for failure to pay the bills, and she subsequently had arranged to have an account with the company opened in the name of another occupant of the residence. No payments were made, however, and when agents of the electric company came to inquire, they discovered that the meter had been tampered with so that it did not accurately measure the electricity that was being used. Ms. Jackson denied any knowledge of this, and several days later, without additional notice, the electric company shut off her power. Ms. Jackson brought suit under the Civil Rights Act, 42 U.S.C.A. § 1983, for failure to provide electricity until she had been afforded notice, hearing, and an opportunity to pay any amounts due. The federal district court dismissed her complaint, finding no element of “state action” in the company’s actions, and that conclusion was affirmed on appeal. The U.S. Supreme Court granted her petition for certiorari.

Mr. Justice REHNQUIST delivered the opinion of the Court.

* * *

The Due Process Clause of the Fourteenth Amendment provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.” In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, “however discriminatory and wrongful,” against which the Fourteenth Amendment offers no shield. * * *

* * * While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is “private,” on the one hand, or “state action,” on the other, frequently admits of no easy answer. * * *

Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. * * * Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. * * * It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be “state” acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. * * * The true nature of the State’s involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. * * *

* * *

Metropolitan is a privately owned corporation, and it does not lease its facilities from the State of Pennsylvania. It alone is responsible for the provision of power to its customers. In common with all corporations of the State it pays taxes to the State, and it is subject to a form of extensive regulation
by the State in a way that most other businesses are not. But this was likewise true of the appellant club in Moose Lodge No. 107 v. Irvis, [407 U.S. 163, 173, 92 S.Ct. 1965, 1971 (1972)] where we said:

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utilities Commission found permissible under state law. * * *

We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. We therefore have no occasion to decide whether petitioner's claim to continued service was "property" for purposes of that Amendment, or whether "due process of law" would require a State taking similar action to accord petitioner the procedural rights for which she contends. The judgment of the Court of Appeals for the Third Circuit is therefore

Affirmed.

Mr. Justice DOUGLAS, dissenting.

* * *

I agree that doctors, lawyers, and grocers are not transformed into state actors simply because they provide arguably essential goods and services and are regulated by the State. In the present case, however, respondent is not just one person among many; it is the only public utility furnishing electric power to the town. When power is denied a householder, the home, under modern conditions, is likely to become unlivable.

* * *

In the aggregate, [a review of the facts] depict[s] a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control. The particular regulations at issue, promulgated by the monopolist, were authorized by state law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions are sufficiently intertwined with those of the State, and its termination-of-service provisions are sufficiently buttressed by state law, to warrant a holding that respondent's actions in terminating this householder's service were "state action" for the purpose of giving federal jurisdiction over respondent under 42 U.S.C.A. § 1983. * * *

* * *

Mr. Justice BRENNAN, dissenting.

I do not think that a controversy existed between petitioner and respondent entitling petitioner to be heard in this action. * * * I would therefore intimate no view upon the correctness of the holdings below whether the termination of service on October 6, 1971, constituted state action but would vacate the judgment of the Court of Appeals with direction that the case be remanded to the District Court with instruction to enter a new judgment dismissing the complaint. * * *

Mr. Justice MARSHALL, dissenting.

I agree with my Brother Brennan that this case is a very poor vehicle for resolving the difficult and important questions presented today. The confusing sequence of events leading to the challenged termination make it unclear whether petitioner has a property right under state law to the service she was receiving from the respondent company. Because these complexities would seriously hamper resolution of the merits of the case, I would dismiss the writ as improvidently granted. Since the Court has disposed of the case by finding no state action, however, I think it appropriate to register my dissent on that point.

* * *
When the State confers a monopoly on a group or organization, this Court has held that the organization assumes many of the obligations of the State. ** Even when the Court has not found state action based solely on the State’s conferral of a monopoly, it has suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. ** Indeed, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177, 92 S.Ct. 1965, 1973 (1972), the court was careful to point out that the Pennsylvania liquor licensing scheme “falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole.” **

The majority’s conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. Elaborate hearings prior to termination might be quite expensive, and for a responsible company there might be relatively few cases in which such hearings would do any good. The solution to this problem, however, is to require only abbreviated pretermination procedures for all utility companies, not to free the “private” companies to behave however they see fit.

At least on occasion, utility companies have failed to demonstrate much sensitivity to the extreme importance of the service they render, and in some cities, the percentage of error in service termination is disturbingly high. ** Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination with a clear indication that a responsible company official can readily be contacted to consider any claim of error.

What is perhaps most troubling about the Court’s opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented. ** Thus, the majority’s analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State’s involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

Whatever the Court’s reluctance in Moose Lodge to find a state-granted liquor license evidence of sufficient state involvement in furthering private discrimination, the Court had little difficulty holding that a state was barred by the Equal Protection Clause from taking private antipathies toward racially mixed marriage into account in determining whether it was in the best interests of the child to revoke child custody. Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct.1879 (1984), involved review of a state court decision to divest a natural mother of custody of her infant child because of her remarriage to a man of a different race. Anthony Sidoti sought custody of the child because, after the break-up of their marriage, Linda Sidoti had subsequently lived with and then married Palmore, an African-American man. A state court had ruled it was in the best interests of the child to remove her from her mother’s custody because, upon reaching school-age, a child living with a stepparent of a different race might be subject to peer pressures and social stigmatization due to private prejudices “not present if the child were living with parents of the same racial or ethnic origin.” The state court never made any determination about Linda Sidoti’s fitness as a
mother. The Supreme Court held that the state court's use of race as the basis for its judgment was a classification manifesting governmentally based discrimination and was barred by "Strauder. Said a unanimous Supreme Court in "Palmore: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

As the cases show, there is no rigid formula for identifying "state action." In the words used by Justice Souter in "Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S.Ct. 924 (2001), "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " In applying this standard, he emphasized that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."

Resolution of the question in any given case is, therefore, a fact-bound inquiry that is necessarily case-specific. The question is whether the affairs of a private entity have become sufficiently entwined with those of the state. This formulation of the concept has been vigorously opposed by Chief Justice Rehnquist and Justices Scalia and Thomas who have argued that entwinement alone is not enough. In their view, to qualify as state action, there must be a finding that private entity "performed a public function [that is, a function 'traditionally exclusively reserved to the State']; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government."

Reaching Private Conduct Through the Thirteenth Amendment

With its decision in "Jones v. Alfred H. Mayer Co. (p. 1200), the Warren Court did much to revive the expansive reading of the Thirteenth Amendment originally articulated in Justice John Harlan, Sr.'s dissent in the "Civil Rights Cases of 1883. In "Jones, the Warren Court upheld the application of a provision of the Civil Rights Act of 1866, passed by Congress to enforce the Thirteenth Amendment and codified as 42 U.S.C.A. § 1982, to prohibit private as well as public discrimination in the sale or rental of property. Despite the change in the Court's composition as a result of the four appointments made by President Richard Nixon, the Burger Court reaffirmed "Jones's reading of the Thirteenth Amendment in "Runyon v. McCrary (p. 1202) less than a decade later.

Other modern decisions by the Court confirm the fact that, whatever misgivings some of the Justices have had about the correctness of the ruling in "Jones, that ruling comports more closely with contemporary values than would a more historically accurate one. In "Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 (1971), the Court held that 42 U.S.C.A. § 1985(3), the Ku Klux Klan Act (a statute derived from the 1866 and 1871 civil rights

\[13.\] The statute provides that an injured party may have a cause of action for damages "[i]f two or more persons * * * conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving * * * any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law * * *." In "Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S.Ct. 753 (1993), the Court held, by a 6–3 vote, that an abortion clinic could not bring suit under 42 U.S.C.A. § 1985(3) against Operation Rescue, which trespasses on private property, blockades abortion clinics, engages in acts of vandalism, and overwhelms the ability of local officials to keep order and preserve patient and employee access to such clinics. The plaintiffs argued that members of Operation Rescue conspired to deprive women seeking abortions of their constitutional right to interstate travel. The Court, per Justice Scalia, held that such a suit was not permissible under the statute (1) because there was no discriminatory animus against women as such because of their gender; and (2) because, although women often travel interstate to reach abortion clinics, it was irrelevant to Operation Rescue's opposition to abortion whether or not travel across state lines preceded the intended abortion. Following the Court's decision, Congress passed the "Freedom of Access to Clinic Entrances Act of 1993 (see p. 745).
statutes), permitted African-American plaintiffs to bring suit against two white citizens of Mississippi after they had been forced from their car and assaulted in the mistaken belief they were civil rights workers. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574 (1976), decided at the same time as Runyon, the Court upheld a suit by two discharged white employees against their employer under 42 U.S.C.A. § 1981 for violating Title VII of the 1964 Civil Rights Act, which prohibits the discharge of an employee on the basis of race, when they were fired for stealing cargo, while a black employee charged with the same offense was not. And in Sharre Tefila Congregation v. Cobb, 481 U.S. 615, 107 S.Ct. 2019 (1987), and St. Francis College v. Al-Khazraj, 481 U.S. 604, 107 S.Ct. 2022 (1987), the Court sustained suits by Jews and Arabs, respectively, under 42 U.S.C.A. §§ 1981 and 1982 for damages arising out of racially discriminatory private conduct on the grounds that “Jews and Arabs were among the people then considered to be distinct races and hence within the protection of the statute.”

Having granted certiorari in 1988 to address the question “[w]hether or not the interpretation of 42 U.S.C.A. § 1981 adopted * * * in Runyon v. McCrary * * * should be reconsidered,” the Rehnquist Court held in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2163 (1989), that it should not. The Court unanimously concluded that “no special justification has been shown for overruling Runyon.” Speaking for the Court, Justice Kennedy said, “Whether Runyon’s interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is wrong or right as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, Runyon is entirely consistent with our country’s deep commitment to the eradication of discrimination based on a person’s race or color of his or her skin.”

JONES V. ALFRED H. MAYER CO.

Supreme Court of the United States, 1968
392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189

BACKGROUND & FACTS

The facts are contained in the opinion below.

Mr. Justice STEWART delivered the opinion of the Court.

In this case we are called upon to determine the scope and constitutionality of an [1866] Act of Congress, 42 U.S.C.A. § 1982, which provides that:

“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief. The District Court sustained the respondents' motion to dismiss the complaint, and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell. * * * We reverse the judgment of the Court of Appeals. We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. * * *

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without
regard to race or color, “the same right” to purchase and lease property “as is enjoyed by white citizens.” As the Court of Appeals in this case evidently recognized, that right can be impaired as effectively by “those who place property on the market” as by the State itself. * * *

On its face, therefore, § 1982 appears to prohibit all discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 “means what it says”—to use the words of the respondents’ brief—then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

* * *

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment. * * *

As its text reveals, the Thirteenth Amendment “is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” Civil Rights Cases, 109 U.S. 3, 20, 3 S.Ct. 18, 28. It has never been doubted, therefore, “that the power vested in Congress to enforce the article by appropriate legislation,” * * * includes the power to enact laws “direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.” * * *

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment “by appropriate legislation” include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

* * *

* * * Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its “burdens and disabilities”—included restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right * * * to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” Civil Rights Cases, 109 U.S. 3, 22, 3 S.Ct. 18, 29. * * *

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to
live wherever a white man can live. If Congress cannot say that being a free man
means at least this much, then the Thirteenth Amendment made a promise the
Nation cannot keep.

Reversed.

Mr. Justice HARLAN, whom Mr. Justice WHITE joins, dissenting.

The decision in this case appears to me to be most ill-considered and ill-advised.

* * *

I believe that the Court's construction of § 1982 as applying to purely
private action is almost surely wrong, and at the least is open to serious doubt. The issues
of the constitutionality of § 1982, as construed by the Court, and of liability
under the Fourteenth Amendment alone, also present formidable difficulties. Moreover,
the political processes of our own era have, since the date of oral argument in this
case, given birth to a civil rights statute embodying "fair housing" provisions which
would at the end of this year make available to others, though apparently not to the
petitioners themselves, the type of relief which the petitioners now seek. It seems to
me that this latter factor so diminishes the public importance of this case that by far the
wisest course would be for this Court to refrain from decision and to dismiss the writ
as improvidently granted.

The court rests its opinion chiefly upon
the legislative history of the Civil Rights
Act of 1866. I shall endeavor to show that
those debates do not, as the Court would
have it, overwhelmingly support the result
reached by the Court, and in fact that a
contrary conclusion may equally well be
drawn. [Discussion omitted.]

The foregoing, I think, amply demonstrates that the Court has chosen to resolve
this case by according to a loosely worded statute a meaning which is open to the
strongest challenge in light of the statute's legislative history. In holding that the
Thirteenth Amendment is sufficient constitutio-
nal authority for § 1982 as interpreted,
the Court also decides a question of great
importance. Even contemporary supporters
of the aims of the 1866 Civil Rights Act
doubted that those goals could constitution-
ally be achieved under the Thirteenth
Amendment, and this Court has twice
expressed similar doubts.

* * *

Runyon v. McCrary
Supreme Court of the United States, 1976
427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415

BACKGROUND & FACTS
Runyon and his wife, proprietors of a private
school in Virginia, denied admission to McCrary, a black, on grounds of race. Federal
law, specifically 42 U.S.C.A. § 1981, provides in part that "[a]ll persons within the
jurisdiction of the United States shall have the same right in every State * * * to
make and enforce contracts * * * as is enjoyed by white citizens * * *" McCrary,
through his parents, brought suit for declaratory and injunctive relief and damages.
The district court upheld the applicability of § 1981 against racial discrimination by
private schools, and the U.S. Court of Appeals, Fourth Circuit, affirmed. This case
was consolidated with several others for hearing by the U.S. Supreme Court.

Mr. Justice STEWART delivered the
opinion of the Court.

* * *
of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C.A. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.

A. APPLICABILITY OF § 1981

It is now well established that § 1 of the Civil Rights Act of 1866, 42 U.S.C.A. § 1981, prohibits racial discrimination in the making and enforcements of private contracts. See * * * Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–443, n. 78, 88 S.Ct. 2186, 2204–2205 (1968).

It is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe’s Private School amounts to a classic violation of § 1981. The parents of Colin Gonzales and Michael McCrary sought to enter into contractual relationships with Bobbe’s Private School for educational services. Colin Gonzales’ parents sought to enter into a similar relationship with the Fairfax-Brewster School. Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments. The educational services of Bobbe’s Private School and the Fairfax-Brewster School were advertised and offered to members of the general public. But neither school offered services on an equal basis to white and nonwhite students. As the Court of Appeals held, “there is ample evidence in the record to support the trial judge’s factual determinations * * * [that] Colin [Gonzales] and Michael [McCrary] were denied admission to the schools because of their race.” * * *

The petitioning schools and school association argue principally that § 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with Jones’ interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an interpretation that * * * [since then has been] reaffirmed * * *. And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct. * * *

It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972 * * * specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in Jones, insofar as it affords private sector employees a right of action based on racial discrimination in employment. * * * There could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination.* * *

B. CONSTITUTIONALITY OF § 1981 AS APPLIED

The question remains whether § 1981, as applied, violates constitutionally protected rights of free association and privacy, or a parent’s right to direct the education of his children.

1. Freedom of Association

In NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958), and similar decisions, the Court has recognized a First Amendment right “to engage in association for the advancement of beliefs and ideas * * *.” * * * That right is protected because it promotes and may well be essential to the “[effective advocacy of both public and private points of view, particularly controversial ones]” that the First Amendment is designed to foster. * * *

From this principle it may be assumed that parents have a First Amendment right
to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804 (1973), “the Constitution * * * places no value on discrimination,” * * * and while “[i]ndividual private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment * * * it has never been accorded affirmative constitutional protections.” * * * [A]s the Court of Appeals noted, “there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.” * * *

2. Parental Rights

In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923), the Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right “to acquire useful knowledge, to marry, establish a home and bring up children,” * * * and, concomitantly, the right to send one’s children to a private school that offers specialized training * * *.

* * * No challenge is made to the petitioners’ right to operate their private schools or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. Thus, the Fairfax-Brewster School and Bobbe’s Private School and members of the intervenor association remain presumptively free to inculcate whatever values and standards they deem desirable. Meyer * * * entitle[s] them to no more.

3. The Right of Privacy

The Court has held that in some situations the Constitution confers a right of privacy. See Roe v. Wade, 410 U.S. 113, 152–153, 93 S.Ct. 705, 726–727 (1973); * * * Griswold v. Connecticut, 381 U.S. 479, 484–485, 85 S.Ct. 1678, 1681–1682 (1965). * * *

While the application of § 1981 to the conduct at issue here—a private school’s adherence to a racially discriminatory admissions policy—does not represent governmental intrusion into the privacy of the home or a similarly intimate setting, it does implicate parental interests. These interests are related to the procreative rights protected in Roe v. Wade, supra, and Griswold v. Connecticut, supra. A person’s decision whether to bear a child and a parent’s decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because government is largely or even entirely precluded from regulating the childbearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child’s education.

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. * * * Indeed, the Court in Pierce [v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925)] expressly acknowledged “the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.” * * *

* * *

For the reasons stated in this opinion, the judgment of the Court of Appeals is in all respects affirmed.

It is so ordered.

Mr. Justice POWELL, concurring.

If the slate were clean I might well be inclined to agree with Mr. Justice WHITE that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this
statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

***

As the Court of Appeals said, the petitioning "schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private." * * * The schools extended a public offer open, on its face, to any child meeting certain minimum qualifications who chose to accept. They advertised in the "yellow" pages of the telephone directories and engaged extensively in general mail solicitations to attract students. The schools are operated strictly on a commercial basis, and one fairly could construe their open-end invitations as offers that matured into binding contracts when accepted by those who met the academic, financial, and other racially neutral specified conditions as to qualifications for entrance. There is no reason to assume that the schools had any special reason for exercising an option of personal choice among those who responded to their public offers. A small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students, for example, would present a far different case.

I do not suggest that a "bright line" can be drawn that easily separates the type of contract offer within the reach of § 1981 from the type without. The case before us is clearly on one side of the line, however defined, and the kindergarten and music school examples are clearly on the other side. Close questions undoubtedly will arise in the grey area that necessarily exists in between. But some of the applicable principles and considerations, for the most part identified by the Court's opinion, are clear: Section 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the Nineteenth Century Civil Rights Acts. The open offer to the public generally involved in the case before us is simply not a "private" contract in this sense. Accordingly, I join the opinion of the Court.

Mr. Justice STEVENS, concurring.

For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186 (1968), and its progeny have unequivocally held that § 1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools at that time, it is quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools. Were we writing on a clean slate, I would therefore vote to reverse.

But Jones has been decided and is now an important part of the fabric of our law. Although I recognize the force of Mr. Justice White's argument that the construction of § 1982 does not control § 1981, it would be most incongruous to give those two sections a fundamentally different construction. The net result of the enactment in 1866, the re-enactment in 1870, and the codification in 1874 produced, I believe, a statute resting on the constitutional foundations provided by both the Thirteenth and Fourteenth Amendments.
An attempt to give a fundamentally different meaning to two similar provisions by ascribing one to the Thirteenth and the other to the Fourteenth Amendment cannot succeed. I am persuaded, therefore, that we must either apply the rationale of Jones or overrule that decision.

There are two reasons which favor overruling. First, as I have already stated, my conviction that Jones was wrongly decided is firm. Second, it is extremely unlikely that reliance upon Jones has been so extensive that this Court is foreclosed from overruling it. * * * There are, however, opposing arguments of greater force.

The first is the interest in stability and orderly development of the law. As Justice Cardozo remarked, with respect to the routine work of the judiciary, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” Turning to the exceptional case, Justice Cardozo noted “that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank disavowal and full abandonment. * * * If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.” In this case, those admonitions favor adherence to, rather than departure from, precedent. For even if Jones did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a sympathetic and liberal construction to such legislation. For the Court now to overrule Jones would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to Jones.

With this explanation, I join the opinion of the Court.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

We are urged here to extend the meaning and reach of 42 U.S.C.A. § 1981 so as to establish a general prohibition against a private individual or institution refusing to enter into a contract with another person because of that person’s race. Section 1981 has been on the books since 1870 and to so hold for the first time would be contrary to the language of the section, to its legislative history and to the clear dictum of this Court in the Civil Rights cases, 109 U.S. 1, 16–17, 3 S.Ct. 18, 25–26 (1883), almost contemporaneously with the passage of the statute, that the section reaches only discriminations imposed by state law. The majority’s belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive. I therefore respectfully dissent.

The legislative history of 42 U.S.C.A. § 1981 confirms that the statute means what it says and no more, i.e., that it outlaw any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract. * * *

* * *

The majority’s holding that 42 U.S.C.A. § 1981 prohibits all racially motivated contractual decisions—particularly coupled with the Court’s decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574 (1976)], that whites have a cause of action against others including blacks for racially motivated refusals to contract—threatens to embarrass the judiciary on a treacherous course.
Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each other—which considerations have never been addressed by any Congress—all under the guise of "construing" a statute. This is a task appropriate for the legislature, not for the judiciary.

However, in Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. en banc, 2006), a federal appellate court upheld, by an 8–7 vote, the right of a Hawaiian private school to deny admission to non-native Hawaiian applicants. The appeals court ruled that the racial preference was justified because: (1) specific, significant imbalances in educational achievement still affected the target population; (2) the admissions policy did not unnecessarily infringe the rights of students in the non-preferred class or create an absolute bar to their advancement; and (3) the admissions policy did no more than was necessary to remedy the imbalance in the community as a whole. The Kamehameha schools received no public funds and were created through a charitable trust established by the last direct descendant of the Hawaiian monarchy for the education of students of Hawaiian ancestry and secondarily for others, but only if there were not enough native applicants.

Private Discrimination and First Amendment Issues

Two noteworthy rulings of the Court address the relationship between private discrimination and the First Amendment. In Bob Jones University v. United States, which follows, the Court upheld governmental action revoking the tax-exempt status of private universities with racially discriminatory admissions policies. Although courts have generally held that private schools that discriminate on the basis of race as a matter of religious doctrine may do so under the First Amendment, discontinuance of their tax-exempt status implicates no such interest. Why? Turning from discrimination based on race to that based on sex, the Court also upheld the application of a Minnesota antidiscrimination law to end the gender-based discrimination practiced by the Jaycees (p. 1208). Why aren't the Jaycees, as a private organization, free to refuse admission to whatever classes of people they like as a matter of freedom of association? Under what circumstances would they be able to?

**NOTE—DENYING TAX-EXEMPT STATUS TO PRIVATE SCHOOLS THAT PRACTICE RACIAL DISCRIMINATION**

Federal tax law exempts corporations "organized and operated exclusively for religious, charitable * * * or educational purposes." In 1970, the Internal Revenue Service began denying tax-exempt...
status to private schools that practiced racial discrimination on the grounds that they were not “charitable” institutions within the meaning of the common-law concept embodied in the federal statutes. Pursuant to this policy, the IRS revoked tax-exempt status for Bob Jones University and denied it to the Goldsboro Christian Schools, so that both institutions were liable for payment of such levies as federal unemployment and social security taxes. In the case of Bob Jones University, the IRS based its revocation of federal tax exemption on the university’s practice of expelling or denying admission to students who practiced or advocated interracial marriage or dating. The IRS refused to grant federal tax exemption to the Goldsboro Christian Schools, a newer but also fundamentalist institution, on the basis of its discriminatory admissions policy generally barring African-Americans predicated on its interpretation of the Bible. Both institutions argued that the IRS had erred in its construction of the statute and that application of the IRS regulation violated the Religion Clauses of the First Amendment.

In Bob Jones University v. United States and Goldsboro Christian Schools, Inc. v. United States, 461 U.S. 574, 103 S.Ct. 2017 (1983), the Supreme Court upheld the actions taken by the IRS * * *

Speaking for the Court, Chief Justice Burger concluded, as a matter of statutory construction, that entitlement to tax-exempt status as a charitable institution within the meaning of the federal statute embodies the common-law standard of charity, meaning that to be eligible an institution must serve a public purpose and not be contrary to established public policy. Further, the Court reasoned, the IRS was correct in determining that racial discrimination was inconsistent with public policy articulated by both the legislative and the executive branches. Indeed, observed the Court, actions taken by Congress since 1970 left no doubt whatever that the practices of both educational institutions contravened express public policy. Finally, the Court held that, although "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools * * * it will not prevent those schools from observing their religious tenets." Said the Chief Justice:

“The governmental interest at stake here is compelling. * * * [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, * * * and no “less restrictive means,” * * * are available to achieve the governmental interest.

NOTE—ROBERTS v. UNITED STATES JAYCEES

In Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244 (1984), the Supreme Court unanimously upheld the constitutionality of applying a Minnesota law that makes it “an unfair discriminatory practice * * * [t]o deny any person the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex” to the restrictive membership policies of the Jaycees. Bylaws of the national organization limit membership to young men between 18 and 35 years of age. Although women and older men are eligible for associate membership, they are not permitted to vote or hold local or national office. When two local chapters of the Jaycees in Minnesota conformed their membership policies to the state law, the national organization began action to revoke the local chapters’ charters. The two Minnesota chapters then filed discrimination charges with the State Department of Human Rights.

Speaking for the Court, Justice Brennan rejected the national Jaycees’ contention that the application of the Minnesota antidiscrimination law to chapters within that state violated the
members' freedom of association under the First Amendment. Justice Brennan observed that the case invited consideration of two different strands of freedom of association decisions—one that secured "[t]he choice to enter into and maintain certain intimate human relationships * * * against undue intrusion by the State" and another in which "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances and the exercise of religion." The Court considered separately the impact of the state law on these respective interests of "freedom of intimate association" and "freedom of expressive association."

As to any interest in the "freedom of intimate association," the Court found that, taking into account relevant factors that distinguish various associations along this dimension—"size, purpose, policies, selectivity, [and] congeniality"—the fact was "the local chapters of the Jaycees are large and basically unselective groups." Justice Brennan observed, "Apart from age and sex, neither the national organization nor the local chapters employs any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds." The Court thus concluded that "the Jaycees lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."

Conceding that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire" and that "freedom of association * * * plainly supposes a freedom not to associate," the Court nevertheless pointed out that "[t]he right to associate for expressive purposes is not * * * absolute." Justice Brennan noted that "[o]n its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." Furthermore, the Court found the state's interest in enforcing an antidiscrimination statute "compelling," because "the Minnesota Act protects the State's citizenry from a number of serious social and personal harms." He explained, "In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." He added that "the Jaycees have failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." Justice Brennan continued, "There is * * * no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in its protected activities [a variety of civic, charitable, lobbying, and fund-raising activities] or to disseminate its preferred views."

The Court also rejected the argument that the statute regulating "a place of public accommodation" was overbroad as applied to an organization such as the Jaycees. As construed earlier by the Minnesota Supreme Court, the majority found that the organization fell within the purview of the act as identified by "a number of specific and objective criteria—regarding the organization's size, selectivity, commercial nature, and use of public facilities—typically employed in determining the applicability of state and federal anti-discrimination statutes to the membership policies of assertively private clubs."

Using substantially similar reasoning, the Court held in subsequent cases that Rotary International could not revoke the charter of a local Rotary club because it admitted women as members in accordance with a California civil rights statute, see Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940 (1987), and sustained the constitutionality of a New York City antidiscrimination ordinance as applied to all-male private clubs, see New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S.Ct. 2225 (1988). Women had argued that their exclusion from all-male private clubs put them at a considerable
disadvantage since important business contacts frequently developed and negotiations often occurred during lunch at these private preserves. The city ordinance exempted small private clubs and benevolent and religious organizations.

In the following case, which addresses whether the Boy Scouts can exclude gays from membership, the Court distinguished the facts from those in the Roberts case and concluded that application of New Jersey’s nondiscrimination-in-public-accommodations law violated the First Amendment rights of the Boy Scouts. Instead of Roberts, the Court concluded that its earlier ruling in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (see p. 847) controlled this case.

BOY SCOUTS OF AMERICA v. DALE

Supreme Court of the United States, 2000
530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554

BACKGROUND & FACTS James Dale joined the Cub Scouts in 1978 at age 8, became a Boy Scout three years later, and remained in Scouting until he was 18. His performance in the organization was exemplary and he attained the rank of Eagle Scout. In 1989, he applied for adult membership, and the Boy Scouts approved his application to become an assistant scoutmaster. About the same time, he left to attend Rutgers University. He quickly became involved with and eventually became co-president of the Rutgers University Lesbian/Gay Alliance. A newspaper covering a seminar that he attended on the psychological and health needs of gay teenagers printed his picture and identified him as a leader of the campus organization. He subsequently received a letter from the Boy Scouts of America (BSA) revoking his adult membership in that organization. When he asked for an explanation, the organization responded by letter that the Boy Scouts “specifically forbid membership to homosexuals.” Dale subsequently sued BSA under the New Jersey public accommodations law that, among other things, explicitly forbids discrimination based on sexual orientation. Although a state trial court rendered judgment for the Boy Scouts, the New Jersey Supreme Court found in Dale’s favor, and BSA petitioned the U.S. Supreme Court for certiorari.

Chief Justice REHNQUIST delivered the opinion of the Court.

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We granted the Boy Scouts’ petition for certiorari to determine whether the application of New Jersey’s public accommodations law violated the First Amendment. ***

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*** The record reveals *** [that] [t]he Boy Scouts is a private, nonprofit organization. According to its mission statement: “It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:

“Scout Oath
“On my honor I will do my best To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.

“Scout Law
“A Scout is: “Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.” ***

*** It seems indisputable that an association that seeks to transmit such a
system of values engages in expressive activity. * * * Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. * * *

* * * The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean." Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. * * * And the terms "morally straight" and "clean" are by no means self-defining. * * *

***

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," * * * and that it does "not want to promote homosexual conduct as a legitimate form of behavior" * * *. We accept the Boy Scouts' assertion * * * as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee * * * expresses * * * the official position of the Boy Scouts * * * that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view * * *.

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. * * * We cannot doubt that the Boy Scouts sincerely holds this view.

* * * As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. * * * That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." * * * Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB), 515 U.S. 557, 115 S.Ct. 2338 (1995) * * * considered whether that application of Massachusetts' public accommodations law * * * require[d] the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. * * * As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster * * *. We disagree * * *.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in
expressive activity that could be impaired in order to be entitled to protection.* * *

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts’ method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

* * * The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. * * * The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.* * *

We recognized cases such as Roberts and [Board of Directors of Rotary International v. Rotary Club of] Duarte [481 U.S. 537, 107 S.Ct. 1940 (1987)] that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. * * * We * * * concluded in each of these cases that the organizations’ First Amendment rights were not violated by the application of the States’ public accommodations laws.

* * *

In Hurley, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in Hurley an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

* * *

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

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG and Justice BREYER join, dissenting.

* * *

[Since the] Boy Scouts of America contends that it teaches the young boys who are Scouts that homosexuality is immoral * * * [we are required] to look at what, exactly, are the values that BSA actually teaches. * * *

It is plain as the light of day that neither one of these principles—“morally straight” and “clean”—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts’ Law and Oath expresses any position whatsoever on sexual matters.

BSA’s published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization * * *.

* * * Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation. This
is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders * * *

Aside from the fact that * * * [BSA's] statements on homosexuality and Scouting were all issued after Dale's membership was revoked, there are four important points relevant to them. First, while the 1991 and 1992 statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort. Rather, BSA's 1993 homosexual exclusion policy was based on its view that including gays would be contrary to "the expectations that Scouting families have had for the organization." * * *

Instead of linking its policy to its central tenets or shared goals—to teach certain definitions of what it means to be "morally straight" and "clean"—BSA chose instead to justify its policy on the "expectation[ ]" that its members preferred to exclude homosexuals. The 1993 policy statement, in other words, was not based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past. * * *

Second, even during the brief period in 1991 and 1992, when BSA tried to connect its exclusion of homosexuals to its definition of terms found in the Oath and Law, there is no evidence that Scouts were actually taught anything about homosexuality's alleged inconsistency with those principles. Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being "morally straight" and "clean." * * *

Third, BSA never took any clear and unequivocal position on homosexuality. Though the 1991 and 1992 policies state one interpretation of "morally straight" and "clean," the group's published definitions appearing in the Boy Scout and Scoutmaster Handbooks take quite another view. And BSA's broad religious tolerance combined with its declaration that sexual matters are not its "proper area" render its views on the issue equivocal at best and incoherent at worst. We have never held, however, that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views. At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.

Fourth, * * * New Jersey's law prohibits discrimination on the basis of sexual orientation. And when Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct. * * *

BSA's claim finds no support in our cases. * * * [T]he right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 13, 108 S.Ct. 2225 (1988). * * * [W]e have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations. * * * [W]e have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy. * * *

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality.* * *

* * *

* * *

We must inquire whether a group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's
antidiscrimination law. More critically, that inquiry requires our independent analysis, rather than deference to a group’s litigating posture. ***

*** To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercise of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant’s claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. ***

*** Dale’s inclusion in the Boy Scouts is nothing like the case in Hurley. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment. ***

The flipside of the controversy in Dale was presented to the Court six years later in Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 547 U.S. 47, 126 S.Ct. 1297 (2006). The difference was that this time the anti-gay stance was the government’s. At issue in this case was the constitutional validity of the so-called Solomon Amendment, 10 U.S.C.A. § 983, adopted by Congress in 1994, which requires that federal funds be shut off to any institution of higher education that denies military representatives access for recruiting purposes. The Amendment originated in the Vietnam war era when those opposed to the war sought to keep ROTC off-campus. The law requires that institutions receiving federal funds must provide military recruiters with the same access as that given to other groups. Conflict arose when an association of law schools adopted an across-the-board policy of withholding placement services from employers who discriminate against job applicants on the basis of race, ethnicity, national origin, religion, gender disability, age, or sexual orientation. Since the military excludes openly gay and lesbian individuals, branches of the U.S. military fell within the prohibition imposed by the law school anti-discrimination policy. The law schools argued that the Solomon Amendment violated the First Amendment by compelling law schools to express support for a policy of discrimination which they opposed. A divided federal appeals court agreed and struck down the Amendment, but the Supreme Court reversed.

Speaking for a unanimous Court in Rumsfeld v. FAIR, Chief Justice John Roberts rejected the argument that the Solomon Amendment coerced the law schools to endorse an opposing point of view. In the first place, he said, the Solomon Amendment offered recipients of federal funds a choice: they could accept the money, in which case they had to give military recruiters the same access they gave to other employers; or they could refuse the money and remain perfectly free to deny military recruiters access. In the second place, this was not a freedom-of-expression case, The Chief Justice explained: “The Solomon Amendment neither limits what law schools may say or requires them to
say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally-mandated employment policy, all the while remaining eligible for federal funds. * * * [T]he Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.” This case was not like Hurley v. GLIB (p. 847), Chief Justice Roberts continued: “[A]ccommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer’s choice of parade contingents, a law school’s decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”

C. VOTING RIGHTS AND ELECTORAL DISCRIMINATION

Under the original terms of the Constitution, regulation of the right to vote—even in federal elections—was placed in the hands of the states. Article I, section 2, paragraph 2 specified that voters would be eligible to elect a member of the House of Representatives if they “have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” And section 4, paragraph 1 consigned to the state legislatures “[T]he Times, Places and Manner of holding [such] Elections,” but added that “Congress may at any time by Law make or alter such Regulations * * *.” Authority over federal elections therefore was a concurrent power of the national and state governments, although Congress’s supervisory power over elections in which federal representatives were elected was easily sustained in Ex parte Siebold, 100 U.S. (10 Otto) 371, 25 L.Ed. 717 (1879).

Recently, Congress exercised its supervisory power over federal elections when it passed the National Voter Registration Act of 1993, 42 U.S.C.A. §§ 1973gg et seq., aimed at increasing voter participation. Dubbed the “Motor Voter Act” because it requires the states to provide for voter registration at such places as it receives applications for driver’s licenses and provides public assistance or services to the disabled, the law was challenged as a violation of the Tenth Amendment. Although the federal courts that have upheld the statute make it clear that “motor voter” registration applies only to elections of federal officials and states can insist on separate voter registration for state elections at places of their own choosing, they have concluded it is a valid exercise of congressional power under Article I, section 4, clause 1. Moreover, the federal courts have also held that the states have to bear the cost of complying with the law, even if it is substantial. See Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093, 116 S.Ct. 815 (1996); ACORN v. Edgar, 880 F.Supp. 1215 (N.D.Ill. 1995), affirmed, 56 F.3d 791 (7th Cir. 1995).

The Voting Rights Act

Until 1965, much of Congress’s effort in exercising its regulatory prerogative over federal elections was spent fixing the manner and time of elections and punishing corruption. Passage of the Voting Rights Act in 1965, however, did much to expand the role of the
national government in the electoral process. That Act was made necessary by post–Civil
War events that constituted the dark side of American politics.

As the Supreme Court acknowledged in the Slaughterhouse Cases (p. 473), the Civil War
Amendments—Thirteen, Fourteen, and Fifteen—were passed to better and protect the
condition of African-Americans following the armed struggle that preserved the Union and
won their freedom. Among these, the Fifteenth specifically prohibited race as a
qualification for voting.

Although the South remained solidly Democratic for more than 100 years after the
Civil War, the maintenance of white control over political power was severely threatened
in the 1890s when Populism attracted strong support from poor whites. Since a division of
white political power between the Democratic and Populist parties would have left blacks
holding the balance of power, the movement to disenfranchise African-Americans
assumed full-blown proportions by the turn of the century. By employing tools such as poll
taxes, literacy tests, good moral character tests, and Constitution interpretation tests—
usually applied in a highly discriminatory manner—black participation in the electoral
process was eliminated, often taking with it effective participation by many poor whites
as well.

As Chief Justice Warren recounts in the following Court opinion in South Carolina
v. Katzenbach, the attack on racial discrimination in the electoral process began in the
federal courts and continued there for decades. Although frequently well intentioned,
the federal courts proved to be a forum of limited effectiveness in battling racial
exclusion from the ballot box. Thanks to the principle of senatorial courtesy, most
federal district judges throughout the South were themselves segregationists. The
involvement of courts depended upon plaintiffs filing lawsuits, but blacks were the
poorest and most illiterate of a regional population that was itself the poorest and most
illiterate in the nation. Moreover, the hallmark of the judicial process is its posture of
attacking problems on the narrowest ground, one slice at a time, and with a remedy
confined to the instant case, when what was wanted was bold, concerted action. These
factors, sizeable in their own right, operated against a backdrop of never-ending racial
violence in which local law enforcement frequently was outnumbered and often willingly
connived.

Relying on the enforcement power contained in section 2 of the Fifteenth Amendment,
Congress enacted the Voting Rights Act, the most sweeping legislation ever enacted to
remove racial discrimination from the electoral process, and the Supreme Court upheld it
in South Carolina v. Katzenbach. The legislation replaced a mainly judicial approach with a
legislative one and shifted the burden from the victims of racial discrimination to its

Although South Carolina v. Katzenbach discusses the constitutionality of the legislation
as it enforces section 2 of the Fifteenth Amendment, the Voting Rights Act protected
other groups besides African-Americans from electoral exclusion. The Act also contained a
 provision, section 4(e), that specified that no individual who had successfully completed
the sixth grade in a Puerto Rican public school or in a private school accredited by that
territory, in which the instructional language was other than English, could be denied the
right to vote simply because he or she could not read and write English. In Katzenbach
v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966), the Supreme Court upheld this provision
as a constitutional exercise of Congress’s power to enforce the Equal Protection Clause of
the Fourteenth Amendment and in doing so intimated that Congress’s power to implement
equal protection could reach a lot further than just assuring the right to vote. The Court
also held that Congress itself could make its own determination that equal protection was
being abridged and could legislate corrective measures based on its findings; Congress need
not await an initial determination by the courts that a deprivation of equal protection has occurred.

SOUTH CAROLINA v. KATZENBACH
Supreme Court of the United States, 1966
383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769

BACKGROUND & FACTS
Under the Supreme Court's original jurisdiction, South Carolina filed a bill of complaint, seeking a declaration as to the constitutionality of several sections of the Voting Rights Act of 1965 and asking that Nicholas Katzenbach, the U.S. attorney general, be enjoined from their enforcement. The Act to which South Carolina objected was designed to identify and remedy racial discrimination in voting. The remedial provisions of the Act applied to any state or political subdivision that was found by the U.S. attorney general to have maintained a "test or device" (e.g., literacy test, constitution interpretation test, requirement that the voter possess "good moral character," etc.) as a prerequisite to voting on November 1, 1964, and that was determined by the director of the census to have less than 50% of its voting-age residents registered or voting in the November 1964 election. The Act provided, among other remedies, that such tests and devices would be promptly suspended, federal registrars and poll-watchers would be assigned, and states identified by the Act would have to obtain a declaratory judgment from the U.S. District Court for the District of Columbia approving any new test or device before it could become effective.

South Carolina challenged provisions of the Act principally as a violation of the Tenth Amendment, though it asserted additional arguments that the Act also violated due process and the principle of equal treatment of states. The attorney general defended on the ground that such legislation was well founded on Congress's power to legislate pursuant to provisions of the Fifteenth Amendment.

Mr. Chief Justice WARREN delivered the opinion of the Court.

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. * * *

Beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These
included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926 (1915). * * * Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872 (1939). The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944), and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953). Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960). Finally, discriminatory application of voting tests was condemned in * * * Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817 (1965).

According to the evidence in recent Justice Department voting suits, the latter strategem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error. The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials. Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. * * *

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. * * *

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4(a)–(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4(a), is the suspension of literacy tests and similar voting qualifications for a
period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6(b), 7, 9, and 13(a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10(d) excuses those made eligible to vote in sections of the country covered by § 4(b) of the Act from paying accumulated past poll taxes for state and local elections.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Section 4(e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10(a)–(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections.

South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that “Congress shall have power to enforce this article by appropriate legislation.” By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitu-
We therefore reject South Carolina’s argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, “This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824).

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. * * * We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. * * *

The bill of complaint is dismissed.

Bill dismissed.

Mr. Justice BLACK, concurring and dissenting.

* * *

Though * * * I agree with most of the Court’s conclusions, I dissent from its holding that every part of § 5 of the Act is constitutional. * * * I think * * *§ 5] is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. * * * [It] is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt [Emphasis supplied]. * * *

(b) My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. * * * Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either “to the States respectively, or to the people.” Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that “The United States shall guarantee to every State in this Union a Republican Form of Government.” I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. * * *

* * * I would hold § 5 invalid for the reasons stated above with full confidence.
that the Attorney General has ample effective protection to the voting rights of power to give vigorous, expeditious and all citizens.

Since its original enactment in 1965, Congress has regularly extended the life of the Voting Rights Act. As the Katzenbach decision details, what impelled Congress to act in the first place was the use of such things as the literacy test, the Constitution interpretation test, the all-white primary, and racial gerrymandering. However, the law refers generically to the discriminatory use of any “test or device” to keep African-Americans from participating in the electoral process. In Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817 (1969), the Warren Court held that the Voting Rights Act should be given “the broadest possible scope” to reach “any state enactment which altered the election law of a covered State in even a minor way.” Two years later, in Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431 (1971), the Burger Court made clear that whether included under a “voting qualification or prerequisite to voting” or as a “standard, practice, or procedure with respect to voting,” the statute also covered such things as changes in the location of polling stations, changes in municipal boundaries by annexations of adjacent areas that enlarged the number of eligible voters, or changes from ward to at-large elections. The Court adopted this broadened view of the law’s coverage because, although African-Americans could no longer be denied access to the polls, the impact of their votes could be minimized either by grouping them into heavily black districts or by using at-large elections or multimember districts to submerge them in a sea of white votes. Although the scope and complexity of that jurisprudence is too extensive to describe—or even summarize—here, there has been considerable interplay between the Court and Congress.

Early on, an increasingly conservative Supreme Court sought to confine successful claims brought under the Voting Rights Act on such issues of vote dilution to instances of intentional discrimination by government officials in the design and adoption of electoral units. Refusing to acquiesce in this restrictive interpretation of the law, Congress amended the statute to make it clear that a sufficiently discriminatory effect was all that need be shown. The debate over what measures to use in demonstrating such a discriminatory effect—short of recognizing a legal right to proportional representation—is well discussed and debated in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986). An excellent overview, description, and appraisal of the methods and difficulties in applying the vote dilution test adopted by the Court in Gingles is presented in Bernard Grofman, Lisa Handley, and Richard Niemi, Minority Representation and the Quest for Voting Equality (1992).

14. In its most recent reauthorization, 120 Stat. 577, Congress in 2006 extended the life of the Voting Rights Act for another 25 years. Last voted upon in 1982, the Act was due to expire in 2007. The current version of the law retains a preclearance requirement for nine states, mostly in the South, and for parts of several others, including the New York City boroughs of Manhattan, Brooklyn, and the Bronx. The law also requires the printing of bilingual ballots in jurisdictions that meet a threshold requirement for the percentage of citizens of a different native language who cannot read English. The 2006 reauthorization, moreover, specifically responds to Supreme Court decisions that had the effect of narrowing the law’s application. For example, the law now prohibits advance approval by the Justice Department, or a federal judicial panel, of any election change enacted for a discriminatory purpose. This provision was a response to the Supreme Court’s decision in Reno v. Bossier Parish School Board, 528 U.S. 320, 120 S.Ct. 866 (2000), which required the Justice Department to reject changes only when they are considered worse than the procedures they replaced, regardless of whether they were adopted with a discriminatory aim. See Congressional Quarterly Weekly Report, July 24, 2006, pp. 2038–2039; New York Times, July 21, 2006, p. A15.
The early reapportionment decisions of the Warren Court recognized the right to vote as a fundamental constitutional right. Beginning from that premise in **Kramer v. Union Free School District No. 15**, the Court acknowledged that, therefore, restrictions on that right warranted the strictest scrutiny.

**KRAMER V. UNION FREE SCHOOL DISTRICT NO. 15**  
Supreme Court of the United States, 1969  
395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

**BACKGROUND & FACTS** The facts are set out in the opinion below.

Mr. Chief Justice WARREN delivered the opinion of the Court.

In this case we are called on to determine whether § 2012 of the New York Education Law is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that § 2012 denied him equal protection of the laws in violation of the Fourteenth Amendment. With one judge dissenting, a three-judge District Court dismissed appellant's complaint. Finding that § 2012 does violate the Equal Protection Clause of the Fourteenth Amendment, we reverse.

* * * The sole issue in this case is whether the additional requirements of § 2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.

[In this case, we must give the statute a close and exacting examination. "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381 (1964).] * * *

Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials under mines the legitimacy of representative government.

Thus, state apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court. * * * No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. * * *

* * *

Besides appellant and others who similarly live in their parent's homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers;
parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that “the decisions taken by local boards * * * may have grave consequences to the entire population.” Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to “members of the community of interest”—those “primarily interested in such elections.” Second, appellees urge that the State’s legitimate interest is in restricting a voice in school matters to those “directly affected” by such decisions.

We do not understand appellees to argue that the State is attempting to limit the franchise to those “subjectively concerned” about school matters. Rather, they appear to argue that the State’s legitimate interest is in restricting a voice in school matters to those “directly affected” by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are “directly affected” by property tax changes should be allowed to vote.

Similarly, parents of children in school are thought to have a “direct” stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those “primarily interested” in school affairs because “the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system.” Appellees say that many communications of school boards and school administrations are sent home to the parents through the district pupils and are “not broadcast to the general public”; thus, nonparents will be less informed than parents. Further, appellees argue, those who are assessed for local property taxes (either directly or indirectly through rent) will have enough of an interest “through the burden on their pocketbooks, to acquire such information as they may need.”

Assuming, arguendo, that New York legitimately might limit the franchise in these school district elections to those “primarily interested in school affairs,” close scrutiny of the § 2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.

Whether classifications allegedly limiting the franchise to those resident citizens “primarily interested” deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct
and direct interest in the school meeting decisions.

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents—other than to argue that the § 2012 classifications include those "whom the State could understandably deem to be the most intimately interested in actions taken by the school board," and urge that "the task of * * * balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature." But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

The judgment of the United States District Court for the Eastern District of New York is therefore reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice STEWART, with whom Mr. Justice BLACK, and Mr. Justice HARLAN join, dissenting.

In Lassiter v. Northampton County Election Bd., 360 U.S. 45, 79 S.Ct. 985 (1959) this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. * * * Believing that the appellant in this case is not the victim of any "discrimination which the Constitution condemns," I would affirm the judgment of the District Court.

* * *

[I]t seems to me that under any equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. First of all, it must be emphasized—despite the Court's undifferentiated references to what it terms "the franchise"—that we are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.

Secondly, the appellant is of course limited to asserting his own rights, not the purported rights of hypothetical childless clergymen or parents of preschool children, who neither own nor rent taxable property.

The appellant's status is merely that of a citizen who says he is interested in the affairs of his local public schools. If the Constitution requires that he must be given a decision-making role in the governance of those affairs, then it seems to me that any individual who seeks such a role must be given it. For as I have suggested, there is no persuasive reason for distinguishing constitutionally between the voter qualifications New York has required for its Union Free School District elections and qualifications based on factors such as age, residence, or literacy.

Today's decision can only be viewed as irreconcilable with the established principle that "[t]he States have * * * broad powers to determine the conditions under which the right of suffrage may be exercised." * * *

Since I think that principle is entirely sound, I respectfully dissent from the Court's judgment and opinion.
In succeeding cases, the Court struck down laws that denied the right to vote to members of the armed forces who had moved to the state as a matter of military assignment (Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775 (1965)); required the payment of a poll tax (Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966)); limited the vote to taxpayers (Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897 (1969)); (Hill v. Stone, 421 U.S. 289, 95 S.Ct. 1637 (1975)) or to property owners (City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990 (1970)); or imposed a lengthy residency requirement (Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972)). The Court also applied strict scrutiny to state laws that severely limited the ability of independent candidates to get their names on the ballot (Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274 (1974); American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296 (1974); Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564 (1983)). In these cases, the Court was often called upon to strike a balance between the fundamental freedom of association and the governmental interest of preventing excessive factionalism. Political science has usually identified the latter as the interest in promoting governability through the operation of a responsible party system. In Tashjian v. Connecticut, summarized in the note that follows, these interests collided head on and were colored by considerations of partisan advantage. Republicans who wanted to broaden the appeal of their party’s candidates were precluded from doing so by a state law enacted by Democrats that restricted voting in primaries to party members. The note also discusses the Supreme Court’s decision in California Democratic Party v. Jones, in which Justices took up a state’s attempt to impose the most open form of candidate selection—the blanket primary.

**NOTE—CAN A STATE REQUIRE THAT CANDIDATES BE SELECTED BY A CLOSED PRIMARY OR BY A BLANKET PRIMARY?**

Because it had been relatively unsuccessful in capturing offices filled by statewide election in recent decades, the Connecticut Republican party sought to broaden its political base by attracting independents through allowing them to participate in its primaries. Connecticut election law, however, only permitted closed primaries, that is, primary elections open only to enrolled party members who are required to have declared their political affiliation no later than the last business day before the primary. The state Republican party adopted a rule permitting the participation of independents in its primaries on a walk-in basis, but its efforts to so amend the state election law were defeated in the Democratic-controlled legislature by virtually straight party line votes. The Republican party subsequently brought suit, arguing that the Connecticut closed primary law infringed the party’s and individual party members’ rights to freedom of association as protected by the First and Fourteenth Amendments. A federal district court rendered judgment for the state Republican Party, and a federal appellate court affirmed.

In Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544 (1986), the U.S. Supreme Court, speaking through Justice Marshall, affirmed the lower court judgment. Beginning from the premise that the right of partisan association was a fundamental right protected by the First and Fourteenth Amendments, the Court rejected the state’s argument that the closed primary constituted a narrowly tailored regulation supported by what were asserted to be compelling interests: “ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.”

Turning to the first interest proffered by the state, Justice Marshall observed that, using the same logic, the state could argue that recognizing a third major party would also complicate the running of elections and cost the government too much money. Said Justice Marshall, “While the State is of course entitled to take administrative and financial considerations into account in choosing whether
or not to have a primary system at all, it can no more restrain the Republican Party’s freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.” As for the interest in preventing raiding, “a practice ‘whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary,’ ” the Court found this assertion implausible, since present election law already actually assisted a “raid” by independents by “permit[ting] an independent to affiliate with the Party as late as noon on the business day preceding the primary * * *.” Next, addressing the interest in avoiding voter confusion, Justice Marshall rejected the proposition that it was a legitimate function of the state to attempt “to act as the ideological guarantor of the Republican Party’s candidates, ensuring that voters are not misled by a ‘Republican’ candidate who professes something other than what the State regards as true Republican principles.” Justice Marshall observed that, while the use of party labels did, indeed, help in identifying candidates and thus informed voters, the party rule and not the present law best addressed the party goal of choosing successful candidates for public office. Justice Marshall explained:

By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to advance that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party’s candidates among a critical group of electors.

Finally, with respect to the state’s asserted interest in protecting responsible party government, Justice Marshall conceded that the Court previously had recognized that “splintered parties and unrestrained factionalism may do significant damage to the fabric of government,” but this argument lost much of its punch since the views of the state in this case represented little more than the self-interested view of the entrenched Democratic Party. But, Marshall continued, “Even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.” Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010 (1981). He continued, “The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. ‘And as is true of all expression of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.’ ” Chief Justice Rehnquist and Justices Stevens, O’Connor, and Scalia dissented. In their view, the majority exaggerated the importance of the associational interest at issue, especially since Connecticut law permitted an independent voter to join the Republican Party and vote in the party primary as late as the day before that primary. Said Justice Scalia, “The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an ‘association’ with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use.”

The Court’s ruling in Tashjian was relied upon repeatedly in subsequent cases where states attempted to regulate political parties. In Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 109 S.Ct. 1013 (1989), the Supreme Court, three years later, invalidated several provisions of California’s election law that banned primary endorsements, imposed restrictions on the organization and composition of the structures governing the parties, limited terms of office for state central committee chairs, and required that the post of party chairperson rotate between residents of Northern and Southern California. And in California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000), the Court struck down legislation implementing
Proposition 198, a ballot initiative voters adopted to replace the state's system of closed primaries with a blanket primary. (Before 1996, voters had to be members of a political party to vote in that party's primary. The new law not only removed the party membership requirement, but allowed a voter to vote in primary contests in different parties, although in only one party primary contest per office.) Four of California's political parties sued to prevent it from being implemented. By a 7–2 vote, the Supreme Court held the imposition of the blanket primary unconstitutional. Said Justice Scalia:

Justice Scalia then went on to cite, as evidence that the prospect of "raiding" was not trivial, the fact that it was common for a fifth to a third of the voters in open primaries not to be members of the party in whose primary they were voting and that "substantial numbers of voters" who have not affiliated with the party in whose primary they are voting "often have policy views that diverge from those of the party faithful." He concluded:

Justice Scalia then went on to reject as insufficient the interests offered by the state as justifying the blanket primary law: producing elected officials who better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy. Throughout, Justice Scalia's opinion relied upon and quoted with approval the Court's previous decisions not only in the Tashjian case but also in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., p. 847.

Justices Stevens and Ginsburg dissented. Justice Stevens began from the premise that the associational rights of political parties were "neither absolute nor as comprehensive as the rights enjoyed by wholly private associations" so "a State may require parties to use the primary format for selecting their nominees." He continued:

The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action. It is because the primary is state action that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow non-members to participate in the party's decisions when it is conducting its own affairs; California's blanket primary system does not infringe this principle. * * * But an election, unlike a convention or caucus, is a public affair. * * * While state rules abridging participation in its elections should be closely scrutinized, the First Amendment does not inhibit the State from acting to broaden
voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.

Recall that, in Tashjian, the Court held that the state could not prevent a political party from opening its primary to registered independents if that was the party's will, but the Court left unaddressed the question whether the state could prevent participation in a party primary by registered members of other parties. In Clingman v. Beaver, 544 U.S. 581, 125 S.Ct. 2029 (2005), the Court upheld Oklahoma's system of semi-closed primaries—a system restricting participation in a party primary to registered members of that political party and registered independents (if the party so chose)—but forbidding participation by registered members of other parties. The plaintiffs in this case were the Libertarian Party of Oklahoma and registered voters of two other political parties. The six-Judge majority held that the "minor burden" on the associational rights of other-party voters was outweighed by the state's interests in: (1) preserving the integrity of political parties as viable and identifiable groups; (2) facilitating efforts at party-building and electioneering; and (3) guarding against "party raiding" ("the organized switching of blocks of voters from one party to another in order to manipulate the outcome of the other party's primary election"). In the majority's view, the interest of other-party members, who wanted to vote in the Libertarian Party primary but who weren't willing—even temporarily—to change their party affiliation to do so, wasn't much of an associational interest.

The 2000 Presidential Election

Although this section has focused on what qualifications on voting are constitutionally permissible, the underlying premise is clear: Inasmuch as all citizens are morally and legally equal, their votes are to count equally. This fundamental assumption also informs the apportionment of seats in legislatures, the topic of the next section in this chapter: Citizens are not only constitutionally entitled to have their votes count equally, they also enjoy the right to equal geographic representation. Equality supposes regularity; arbitrariness and inequality go hand-in-hand.

It is against this background that the Supreme Court's controversial resolution of the 2000 presidential election should be seen. In Bush v. Gore, which follows, all of the Justices agreed that recounting the ballots cast by Florida's voters in the presidential contest should proceed by clear standards consistently applied. There was little doubt among the Justices that that had not occurred. The problem was what to do about it. The Florida legislature had enacted a law that sought to assure the electoral votes cast by its presidential electors would be accepted by Congress as binding when it met in January 2001 to see the electoral votes counted. To take advantage of this "safe harbor" that federal law provided, the selection of Florida's presidential electors would have to be certified by a specified date; but the popular vote result in Florida was razor-thin, and more time would be needed to undertake a thorough recount in several populous counties. Whether to certify a result without a rigorous recount so as to meet the "safe harbor" deadline or whether to take the time for a complete re-canvass of votes but fail to meet the deadline that would guarantee the counting of Florida's electoral vote as its state legislature wished—those were the alternatives. The controversy in this lay in the fact that these alternatives favored different candidates: the first favored Gov. George W. Bush; the second Vice President Al Gore, because Bush was ahead, though only by a few hundred votes. As the now-familiar story unfolded, Florida's electoral votes would determine which would be the next President of the United States. When the five most conservative Justices of the Supreme Court voted to
award judgment to Bush in the following case, ostensibly because the demands of the Equal Protection Clause could not be met in time to assure a recount of the disputed popular votes in a clear and consistent manner, critics charged that the five Justices in the majority—all Republicans—had acted out of partisan motives. Criticism that the President had been chosen by an undemocratic body was doubled by what many observers saw as a patently undemocratic result—Bush lost the popular vote to Gore by more than half a million votes. Perhaps unavoidably, the political affiliation of the reader is the most important factor in trying to decide whether Bush v. Gore reflects a good-faith application of equal protection principles to voting rights or whether it reflects simply a rush to judgment.

BUSH v. GORE
Supreme Court of the United States, 2000
531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388

BACKGROUND & FACTS Although Vice President Al Gore out-pollled Governor George Bush by 540,000 popular votes nationally, the presidential election of 2000 was decided by Bush’s majority in the Electoral College of 271 votes to Gore’s 266. Florida’s 25 electoral votes—the decisive factor in Bush’s selection as President—eventually went to the governor by a margin of 537 popular votes. Because Bush’s initial margin of victory was 1,784—less than half a percent of the total vote cast—an automatic machine recount was required under Florida election law. After this recount showed Bush still leading but by a markedly reduced margin, Gore sought a hand-recount in four Florida counties. A dispute then arose about the deadline for local county canvassing boards to submit returns to the Florida Secretary of State so that a winner of Florida’s electoral votes could be certified. After the Secretary of State, a Republican, refused to extend the deadline imposed by statute, the Gore forces won an extension from the Florida Supreme Court. The U.S. Supreme Court vacated the extension in Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 121 S.Ct. 471 (2000), saying that it did not understand on what grounds it had been granted, and remanded the case. On remand, the state supreme court reinstated the extended deadline. On that day, the Florida Elections Canvassing Commission subsequently certified the results of the election and named Bush the winner of the state’s 25 electoral votes.

The next day, Gore filed a complaint under a provision of Florida election law that specified that “receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result to the election” would be grounds for a contest. In the meantime, manual recounts of ballots proceeded in several counties, which showed net gains for Gore. Hand examination of ballots during this recount unearthed a host of problems with the punch-card ballot system: some ballots showed punches for more than one presidential candidate; some ballots showed a choice of one candidate had been made, but the part to be punched-out (the chad) was still hanging from the card; and still other punch cards showed an indentation, but the punch had not removed the chad at all. In all these instances, the tabulating machines had not recorded any vote for president. The first of these circumstances constituted what were called “overvotes”; the second and third of these situations resulted in what were termed “undervotes.”
A state circuit court denied Gore relief, but this judgment was overturned by a 4–3 vote of the Florida Supreme Court. Although the state supreme court rejected Gore’s challenge to votes from two counties, it upheld his challenge to a decision by election officials in Miami-Dade County refusing to manually count 9,000 votes there on which the machines had failed to detect a vote for president. The supreme court directed that they count every “legal vote,” defined as “one in which there is a clear indication of the intent of the voter.” The state supreme court went on to so direct all other counties that had not yet manually counted and tabulated “undervotes.” Finally, the court directed that additional votes from manual recounts in two counties be included in the state totals, to the benefit of Gore. Bush then petitioned the U.S. Supreme Court for certiorari.

PER CURIAM.

***

[We find a violation of the Equal Protection Clause.]

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The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. * * * [T]he State legislature may, if it chooses, select the electors itself * * * [or provide that its] citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote * * * is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. * * *

* * * Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. * * *

* * * The question before us * * * is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. * * * The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida’s basic command for the count of legally cast votes is to consider the “intent of the voter.”* * * The problem * * * [is] the absence of specific standards to ensure its equal application. * * *

* * * [T]he question is * * * how to interpret the marks or holes or scratches on * * * a piece of cardboard or paper which * * * might not have registered as a vote during the machine count. * * * The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. * * * [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

* * * Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.
In addition, the recounts in these counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court’s inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

* * *

* * * When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

* * *

[It] is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. * * *

The Supreme Court of Florida has said that the legislature intended the State’s electors to “participate[e] fully in the federal electoral process,” as provided in 3 U.S.C. § 5. * * * That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive’ selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court’s order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

* * *

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

* * *

*** Article II, § 1, cl. 2, provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

* * *

*** 3 U.S.C. § 5 ** provides that the State’s selection of electors “shall be conclusive, and shall govern in the counting of the electoral votes” if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. * * * If we are to respect the legislature’s Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the “safe harbor” provided by § 5.

* * *

This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory
meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

***

* * * [I]n light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the per curiam, we would reverse. Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

***

In the interest of finality, * * * the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadline set forth in Title 3 of the United States Code. * * * But * * * those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. * * * They do not prohibit a State, from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. * * * Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." * * *

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

***

Justice SOUTER, with whom Justice BREYER joins and with whom Justice STEVENS and Justice GINSBURG join with regard to * * * [part], dissenting.

***

No State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

***

* * * I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not
possibly comply with this requirement before the date set for the meeting of electors, December 18. ** [T]he statewide total of undervotes is about 60,000. ** To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join ** and with whom Justice SOUTER join [as to the portion that follows] ** dissenting.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of any record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. **

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. **

[The remaining part of Justice BREYER’s dissent dealing with the political question aspects of this controversy (the part of this opinion that Justice SOUTER did not join) appears in Chapter 1 at p. 69].

The per curiam in Bush v. Gore explicitly stated that its consideration of the principle of voter inequality was “limited to the present circumstances” because “the problem of equal protection in election processes generally presents many complexities.” It has been argued, however, that the decision “was not just a pretext to put a preferred candidate in the White House,” but “it should mean that states cannot provide some voters with better voting machines, shorter lines, or more lenient standards for when their provisional ballots get counted.” Adam Cohen, “Has Bush v. Gore Become the Case That Must Not Be Named?” New York Times, Aug. 15, 2006, p. A22. The more than 2,400 citations to Bush v. Gore in subsequent cases suggests this may be true. In Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006), for example, a federal appeals court held for the plaintiff voters who sued the Ohio Secretary of State alleging that the use of punch cards in some, but not all, areas of the state violated their right to have their votes treated equally because it saddled them with a notoriously unreliable and deficient kind of voting equipment. The state thereafter abandoned the punch-card method and the appeals court vacated its ruling on grounds of mootness. Although punch cards are disfavored because of the “hanging chad” problem and others cited in Bush v. Gore, states are also switching away from touch-screen technology in favor of optical-scan ballots that assure there will be a paper trail and greater accuracy in the event of recounts. Ian Urbina and Christopher Drew, “Big Shift Seen in Voting Methods with Turn Back to a Paper Trail,” New York Times, Dec. 8, 2006, pp. Al, A25.
At least as controversial as the method of counting votes is the means of voter identification, specifically the requirement that voters provide photo identification on Election Day which, it is argued, tends to disenfranchise the poor, the elderly, and the disabled, who may be less likely to have a driver's license. Requiring documentation of residence (such as utility bills, for example) is also said to depress voter turnout mostly because it is perceived to be a hassle. Courts have split on the question whether having to show picture ID at the polls unconstitutionally burdens the right to vote, despite its advocates' contention that it is essential to prevent fraud. Compare Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (struck down), and Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007) (upheld). See also Purcell v. Gonzalez, 549 U.S. —, 127 S.Ct. 5 (2006). Voters not producing photo ID to vote on Election Day cast provisional ballots that are counted only if the individual subsequently shows up by a deadline with satisfactory identification. (For a map showing which states require identification at the polls, see Andrew Zajac and Tim Jones, "More States Ask Voters to Show ID," Chicago Tribune, Oct. 31, 2006, p. 6.) However, after a five-year effort by the administration of President George W. Bush to crackdown on alleged voter fraud, the Justice Department turned up little evidence of actual wrongdoing. See New York Times, Apr. 12, 2007, pp. A1, A15.

D. MALAPPORTIONMENT

The equal opportunity to cast a vote can mean very little if the strength of that vote is not equal. The Court, therefore, came to examine the constitutionality of that variety of political discrimination that results in unequal representation due to the malapportionment of legislative districts. This problem became particularly acute because the distribution of legislative seats in virtually all of the states had not kept pace with the flow of the population to urban areas. The end product of such inertia was legislatures that badly underrepresented urban majorities and consequently were unresponsive to the mounting problems of the cities. Unfortunately, by the time the Supreme Court grasped the constitutional issue and began to attack the malapportionment of state legislative seats, the flow of population away from the cities was well under way. Thus, federal judicial involvement in the end largely benefited the suburbs. The net result was better representation for voters who generally favored lower taxes and displayed little interest in increased expenditures to address the problems of the center city they left behind.

Until 1962, the Supreme Court adhered to the view that challenges to malapportionment constituted "political questions." The Court reversed this position with its ruling in Baker v. Carr. The portion of Baker appearing in Chapter 1 contained an extensive discussion of the sorts of issues that have been judged to be precluded from judicial decision by the "political question" doctrine; the excerpt of Baker that follows focuses only on the discussion of malapportionment. Previously, as in Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198 (1946), the Court had rejected the litigants' contention that unequal representation violated the provision of Article IV, section 4, guaranteeing "to every State in this Union a Republican Form of Government * * *." Speaking through Justice Brennan, the Court in Baker held that the federal district court had jurisdiction, the urban plaintiffs had standing, and the issue was justiciable, but the Court did not indicate what standard the district court should apply on remand. This disposition of the case prompted some heated objections from Justice Frankfurter.
BACKGROUND & FACTS

In 1901, the Tennessee General Assembly enacted legislation apportioning its two houses and provided for subsequent reapportionment every ten years on the basis of the number of qualified voters resident in each of the state’s counties as reported in the census. For more than 60 years, however, proposals to redistribute the legislative seats had failed to pass, while a large share of the state’s population continued to drift into urban areas. Baker and others, citizens and qualified voters of the state, sued under the federal civil rights statutes, charging that as urban residents they were being denied equal protection of the laws contrary to the Fourteenth Amendment by virtue of the fact that their votes had been devalued. In the suit, they named Tennessee’s secretary of state, attorney general, and state election officials as respondents and asked the court to declare the 1901 apportionment act unconstitutional and to order state officials to either hold the election of state legislators at large without regard to counties or districts or hold an election at which legislators would be selected from constituencies in accordance with the federal census of 1950. The U.S. District Court for the Middle District of Tennessee dismissed the suit on the ground that, while the abridgment of civil rights was clear, remedy did not lie with the courts, and direct appeal was made to the Supreme Court.

Mr. Justice BRENNAN delivered the opinion of the Court.

***

[W]e hold today only (a) that the [District Court] possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

JURISDICTION OF THE SUBJECT MATTER

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* * * The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. * * *

STANDING

* * *

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State’s Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties. A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such
impairment resulted from dilution by a false tally, cf. United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031 (1941); or by a refusal to count votes from arbitrarily selected precincts, cf. United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904 (1915); or by a stuffing of the ballot box, cf. Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880). * * *

It would not be necessary to decide whether appellants’ allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. * * *

They are entitled to a hearing and to the District Court’s decision on their claims. * * *

JUSTICIABILITY
In holding that the subject matter of this suit was not justiciable, the District Court relied on Colegrove v. Green [328 U.S. 549, 66 S.Ct. 1198 (1946)], and subsequent per curiam cases. * * * We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a “political question” and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable “political question.” * * *

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection “is little more than a play upon words.” * * * Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted Colegrove v. Green and other decisions of this Court on which it relied. * * *

In the Guaranty Clause cases and in the other “political question” cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the “political question.” * * *

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence. The doctrine of which we treat is one of “political questions,” not one of “political cases.” The courts cannot reject as “no law suit” a bona fide controversy as to whether some action denominated “political” exceeds constitutional authority. * * *

But it is argued that this case shares the characteristics of decisions that constitute a category * * * [of] cases concerning the Constitution’s guaranty, in Art. IV, § 4, of a republican form of government. * * *
Guaranty Clause claims involve those elements which define a “political question,” and for that reason and no other, they are nonjusticiable. * * * [T]he nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: [In] Luther v. Borden, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849), * * * [t]he defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose “out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842,” * * * and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff’s right to recover depended upon which of the two groups was entitled to such recognition; but the lower court’s refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or “charter” government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

Chief Justice Taney’s opinion for the Court reasoned as follows: (1) If a court were to hold the defendants’ acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government’s actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that “the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals.” * * * A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided * * *.

(2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority.

Indeed, the courts of Rhode Island had in several cases held that “it rested with the political power to decide whether the charter government had been displaced or not,” and that that department had acknowledged no change.

(3) Since “[t]he question relates, altogether, to the constitution and laws of [the] * * * State,” the courts of the United States had to follow the state courts’ decisions unless there was a federal constitutional ground for overturning them.

(4) * * * [There were] textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary. * * * [For example, Art. I, § 5, ¶ 1 of the Constitution explicitly commits to the discretion of the respective Houses of Congress whom to seat as a state’s legitimate representatives and senators. Moreover, a statute passed by Congress in 1795, enacted pursuant to the Guarantee Clause, authorized the President, upon the request of the state legislature or governor, to call out the militia in the event of an insurrection or rebellion. Here, the President had in fact responded to a call from the incumbent governor of the state to call up the militia.] * * *

Clearly, several factors were thought by the Court in Luther to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that Luther could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government. The Court has since refused to resort to the Guaranty Clause—which alone
had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. * * *

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable “political question” bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought “political,” can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define “political questions,” and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization. * * *

We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice WHITTAKER did not participate in the decision of this case.

Mr. Justice DOUGLAS, concurring.

The question is the extent to which a State may weight one person’s vote more heavily than it does another’s.

* * *

Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment. * * *

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State’s freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made “an invidious discrimination,” as it does when it selects “a particular race or nationality for oppressive treatment.” See Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942). Universal equality is not the test; there is room for weighting. As we stated in Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955), “The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times
a single vote in Shelby or Knox County. The opportunity to prove that an “invidious discrimination” exists should therefore be given the appellants.

Mr. Justice CLARK, concurring.

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no “practical opportunities for exerting their political weight at the polls” to correct the existing “invidious discrimination.” Tennessee has no initiative and referendum. I have searched diligently for other “practical opportunities” present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative straight jacket. Tennessee has an “informed, civicly militant electorate” and “an aroused popular conscience,” but it does not sear “the conscience of the people’s representatives.” This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.

Mr. Justice STEWART, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today’s decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: “(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) * * * that the appellants have standing to challenge the Tennessee apportionment statutes.”

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court’s “judicial Power” not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public
confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today’s umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as “a brooding omnipresence in the sky,” for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. * * * Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incomensurable factors of policy that underlie these mathematical puzzles is to attribute, however flattering, omnicompetence to judges.* * *

Recent legislation, creating a district appropriately described as “an atrocity of ingenuity,” is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there’s the rub. In effect, today’s decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court’s notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court’s admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives. In any event there is nothing judicially more unseemly nor
more self-defeating than for this Court to make in terrorem pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

***

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. * * *

Where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. * * *

***

Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of “debasement” or “dilution” is circular talk. One cannot speak of “debasement” or “dilution” of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. * * *

Appellants seek to make equal weight of every voter’s vote the standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. * * *

To Justice Stewart, it was the fact that the legislative apportionment was the product of a decision made long, long ago, not any considered decision about how relevant political interests should be represented, that made Tennessee’s districting scheme irrational. Although Justice Stewart (see p. 1246 and p. 1249) and perhaps others (such as Justice Douglas) had the impression when Baker was decided that the test of whether a legislative apportionment could survive constitutional challenge was whether it was “rational” or “reasonable” (rather like economic legislation undergoing scrutiny under the Equal Protection or the Due Process Clause), the Court, invalidating Georgia’s county unit system in Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963), a year later, announced that in fact “substantial equality” among districts was the test. And striking down Georgia’s apportionment of its congressional seats in Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 535 (1964), the year after that, the Court said, “Readers surely have fairly taken this to mean, ‘one person, one vote.’ ”

It was the notion that the test should be the reasonableness with which legislative districting accommodated various political interests that prompted Justice Frankfurter to assert that the plaintiffs’ equal protection argument was simply “a Guarantee Clause claim
masquerading under a different label.” And it was the Court’s hesitancy to announce the one person–one vote rule that evoked his admonition that, if it could not stand the heat, the Court should get out of the kitchen.

In short order, the Supreme Court rejected arguments for legislative apportionments based on something other than population. In Reynolds v. Sims below, the Court rebuffed Alabama’s argument that its upper house was apportioned similarly to the U.S. Senate. Rejecting “the federal analogy,” Chief Justice Warren set out a constitutional theory of representation quite different from the pluralist view articulated in Justice Stewart’s dissent in Lucas v. Forty-Fourth General Assembly of Colorado (p. 1247). In Lucas, decided the same day, the Court also turned aside a legislative districting scheme adopted by Colorado voters in a referendum that would have weighted rural interests more heavily in that state’s legislature. Invoking Justice Jackson’s ringing declaration made two decades earlier in the Flag Salute Case (p. 859), the Court reiterated that “fundamental rights ‘may not be submitted to a vote; they depend on the outcome of no elections.’”

**REYNOLDS v. SIMS**

Supreme Court of the United States, 1964

377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506

**BACKGROUND & FACTS** Sims and other Alabama residents brought suit against state and political party officials, challenging the apportionment of the state legislature. The state constitution provided that the legislature would be reapportioned every ten years on the basis of population, but with the qualification that each county would be allocated at least one representative and no county would be entitled to more than one senator. No apportionment, however, had taken place since 1901. Under the existing scheme, approximately a quarter of the population could elect a majority of the state senators, and about the same proportion could elect a majority of the state representatives. The voting power of constituents (ratios of people to legislators) varied from as much as 41–1 among senate districts to 16–1 among districts in the lower house. A federal district court held this apportionment to be a violation of plaintiffs’ rights to equal protection of the laws under the Fourteenth Amendment. In response to pressure from the district court, the Alabama legislature adopted two reapportionment plans, neither of which, however, apportioned the legislative districts solely on the basis of population, whereupon the district court held the plans unconstitutional. Reynolds and the other defendants in the suit appealed to the U.S. Supreme Court.

Mr. Chief Justice WARREN delivered the opinion of the Court.

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*** Our problem *** is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.

A predominant consideration in determining whether a State’s legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. *** Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. ***
Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be said that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. *** It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. * * *

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Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race * * * or economic status. * * *

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office
require no less of us. To the extent that a citizen’s right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further. However, one of the proposed plans [allocating one senator to each county] at least superficially resembles the scheme of legislative representation followed in the Federal Congress.

We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominately, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. The relationship of the States to the Federal Government could hardly be less analogous.

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legisla-
tive districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

* * * For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. * * *

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

* * * So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. * * *

* * * We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. * * *

Affirmed and remanded.

Mr. Justice CLARK, concurring in the affirmance.

The Court goes much beyond the necessities of this case in laying down a new “equal population” principle for state legislative apportionment. * * *

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is “a crazy quilt,” clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. * * *

I * * * do not reach the question of the so-called “federal analogy.” But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State. * * *

Mr. Justice STEWART. * * *

All of the parties have agreed with the District Court’s finding that legislative inaction for some 60 years in the face of growth and shifts in population has
converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, * * * I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

* * *

Mr. Justice HARLAN, dissenting.

* * *

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible solutions, with varying political consequences, than reapportionment broadside.

* * *

Although the Court—necessarily as I believe—provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that "indiscriminate districting" is an invitation to "partisan gerrymandering," * * * the Court nevertheless excludes virtually every basis for the formation of electoral districts other than "indiscriminate districting." * * *

* * * What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. * * *

[No thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable. Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

* * *
BACKGROUND & FACTS

Andres Lucas and other residents of Denver initiated action against the Colorado legislature, challenging the validity of a legislative apportionment scheme authorized in an amendment to the state constitution. Amendment No. 7, which provided for the apportionment of the lower house on the basis of population, but took into account additional factors together with population in drawing state senate districts, was approved by the Colorado electorate in November 1962 by a margin of 305,700 to 172,725. In the same election, the voters defeated 311,749 to 149,822 Amendment No. 8, which provided for the apportionment of both houses of the state legislature solely on a population basis. A federal district court upheld the validity of the apportionment based on Amendment No. 7, and the case was brought to the U.S. Supreme Court on appeal. The case was docketed for hearing together with the other reapportionment cases during the October 1963 Term, including Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, and WMCA v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, an action challenging the county-based apportionment of the New York legislature in which, like Colorado, factors other than population had been taken into account in drawing district lines.

Mr. Chief Justice WARREN delivered the opinion of the Court.

***

Several aspects of this case serve to distinguish it from the other cases involving state legislative apportionment also decided this date. Initially, one house of the Colorado Legislature is at least arguably apportioned substantially on a population basis under Amendment No. 7 and the implementing statutory provisions. Under the apportionment schemes challenged in the other cases, on the other hand, clearly neither of the houses in any of the state legislatures is apportioned sufficiently on a population basis so as to be constitutionally sustainable. Additionally, the Colorado scheme of legislative apportionment here attacked is one adopted by a majority vote of the Colorado electorate almost contemporaneously with the District Court’s decision on the merits in this litigation. Thus, the plan at issue did not result from prolonged legislative inaction.

As appellees have correctly pointed out, a majority of the voters in every county of the State voted in favor of the apportionment scheme embodied in Amendment No. 7’s provisions, in preference to that contained in proposed Amendment No. 8, which, subject to minor deviations, would have based the apportionment of seats in both houses on a population basis.

Finally, this case differs from the others decided this date in that the initiative device provides a practicable political remedy to obtain relief against alleged legislative malapportionment in Colorado.

In Reynolds v. Sims * * * we held that the Equal Protection Clause requires that both houses of a bicameral state legislature must be apportioned substantially on a population basis. * * * Under neither Amendment No. 7’s plan, nor, of course, the previous statutory scheme, is the overall legislative representation in the two houses of the Colorado Legislature sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause.

* * * An individual’s constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a
majority of a State’s electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185 (1943), “One’s right to life, liberty, and property *** and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in Reynolds v. Sims. And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State’s voters at the next election.

Reversed and remanded.

Dissenting opinion by Mr. Justice HARLAN printed in *** Reynolds v. Sims. ***
Mr. Justice CLARK, dissenting.

I would refuse to interfere with this apportionment for several reasons. First Colorado enjoys the initiative and referendum system which it often utilizes and which, indeed, produced the present apportionment. *** Next, as my Brother STEWART has pointed out, there are rational and most persuasive reasons for some deviations in the representation in the Colorado Assembly. The State has mountainous areas which divide it into four regions, some parts of which are almost impenetrable. There are also some depressed areas, diversified industry and varied climate, as well as enormous recreational regions and difficulties in transportation. These factors give rise to problems indigenous to Colorado, which only its people can intelligently solve. This they have done in the present apportionment.

Finally, I cannot agree to the arbitrary application of the “one man, one vote” principle for both houses of a State Legislature. In my view, if one house is fairly apportioned by population (as is admitted here) then the people should have some latitude in providing, on a rational basis, for representation in the other house. The Court seems to approve the federal arrangement of two Senators from each State on the ground that it was a compromise reached by the framers of our Constitution and is a part of the fabric of our national charter. But what the Court overlooks is that Colorado, by an overwhelming vote, has likewise written the organization of its legislative body into its Constitution, and our dual federalism requires that we give it recognition. ***

Mr. Justice STEWART, whom Mr. Justice CLARK joins, dissenting.

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State’s distinct history, distinct geography, distinct distribution of population, and distinct political heritage. *** I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Consti-
tution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State’s public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State’s legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course, this ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

* * *

* * * The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests, and the goal is solely that of equally “weighted” votes, I do not understand why the Court’s constitutional rule does not require the abolition of districts and the holding of all elections at large.

Throughout our history the apportionments of State Legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can better be expressed by a medley of component voices than by the majority’s monolithic command. What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, * * *

[But so long as a State’s apportionment plan reasonably achieves, in the light of the State’s own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.

This brings me to what I consider to be the proper constitutional standards to be applied in these cases. Quite simply, I think the cases should be decided by application of accepted principles of constitutional adjudication under the Equal Protection Clause. * * *

* * * I think that the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State’s own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State. I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards. But, beyond this, I think there is nothing in the Federal Constitution to prevent a State from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. * * *

* * *

Following Reynolds and Lucas, the Warren Court strictly scrutinized legislative apportionments. The Court’s analysis began from the premise that mathematical equality
was the norm among districts, but that small deviations from equality—as measured by the number of residents, not the percentages (a 10% variance in New York would be a great deal larger than a 10% variance in Hawaii)—would be tolerated. Where deviations occurred, the state bore the burden of establishing a compelling interest that would justify them. Offsetting considerations could include the state’s interests in designing districts that were compact, were contiguous, and respected the boundary lines of units of local government, but would not extend to include political or group interests or, as the Court put it in Kirkpatrick v. Preisler, 394 U.S. 526, 534, 89 S.Ct. 1225, 1230 (1969), “considerations of practical politics.” These principles were, in turn, applied to local government and other political subdivisions created by the state. As the Court said in Avery v. Midland County, 390 U.S. 474, 485–486, 88 S.Ct. 1114, 1121 (1968), “Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.”

In many important respects, however, the Burger Court loosened some of these principles. Deviations from mathematical equality among districts came to be measured in percentages, with a maximum population variation of more than 10% constituting a prima facie case of discrimination and thus requiring justification by the state (Brown v. Thompson, 462 U.S. 835, 103 S.Ct. 2690 (1983)). The Court recognized numerous special purpose districts, such as water reclamation or water storage districts in the West (in which directors could be elected by a system of voting weighted to reflect the amount of land a voter owned or the assessed valuation of his property). And, as the Court announced in White v. Regester, 412 U.S. 755, 763, 93 S.Ct. 2332, 2338 (1973), “[S]tate reapportionment statutes [were] not subject to the same strict standards applicable to the reapportionment of congressional seats.”

Moreover, the Burger Court greatly expanded the sorts of compelling governmental interests it would accept to offset population variation among districts. In Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321 (1973), the Court validated a Connecticut reapportionment plan that sought to assure each of the major political parties a minimum base of political support in the legislature by creating plenty of safe seats. In White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348 (1973), the Court legitimated deviations among Texas congressional districts on grounds of the state’s interest in protecting the seniority of incumbent representatives. Summing it up in Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653 (1983), the Justices reaffirmed the view that there were no fixed standards for excusing population variance without regard for the circumstances of each case. If the rigor with which the Warren Court applied strict scrutiny did much to deflate Justice Frankfurter’s objection that an equal protection claim in a legislative districting case was just “a Guarantee Clause claim masquerading under a different label,” the kind of governmental interests the Burger Court was prepared to recognize as “compelling” surely threatened to smuggle the Guarantee Clause problem in through the back door.

More contemporary controversies in vote dilution are reflected in the two cases that follow. In Davis v. Bandemer (p. 1251), Indiana Democrats alleged an unconscionable political gerrymander at the hands of the state’s Republicans. Although the “one person, one vote” standard might protect against vote dilution in a formal sense, it cannot protect a minority party from the loss of political influence that results from the efforts of a dominant political party to draw district lines in ways that maximize its power. In Bandemer, the Court
attempted to outline the conditions that would justify its intervention to upset gerrymanders. Of course, to the extent that the Justices do intervene in such cases, they risk involvement in the very quandary identified by Justice Frankfurter.

NOTE—DAVIS V. BANDEMER

The Indiana legislature consists of two houses: a 100-seat house of representatives and a senate half that size. Representatives serve two-year terms, and all stand for election at the same time. Senators are elected for four-year terms, with half chosen every two years. The legislature was reapportioned in 1981 following the 1980 census. The reapportionment plan produced 50 single-member senate districts and 7 triple-member, 9 double-member, and 61 single-member house districts. The multimember house districts were generally in the state's urban areas. The reapportionment was passed by Republican majorities in both houses and signed into law by the governor, who was also a Republican. In 1982, Indiana Democrats brought suit in a U.S. district court, attacking the reapportionment plan as a political gerrymander designed to minimize their strength and arguing that it violated their right, as Democrats, to equal protection. The case went to trial following the 1982 election, and the plaintiffs pointed to the results of the election as confirming their claim of political discrimination. Democratic candidates for the house received 51.9% of the vote statewide, but only 43 of the 100 seats. In two urban counties with multimember districts, Democratic house candidates drew 46.6% of the vote, but only 3 of the 21 Democratic candidates were elected. Democrats fared better in the senate races, where their party's candidates received 53.1% of the vote statewide, and 13 of their 25 candidates were elected. Relying on the 1982 election results as proof of vote dilution, the three-judge federal district court found for the plaintiffs, enjoined state officials from holding any more elections under the 1981 reapportionment, and ordered the state legislature to produce a new plan, whereupon the state officials appealed.

The Supreme Court reversed the judgment of the district court in Davis v. Bandemer, 478 U.S. 109, 106 S.Ct. 2797 (1986). Speaking for a six-Justice majority as to whether partisan gerrymandering presented a political question, Justice White found that it did not and cited Baker v. Carr as authority for the proposition that vote dilution was a justiciable issue. He acknowledged that the vote dilution claim in this case did not rest upon a showing that the legislative districts were unequal in population and thus was different from the claim made by the plaintiffs in Baker and subsequent cases. If controversies involving vote dilution were justiciable, they were justiciable for reasons of fairness and were not necessarily limited to circumstances of district inequality. In resolving the issue whether the vote dilution claim by Indiana Democrats satisfied the criteria appropriate to identifying a denial of equal protection, Justice White spoke only for a plurality that included Justices Brennan, Marshall, Blackmun, and himself. While the plaintiffs had established that the adverse line-drawing was intentional, the plurality concluded that the vote dilution claim was insufficient because the statistical evidence submitted pertained to only one election and did not demonstrate that the Democrats had been locked out of participating in the political process. According to the plurality, no structural impediment in the existing reapportionment prevented them from gaining control of the legislature if there was a reasonable increase in the votes polled by Democratic candidates in the future. The plurality defended limiting relief to only long-term and pervasive political discrimination lest "a low threshold for legal action * * * invite an attack on * * * reapportionment statutes * * * whenever a political party suffers at the polls." Justice White added, "Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task.
for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls."

In an opinion concurring in the judgment, Justice O’Connor, joined by Chief Justice Burger and Justice Rehnquist, voted to reverse on the grounds that partisan gerrymandering presented a political question that either defied judicially manageable standards or else was resolvable only by imposing a system of proportional representation. She distinguished the Court’s legitimate concern about racial gerrymanders from partisan ones by saying that in no sense could the major political parties be regarded as historically disadvantaged discrete and insular groups. In any case, Justice O’Connor noted that partisan gerrymanders were likely to be self-limiting. She observed: "In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat. * * * [A]n overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious."

Although Justices Powell and Stevens agreed with the plurality that the issue in this case was justiciable, they voted to affirm the judgment below. Speaking for the duo, Justice Powell pointed to several factors as relevant criteria for evaluating partisan gerrymanders: the intent and nature of the reapportionment proceedings, the shapes of the districts and their conformity with the boundaries of political subdivisions, and the statistical evidence of vote dilution. Given the empirical evidence of vote dilution, the fact that the reapportionment plan had been rammed through, and the fact that the shapes of the districts were irrational and were heedless of traditional political subdivisions in the state, Justices Powell and Stevens saw no reason to overturn the judgment of the district court.

Although it is true according to Bandemer that partisan redistricting can be so egregious as to deprive a victimized political majority of equal protection of the laws, proving such a violation would appear to be difficult and, therefore, rare. This is so because there has never been agreement on—or even clear articulation of—a standard by which such constitutional over-stepping can be measured. In Vieth v. Jubelirer, 541 U.S. 267, 124 S.Ct. 1769 (2004), decided 18 years after Bandemer, four Justices (Rehnquist, O’Connor, Scalia, and Thomas) announced they were throwing in the towel, that a manageable judicial standard was not possible, that political gerrymandering was a “political question,” and they voted to overrule Bandemer. Five members of the Court (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) left the possibility open, repeating their view that a tell-tale sign of forbidden gerrymandering was a legislative district so bizarrely-shaped that there was no plausible justification for it other than political exploitation. As long as a legislative body takes care to keep the population variance among districts within the 10% “safe harbor” recognized in the Court’s past redistricting cases, however, it is difficult to imagine much chance of success for challengers to a politically-motivated re-map, unless they comprise a category of voters protected from vote dilution by the reach of the Voting Rights Act, such as African-Americans or Hispanics. Recent developments confirm this.

Instead of waiting out the decade for the customary reapportionment following a new census, Republicans attempted to pad their seat total in the U.S. House of Representatives by mid-decade redistricting. Although Colorado and Texas had their congressional boundary lines drawn after the 2000 census, Republicans gaining control of the state legislatures there in 2002 enacted new laws gerrymandering the seats to their considerable advantage. The new Colorado scheme was struck down by the state supreme court on grounds the state constitution permitted redistricting only once a decade. The effort to get the U.S. Supreme Court to review the Colorado Supreme Court’s decision failed (see
In League of United Latin American Citizens v. Perry, 548 U.S. —, 126 S.Ct. 2594 (2006), the Court addressed the redistricting of Texas’s House seats. It left the mid-decade, statewide gerrymander of Texas congressional seats intact, holding that the redistricting was not sufficiently suspect under any manageable standard that could identify an unconstitutional gerrymander. In other words, the Court reiterated its stance in Vieth v. Jubelirer, not ruling that a political gerrymander presented a political question per se, but instead declining to identify the conditions under which the partisan drawing of district lines would be so egregious as to violate the Equal Protection Clause. Moreover, the Court indicated that there would be nothing amiss—according to the U.S. Constitution, at least—if state legislators were to reapportion congressional seats whenever they liked. That the Constitution requires a federal census to be conducted every decade so as to permit accurate and timely apportionment of seats did not mean that district lines could not be redrawn more often. It remains to be seen whether this announcement will license political retaliation whenever control of a state government changes from one party to the other. Although the Court did not overturn the statewide redistricting of Texas, it did invalidate the lines of one congressional district which it found devalued minority representation under the Voting Rights Act by shifting 100,000 Hispanic voters into an adjoining district in order to maximize the number of Republican representatives elected.

Bandemer deals with politically motivated gerrymanders. Shaw v. Reno (p. 1254) directs our attention again to racial gerrymanders. Gomillion v. Lightfoot, encountered previously (p. 1165), dealt with a racial gerrymander that disadvantaged African-Americans. Shaw places the issue in the posture of affirmative action. After North Carolina responded to an objection from the U.S. attorney general under section 5 of the Voting Rights Act that its congressional apportionment had created too few black districts, the state created an additional black congressional district, but it had a highly irregular shape. White voters challenged the creation of a district along racial lines on the grounds that it violated their right to equal protection under the Fourteenth Amendment. In Shaw, the Court discussed the constitutionality of racial gerrymandering aimed at advantaging African-Americans. Does the Court in Shaw spell out general principles to guide the examination of racial gerrymanders, or is Shaw just an isolated decision about a funny-shaped district? Some insight into this question is provided by Justice Souter’s dissent, which argues that the use of race in districting decisions is simply different from the consideration of race in other sorts of governmental decisions.

15. The map of Colorado congressional districts that Republicans attempted to replace in 2003 was one imposed by a federal district court after split-control of the state legislature led to an impasse in redistricting after the 2000 census. To break the stalemate, the federal district court imposed its own re-map, which tended to favor the Democrats. After the decision in Salazar, Republicans sued to overturn the judicial re-map, arguing that the court-imposed plan violated the right of citizens to vote for congressional candidates in districts created by state legislators. They cited the Elections Clause, which provides that the “Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.” Art I, § 4, cl. 1 (emphasis supplied). In an unanimous decision, Lance v. Coffman, 549 U.S. —, 127 S.Ct. 1194 (2007), the Court held that the injury to the plaintiffs from not following the Elections Clause was insufficient to afford standing because they asserted “no particularized stake in the litigation.” The per curiam opinion declared, “This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.”
BACKGROUND & FACTS As a result of the 1990 census, North Carolina acquired a twelfth seat in the U.S. House of Representatives. To comply with section 5 of the Voting Rights Act of 1965, state officials submitted to the U.S. attorney general a congressional reapportionment map that contained one district with a black majority. The attorney general refused to approve the plan on the grounds that a second majority-black district was justified by the voting strength of African-Americans in the state’s south-central and southeastern region. The state produced a revised plan that created a second majority-black congressional district that stretched for 160 miles along Interstate 85 and for much of its length was no wider than that highway’s corridor. Several state residents filed suit against the federal and state officials. They argued that the two majority-black districts concentrated African-American voters arbitrarily without regard to contiguity, compactness, or respect for political subdivisions and with the sole object of ensuring the election of two black representatives. A three-judge federal district court dismissed the complaint and ruled, among other things, that the plaintiffs failed to state an equal protection claim, since favoring minority voters was not invidiously discriminatory under the Constitution and since it did not result in proportional underrepresentation of white voters statewide.

Justice O’CONNOR delivered the opinion of the Court.

This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional “right” to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. * * * Appellants allege that the revised plan, which contains district boundary lines of dramatically irregular shape, constitutes an unconstitutional racial gerrymander. The question before us is whether appellants have stated a cognizable claim.

* * *

Appellants contend that redistricting legislation that is so bizarre on its face that it is "unexplainable on grounds other than race," * * * demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.

* * *

* * * A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. * * * [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions. * * *

The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all.
In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to "segregate ... voters" on the basis of race. Gomillion v. Lightfoot, 364 U.S., at 341, 81 S.Ct., at 127. Gomillion, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions. We emphasize that these criteria are important because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more" always gives rise to an equal protection claim.

We hold only that, on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss.

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justifica-
tion. If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest. Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

***

Redistricting plans * * * reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group’s power to affect the political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim. * * *

With these considerations in mind, we have limited such claims by insisting upon a showing that “the political processes * * * were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” White v. Regester, * * * 412 U.S., at 766, 93 S.Ct., at 2339. Indeed, * * * the Court’s gerrymandering cases all carry this theme—that it is not mere suffering at the polls but discrimination in the political process with which the Constitution is concerned.

***

[I]t is irrefutable that appellants in this proceeding * * * have failed to state a claim. * * * [A] number of North Carolina’s political subdivisions have interfered with black citizens’ meaningful exercise of the franchise, and are therefore subject to §§ 4 and 5 of the Voting Rights Act. * * * In other words, North Carolina was found by Congress to have “resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees” and therefore “would be likely to engage in similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” McCain v. Lybrand, 465 U.S. 236, 245, 104 S.Ct. 1037, 1044 (1984) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334, 335, 86 S.Ct. 821–822 (1966)). * * * North Carolina failed to prove to the Attorney General’s satisfaction that its proposed redistricting had neither the purpose nor the effect of abridging the right to vote on account of race or color. * * * The Attorney General’s interposition of a § 5 objection “properly is viewed” as “an administrative finding of discrimination” against a racial minority. * * * Finally, * * * North Carolina reacted by modifying its plan and creating additional majority-minority districts. * * *

In light of this background, it strains credibility to suggest that North Carolina’s purpose in creating a second majority-minority district was to * * * [do other than] to respond to the Attorney General’s objections * * * by improving the minority group’s prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court’s equal protection cases * * *. But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76 percent of the total population and 79 percent of the voting age population in North Carolina. Yet, under the State’s plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minority voters—surely they cannot complain of discriminatory treatment.

* * *
Justice SOUTER, dissenting.

I

Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct, and before turning to the different regimes of analysis it will be useful to set out the relevant respects in which such districting differs from the characteristic circumstances in which a State might otherwise consciously consider race. Unlike other contexts in which we have addressed the State’s conscious use of race, see, e.g., Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989) (city contracting); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 106 S.Ct. 1842 (1986) (teacher layoffs), electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population. As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like “minority voting strength,” and “dilution of minority votes,” and as long as racial bloc voting takes place, legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt. One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act.

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race. Thus, for example, awarding government contracts on a racial basis excludes certain firms from competition on racial grounds. And when race is used to supplant seniority in layoffs, someone is laid off who would not otherwise be. The same principle pertains in nondistricting aspects of voting law, where race-based discrimination places the disfavored voters at the disadvantage of exclusion from the franchise without any alternative benefit. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 341, 81 S.Ct. 125, 127 (1960) (voters alleged to have been excluded from voting in the municipality).

In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others. All citizens may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter’s representation. As we have held, one’s constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group.

It is true, of course, that one’s vote may be more or less effective depending on the interests of the other individuals who are in one’s district, and our cases recognize the reality that members of the same race often have shared interests. “Dilution” thus refers to the effects of districting decisions not on an individual’s political power viewed in isolation, but on the political power of a group. This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter.

II

Our different approaches to equal protection in electoral districting and nondistricting cases reflect these differences. There is a characteristic coincidence of disadvantageous effect and illegitimate purpose associated with the State’s use of race in those situations in which it has immediately triggered at least heightened scrutiny (which every Member of the Court to...
address the issue has agreed must be applied even to race-based classifications designed to serve some permissible state interest. Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened “scrutiny” to race-based districting decisions. * * * Under our cases there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy. * * *

A consequence of this categorical approach is the absence of any need for further searching “scrutiny” once it has been shown that a given districting decision has a purpose and effect falling within one of those categories. If a cognizable harm like dilution or the abridgment of the right to participate in the electoral process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not. * * *

[T]here is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm. * * *

III

The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims. * * * Since there is no justification for the departure here from the principles that continue to govern electoral districting cases generally in accordance with our prior decisions, I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. In the absence of an allegation of such harm, I would affirm the judgment of the District Court. * * *

The constitutional violation recognized in Shaw was that the state impermissibly used race as the basis for dividing voters into districts. The bizarre shape of the district was not an essential element of the constitutional wrong but was simply an indication that the state may have relied upon race for its own sake and not other redistricting factors, such as compactness and contiguity, which are permissible. The Court’s holding that strict scrutiny of a districting scheme is triggered whenever there is persuasive evidence that the state has taken race into account, however, logically demands answers to other questions: How much use of race is too much use? What constitutes a compelling reason for taking race into account in drawing district maps?

In Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475 (1995), decided two years later by the same split vote (Justices Ginsburg and Breyer by then had replaced Justices White and Blackmun in dissent), the majority conceded it was not expected that legislators ignore race in districting schemes but that they not be motivated by race in drawing the lines. Although prospective plaintiffs challenging the design of legislative districts had to understand that many variables are in play when such decisions are made, nevertheless a redistricting plan that is racially motivated is constitutionally prohibited. To prevail on a constitutional claim that a districting plan violates equal protection, “[t]he plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” (emphasis supplied).
Or, as Justice O'Connor spelled it out six years later, perhaps with greater clarity, in Hunt v. Cromartie, 532 U.S. 234, 121 S.Ct. 1452 (2001): “[W]here majority-minority districts * * * are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.” If traditional districting concerns were not subordinated to race, the contention that a districting plan amounted to a racial gerrymander would fail. Certainly, obtaining Justice Department pre-clearance of a districting plan, as may be required by § 5 of the Voting Rights Act, would not in itself constitute a compelling reason to justify a reapportionment of legislative seats along racial lines, because the Attorney General could not authorize a violation of the Equal Protection Clause. To be blunt, no deference was due the Justice Department’s simple say-so that a districting scheme would give African-Americans better representation. These racial districting cases have most often been decided on 5–4 votes that reflect remarkably consistent alignments, with Justice O’Connor invariably casting the swing vote.

E. ECONOMIC AND SOCIAL DISCRIMINATION

To this point, this chapter has examined race as a suspect classification in the creation of categories in law and legal classifications or boundaries that have an impact on the fundamental right to vote. Since fundamental rights and suspect classifications trigger strict scrutiny, legislation drawn along these lines often, but not always, has been declared unconstitutional. This section examines the constitutionality of other bases for creating categories in law. It begins by examining the constitutionality of conditioning social welfare benefits in ways that limit the right to travel. The remainder of the section examines in turn the legitimacy of indigency, illegitimacy, gender, age, mental impairment, sexual preference, and alienage as bases for creating legal classifications.

This section also explores the emergence of “middle tier” interests, the regulation of which requires “intermediate scrutiny.” During the 1970s in the course of examining discrimination based on gender, the Court created a middle level of constitutional scrutiny between the existing dichotomy of fundamental rights and suspect classifications, which triggered strict scrutiny, and nonfundamental rights and nonsuspect classifications, which required only that legislation have a rational basis. During the 1970s and 1980s, the Burger Court engaged in an extensive sorting of interests that resulted in applying different levels of constitutional scrutiny to legislation affecting a variety of interests. The two-level approach to constitutional analysis was replaced by a three-tier structure. In a sense, the Burger Court adopted a modified version of a position advocated by Justice Marshall—that the Court apply various levels of constitutional scrutiny to a sliding scale of interests. This development, remarkable in itself, was doubly so because it occurred during an era in which every appointment to the Court was made by a Republican President and thus, presumably, by an administration committed to the philosophy of judicial self-restraint.

Exhibit 14.1 on page 1260 sorts the different freedoms and classifications discussed in this chapter by the level of interest and degree of constitutional scrutiny each triggers. It constitutes the organizational framework for the remainder of this chapter. Subsequent subsections will introduce and describe the Court’s constitutional treatment of each of these interests associated with economic and social discrimination.
### Exhibit 14.1 The Supreme Court’s Multi-Tier Approach to Equal Protection Analysis

<table>
<thead>
<tr>
<th>Category of Interests</th>
<th>Constitutional Standard</th>
<th>Classifications</th>
<th>Rights</th>
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<tbody>
<tr>
<td><strong>Upper Tier</strong></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Suspect classifications and fundamental rights</td>
<td>Strict Scrutiny</td>
<td>Race (Bolling, p. 1140; Croson, p. 1176; Adarand Constructors, p. 1183)</td>
<td>Vote (Kramer, p. 1222; Lucas, p. 1247)</td>
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<td></td>
<td></td>
<td>Alienage, generally (Ambach, p. 1328)</td>
<td>Interstate travel (Skajdo, p. 1261)</td>
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<tr>
<td><strong>Middle Tier</strong></td>
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<tr>
<td></td>
<td>Intermediate Scrutiny</td>
<td>Gender (Craig, p. 1289; Virginia, p. 1294; Nguyen, p. 1300)</td>
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<td>Illegitimacy (p. 1281)</td>
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<td>Alienage, where children of illegal aliens are barred from public education (Pliler, p. 1332)</td>
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<tr>
<td><strong>Lower Tier</strong></td>
<td>Reasonableness</td>
<td>Indigency (Rodriguez, p. 1269; Maher, p. 747; McRae, p. 750)</td>
<td>International travel (Aznavarian, p. 1266)</td>
</tr>
<tr>
<td>Nonsuspect classifications and nonfundamental rights</td>
<td></td>
<td>Age (Morga, p. 1305)</td>
<td>Education Welfare Housing</td>
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<tr>
<td></td>
<td></td>
<td>Alienage, where a “governmental function” is implicated (Ambach, p. 1328)</td>
<td>(Rodriguez p. 1269)</td>
</tr>
<tr>
<td></td>
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<td>Mental disability (Cleborne Living Center, p. 1312)</td>
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<td></td>
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<td>Sexual preference (Steffan, p. 1312)</td>
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</tbody>
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*Although there are no illustrations in this chapter, examples of middle-tier rights would include the protection of “speech plus” and commercial speech discussed in Chapter 11; see chart, p. 933.*
Social Welfare Benefits and Limitations on the Right to Travel

The right to travel from state to state and to be free of discrimination by a state because one is not a resident of that state has long been thought to be an attribute of American citizenship. In the ringing terms of his concurring opinion in Edwards v. California (see p. 477), in which the Court struck down California’s “anti-Okie law,” which made it a crime to bring poor people into the state, Justice Jackson took note of “[t]he power of citizenship as a shield against oppression” and in so doing quoted the ancient admonition concerning Paul’s citizenship, “‘Take heed what thou doest: for this man is a Roman.’”

Several provisions of the Constitution could be regarded as securing such basic attributes of national citizenship. Article IV, section 2 of the Constitution provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.” Justice Jackson’s concurrence favored securing the protections as an aspect of the Fourteenth Amendment’s guarantee that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *.” Finally, the right to travel interstate and to be free of discrimination as a nonresident of a given state might be deemed a “liberty” so fundamental as to be secured by the Due Process Clause of the same amendment. In Shapiro v. Thompson below, which involved an equal protection challenge to a state requirement of a year’s residency in order to obtain welfare benefits, the Court acknowledged the fundamental quality of the right without specifically locating it in the Constitution.

**SHAPIRO v. THOMPSON**
Supreme Court of the United States, 1969
394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600

**BACKGROUND & FACTS** Nineteen-year-old unwed mother Vivian Thompson had one child and was pregnant with another when she moved to Connecticut from Massachusetts in June 1966. When she filed an application in August of that year for public assistance money under the Aid to Families with Dependent Children program, it was denied on the sole ground that she had not met the state’s one-year residency requirement, which was a prerequisite for eligibility to receive aid. She brought suit against Bernard Shapiro, the Connecticut welfare commissioner, in the U.S. District Court for the District of Connecticut. That court found the state residency requirement unconstitutional because it had a “chilling effect on the right to travel” and violated the Equal Protection Clause of the Fourteenth Amendment. Shapiro appealed to the Supreme Court. The Court consolidated similar cases from Pennsylvania and the District of Columbia for hearing with the Shapiro case. Each involved the validity of a one-year residency requirement.

Mr. Justice BRENNAN delivered the opinion of the Court.

* * *

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate
all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. * * *

We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. * * *

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 383 U.S. 745, 757–758, 86 S.Ct. 1170, 1178 (1966):

"[T]he constitutional right to travel from one State to another occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

"[T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

Thus, the purpose of deterring the immigration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. * * *

Alternatively, appellants argue that * * * the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. * * *

* * * [A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State’s public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. * * * Appellants’ reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

We recognize that a State has a valid interest in preserving the fiscal integrity of its
programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement. They argue that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

At the outset, we reject appellants’ argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. * * * The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellants were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. * * *

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year. Nor are new residents required to give advance notice of their need for welfare assistance. Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. * * *

The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. * * *

Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. * * *

Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A State purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only. * * * Under this [compelling interest] standard, the waiting-period requirement clearly violates the Equal Protection Clause. * * *

* * *

Even if we were to assume, arguendo, that Congress did approve the imposition of a one-year waiting period, it is the responsive state legislation which infringes constitutional rights. By itself [the congressional statute] has absolutely no restrictive effect. It is * * * the state requirements which pose the constitutional question. * * *

* * * Congress may not authorize the States to violate the Equal Protection Clause. * * *
The waiting-period requirement in the District of Columbia Code is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment. "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954). For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed. * * *

Affirmed.

Mr. Chief Justice WARREN, with whom Mr. Justice BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

* * *

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

Mr. Justice HARLAN, dissenting.

* * *

Against the indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. First, a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits. This seems to me an entirely legitimate objective. [Denying] benefits to those who enter primarily in order to receive them will make more funds available for those whom the legislature deems more worthy of subsidy.

A second possible purpose of residence requirements is the prevention of fraud. It may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have recently made some contribution to the State's economy, through having been employed, having paid taxes, or having spent money in the State. * * *

The question is whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. [T]he impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial. [T]hese are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one in which the States have acted within the terms of a limited authorization
by the National Government, and in which Congress itself has laid down a like rule for
the District of Columbia. **

[**]The field of welfare assistance is one in which there is a widely recognized need for
fresh solutions and consequently for experiment. Invalidation of welfare residence
requirements might have the unfortunate consequence of discouraging the Federal
and State Governments from establishing unusually generous welfare programs in
particular areas on an experimental basis, because of fears that the program would
cause an influx of persons seeking higher welfare payments. **[** *Finally*, a strong
presumption of constitutionality attaches to statutes of the types now before us. Congress-
ional enactments come to this Court with an extremely heavy presumption of
validity. ** A similar presumption of constitutionality attaches to state statutes,
particularly when, as here, a State has acted upon a specific authorization from
Congress. **

[**]This is an area in which the judiciary should be especially slow to fetter the
judgment of Congress and of some 46 state legislatures in the choice of methods.
Residence requirements have advantages, such as administrative simplicity and relative
certainty, which are not shared by the alternative solutions proposed by the appel-
lees. ** I [do not] believe that the period of residence required in these cases—one
year—is so excessively long as to justify a finding of unconstitutionality on that score.

** Today’s decision, it seems to me, reflects to an unusual degree the current
notion that this Court possesses a peculiar wisdom all its own whose capacity to lead
this Nation out of its present troubles is contained only by the limits of judicial
ingenuity in contriving new constitutional principles to meet each problem as it arises.
For anyone who, like myself, believes that it is an essential function of this Court to
maintain the constitutional divisions between state and federal authority and among
the three branches of the Federal Government, today’s decision is a step in the wrong
direction. ** I consider it particularly unfortunate that this judicial roadblock to the
powers of Congress in this field should occur at the very threshold of the current
discussions regarding the “federalizing” of these aspects of welfare relief.

Despite the markedly increased conservatism of the Court in the meantime, an even
milder form of welfare cost reduction failed to pass constitutional muster three decades later
challenged in *Shapiro* imposed a one-year waiting period to obtain any benefits, a California
statute limited welfare benefits to new arrivals during their first year of residency to the
same level they were receiving in the state they left. By a 7–2 vote, the Court concluded
California’s statute also violated the right to interstate travel. Although California
disavowed any aim of neutralizing the attractiveness of the relative generosity of the state’s
welfare payments to new arrivals, the Court nonetheless found the state’s goal of gaining
greater predictability in its steadily mounting welfare budget invalid in light of the right of
“those travelers who elect to become permanent residents ** to be treated like other
citizens of that State.” Chief Justice Rehnquist and Justice Thomas concluded that the right
to travel was no more implicated in this case than they thought it was in *Shapiro*, since the
plaintiffs had already begun living in California and thus were no longer engaged in any
interstate travel. The two dissenters were also of the view that distinctions drawn by the
Court upholding the constitutional validity of some residency requirements but not others
seemed to split hairs and made little sense over all.

State residency requirements, like that at issue in *Shapiro*, have not all suffered the
same constitutional fate. Under the Fourteenth Amendment, the Supreme Court struck
down a Tennessee requirement that conditioned the right to vote on a year’s residency in the state and three months’ residency in the county (Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972)); a Connecticut law that barred out-of-state college students during the entire period of their attendance at a state school from establishing residency so as to obtain in-state tuition rates (Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230 (1973)); and an Arizona statute that required one year as a county resident as a condition for receiving nonemergency hospitalization or medical care at the county’s expense (Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076 (1974)). But, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975), the Court did uphold Iowa’s one-year residency requirement as a prerequisite to initiating divorce proceedings. Interpreting the Privileges and Immunities Clause of Article IV, the Court struck down a New Hampshire rule that limited bar admission to state residents (Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272 (1985)) and an Alaska law that gave a hiring preference to residents over nonresidents in the operation of the state’s oil and gas industry (Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482 (1978)). However, the Supreme Court has sustained the imposition of higher hunting and fishing fees and more restrictive game licenses on nonresidents (Baldwin v. Fish & Game Comm’n of Montana, 435 U.S. 371, 98 S.Ct. 1852 (1978)). Finally, the Supreme Court has upheld—a over a Commerce Clause challenge—a municipal policy pertaining to all construction projects financed in whole or in part by the city that at least half the project workforce must be comprised of city residents (White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 103 S.Ct. 1042 (1983)).

Whatever the exact location of the right to interstate travel in the Constitution—whether in Article II, section 2 of the Constitution itself or the Privileges and Immunities Clause of the Fourteenth Amendment, or in the “liberty” that is protected by the Due Process Clauses—the Court has made it clear that such a right is fundamental, so that restrictions on it trigger strict scrutiny. In this important respect, the right to interstate travel is different from the right to international travel, which is discussed in the note on Califano v. Aznavorian that follows.

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**NOTE—RECEIVING SOCIAL WELFARE BENEFITS AND THE RIGHT TO INTERNATIONAL TRAVEL**

In enacting the Supplemental Security Income program, which provides aid to the needy aged, blind, and disabled, Congress specified that no benefits are to be paid to a recipient for any month that he or she spends entirely outside the United States. In Califano v. Aznavorian, 439 U.S. 170, 99 S.Ct. 471 (1978), the Court sustained the statute against constitutional attack. Said Justice Stewart, speaking for the Court:

> Social welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress’s choice.

> “The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. * * * In enacting legislation of this kind a government does not deny equal protection merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” * * *
To be sure, the standard by which legislation such as this must be judged is not a toothless one, but the challenged statute is entitled to a strong presumption of constitutionality.

Aznavorian argues that, even though the statutory provision may under this standard be valid as against an equal protection or due process attack, a more stringent standard must be applied in a constitutional appraisal because this statutory provision limits the freedom of international travel. We have concluded, however, that the statutory provision, fortified by its presumption of constitutionality, readily withstands attack from that quarter as well.

The freedom to travel abroad has found recognition in at least three decisions of this Court. In Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113 (1958), the Secretary of State had refused to issue a passport to a person because of his links with leftwing political groups. The Court held that Congress had not given the Secretary discretion to deny passports on such grounds. Although the holding was one of statutory construction, the Court recognized that freedom of international travel is "basic in our scheme of values" and an "important aspect of the citizen's 'liberty.'" Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659 (1964), dealt with § 6 of the Subversive Activities Control Act, which made it a criminal offense for a member of the Communist Party to apply for a passport. The Court again recognized that the freedom of international travel is protected by the Fifth Amendment. Congress had legislated too broadly by restricting this liberty for all members of the Party. In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271 (1965), the Court upheld the Secretary's decision not to validate passports for travel to Cuba. The Court pointed out that "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."

Aznavorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over a hundred years. But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel.

The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such, this 'right,' the Court has held, can be regulated within the bounds of due process.

Unlike cases involving the right of interstate travel, this case involves legislation providing governmental payments of monetary benefits that has an incidental effect on a protected liberty, similar to the legislation considered in Califano v. Jobst, 434 U.S. 47, 98 S.Ct. 95 (1977). There, another section of the Social Security Act was challenged because it "penalized" some beneficiaries upon their marriage. The Court recognized that the statutory provisions "may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others," but nonetheless upheld the constitutional validity of the challenged legislation.

The statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the Kent, Aptheker, or Zemel cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It merely withdraws a governmental benefit during and shortly after an extended absence from this country. Unless the limitation imposed by Congress is wholly irrational, it is constitutional in spite of its incidental effect on international travel.

The Court noted that several considerations supported the payment limitation:

Congress may simply have decided to limit payments to those who need them in the United States. The needs to which this program responds might vary dramatically in foreign countries. The Social Security Administration would be hard pressed to monitor the continuing eligibility of persons outside the country.

And, indeed, Congress may only have wanted to increase the likelihood that these funds would be spent inside the United States.
Justice Stewart observed, “These justifications for the legislation in question are not, perhaps, compelling. But its constitutionality does not depend on compelling justifications. It is enough if the provision is rationally based.”

Indigency

Support for an enlarged view of “suspect classes” and an expanded list of “fundamental rights” was apparent in Shapiro and many other decisions of the Warren Court. Although the Warren Court never held that indigency or lack of money created a suspect classification as such, it ruled in Griffin v. Illinois and Douglas v. California, discussed in Chapter 8 (see p. 519), that the states had to provide counsel and a copy of the trial transcript to poor defendants to allow them an appeal. Those Justices who constituted the prevailing majority on the Warren Court were particularly sensitive to discrimination on the basis of poverty. Such liberal stalwarts as Justices Brennan and Marshall, and Justice Douglas before he left the Court in 1975, continued this tradition of sympathy for the underdog on the Burger and Rehnquist Courts. Propelled by the belief that the Supreme Court had a unique obligation to protect powerless groups—those on the periphery of society—from unfriendly, class-based legislation, these activist holdovers from the Warren Court tried to push the notion of “suspect class” beyond the traditional “insular and discrete” minorities identified by race, alienage, and religion in footnote 4 of the Carolene Products case (see Chapter 2 or the essay, “The Modes of Constitutional Interpretation” at the end of the second paperback volume) to include the poor, illegitimate children, and women. They also favored an enlarged body of “fundamental rights,” reaching beyond the Bill of Rights to create other guarantees, such as the right to equal educational opportunity.

By contrast, the majority that dominated the Burger and Rehnquist Courts showed little enthusiasm for expanding the number of upper-tier interests, as the Court’s opinion in San Antonio Independent School District v. Rodriguez (p. 1269) shows. Indeed, the Burger Court’s refusal to regard classifications based on wealth as suspect is clear from the following statement by Justice Powell for the Court in the context of disposing of a constitutional challenge to state legislation limiting the expenditure of public funds for abortions to those women whose lives would be endangered by carrying a fetus to term: “In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But the Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.” Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376 (1977). This view was reaffirmed in Harris v. McRae (p. 750). A graphic example of the difference between the Warren and Burger Courts on the disposition of equal protection claims in welfare cases is provided by the contrast between Shapiro v. Thompson, on the one hand, and Rodriguez, on the other.

This debate over the level of constitutional scrutiny to be applied is far from academic. Without elevated scrutiny, the consequence of judicial self-restraint in a case like Rodriguez is—to use Justice Marshall’s words—to permit “a State * * * [to] vary the quality of the education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside.” In light of the exodus to the suburbs by more affluent whites and the rising minority proportion of center-city population left behind, the most likely practical result of Rodriguez is education that is—to paraphrase Plessy—separate and unequal.
BACKGROUND & FACTS  Texas financed its public schools from a combination of state, local, and federal funds. The state program was designed to provide a minimum level of education in all school districts by funding a large share of teachers' salaries, operating expenses, and transportation costs. Each school district provided additional funds for its own schools through taxes levied on local real estate. However, because the value of local property varied widely among districts, wide disparities existed in per-pupil expenditures. Edgewood, located in the core-city with little commercial or industrial property, was the poorest of metropolitan San Antonio's seven school districts. At the time of this litigation, its 22,000 students were enrolled in 25 elementary and secondary schools. Approximately 90% of its students were Mexican-American and more than 6% were African-American. The assessed valuation of its property per pupil was $5,960 and the median family income was $4,686, both the lowest in the metropolitan area. Its expenditure per pupil was $356 for the 1967–68 school year. By contrast, Alamo Heights, the most affluent of San Antonio's school districts, was a predominantly Anglo residential community with only 18% Mexican-American residents and less than 1% who were African-American. Its six schools housed 5,000 pupils. The assessed value of its property per pupil was $49,000 and its median family income was $8,001. Its per-pupil expenditure for the 1967–68 school year was $594.

Demetrio Rodriguez, an Edgewood resident, and others brought a class action on behalf of all children attending school in districts with low property-tax bases. A federal district court held that the state's system of financing public education violated the Equal Protection Clause because it discriminated against the poorer districts. The case reached the U.S. Supreme Court on appeal. Although the title of the case still named the San Antonio school district as the lead appellant, the school district in fact had withdrawn its opposition and, siding with Rodriguez, submitted an amicus curiae brief in argument before the Court challenging the maldistribution of educational resources. The state board of education, the state commissioner of education, the state attorney general, and the trustees of Bexar County remained as parties opposing Rodriguez in the suit.

Mr. Justice POWELL delivered the opinion of the Court.

* * *

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the "least drastic means" for effectuating its objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. * * *

* * * We must decide, first, whether the Texas system of financing public education
operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invalid discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. * * *

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court’s opinion and of appellees’ complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against “poor” persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally “indigent,” or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

* * * The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), and its progeny, the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion de facto discrimination against those who, because of their indigency, were totally unable to pay for transcripts. * * *

Likewise, in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963), a decision establishing an indigent defendant’s right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. Douglas provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018 (1970), and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1971), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. * * * Sentencing judges may, and often do, consider the defendant’s ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849 (1972), the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases
were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided “no reasonable alternative means of access to the ballot” * * * inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees’ first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of definably “poor” persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the “poor,” appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that “[i]t is clearly incorrect * * * to contend that the ‘poor’ live in ‘poor’ districts. * * * Thus, the major factual assumption * * *—that the educational financing system discriminates against the ‘poor’—is simply false in Connecticut.” Defining “poor” families as those below the Bureau of the Census “poverty level,” the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees’ argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. * * *

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family’s children.

* * *

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees’ comparative-discrimination theory would still face serious unanswered questions, including whether a bare positive correla-
tion or some higher degree of correlation is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor, and whether a class of this size and diversity could ever claim the special protection accorded “suspect” classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

This brings us, then, to the third way in which the classification scheme might be defined—district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education. Alternatively, as suggested in Mr. Justice MARSHALL's dissenting opinion, * * * the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. * * * [Appellees * * * also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right [to education] * * *.

In Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), a unanimous Court recognized that "education is perhaps the most important function of state and local governments." * * *

* * * But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.* * *

* * * It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. * * *

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First
Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The “marketplace of ideas” is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.

Furthermore, the logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State. The power to tax local property for educational purposes has been recognized in Texas at least since 1883. When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

* * *

* * * While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district’s schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. * * *

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means the freedom to devote more money to the education of one’s children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of
the peculiar strengths of our form of government each State’s freedom to “serve as a laboratory; and try novel social and economic experiments.” No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

* * *

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on “happenstance.” They see no justification for a system that allows * * * the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. * * * It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. * * * The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. * * *

* * * The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. * * * But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

Mr. Justice WHITE, with whom Mr. Justice DOUGLAS and Mr. Justice BRENAN join, dissenting.

* * *

This case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures and so to improve their children’s education to the extent that increased funding would achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because
the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is $49,078, in Edgewood $5,960. In a typical relevant year, Alamo Heights had a maintenance tax rate of $1.20 and a debt service (bond) tax rate of 20¢ per $100 assessed evaluation, while Edgewood had a maintenance rate of 52¢ and a bond rate of 67¢. These rates, when applied to the respective tax bases, yielded Alamo Heights $1,433,473 in maintenance dollars and $236,074 in bond dollars, and Edgewood $223,034 in maintenance dollars and $279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood’s base, realized approximately six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond dollars by using a bond tax rate less than one-third of that used by Edgewood.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and its impact on Edgewood is undeniably serious.

In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax at the rate of 68¢ per $100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of $5.76 per $100. But state law places a $1.50 per $100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved.

If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture. In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside.
In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954). * * *

*** I must * * * voice my disagreement with the Court's rigidified approach to equal protection analysis. * * * The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. * * *

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. * * * Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170 (1966). * * * Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S., at 634, 89 S.Ct., at 1331. But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest "is a right * * * explicitly or implicitly guaranteed by the Constitution." * * *

I would like to know where the Constitution guarantees the right to procreate, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 1113 (1942), or the right to vote in state elections, e.g., Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964), or the right to an appeal from a criminal conviction, e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. * * *

* * *

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I * * * certainly do not accept the view that the process need necessarily
degenerate into an unprincipled, subjective “picking-and-choosing” between various interests or that it must involve this Court in creating “substantive constitutional rights in the name of guaranteeing equal protection of the laws.” * * * Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are frequently afforded special judicial consideration because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

* * *  
A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as “discrete and insular minorities” who are relatively powerless to protect their interests in the political process. See * * * United States v. Carolene Products Co., 304 U.S. 144, 152–153, n. 4, 58 S.Ct. 778, 783–784 (1938). Moreover, race, nationality, or alienage is “in most circumstances irrelevant’ to any constitutionally acceptable legislative purpose.” * * * * * *  
** * * * Discrimination on the basis of sex posed for the Court the specter of * * * discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. * * * * * *  
** * * Status of birth, like the color of one’s skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. * * * But the situation differs markedly when discrimination against
important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "super-legislature." * * * I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. * * *

[The majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority * * * ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. * * *

* * * As this Court held in Brown v. Board of Education, 347 U.S., at 493, 74 S.Ct., at 691, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." * * * [F]actors * * * including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts—a conclusion which is only strengthened when we consider the character of the classification in this case.

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**NOTE—EQUALITY IN THE FINANCING OF PUBLIC EDUCATION AS A MATTER OF STATE CONSTITUTIONAL LAW**

The Supreme Court's ruling in Rodriguez—that equal protection is not denied simply because state-aid formulas do not offset inequalities resulting from variation in tax bases among local school districts—is definitive as a matter of federal constitutional law. However, it did not end the legal controversy. Relying on equal protection language and other guarantees contained in their state constitutions, several state supreme courts have held that educational funding inequalities violate state constitutional law. Less than two weeks after Rodriguez was decided, the New Jersey Supreme Court struck down that state's system of public school financing in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), cert. denied, 414 U.S. 976, 94 S.Ct. 292 (1973), because the inequalities were judged to violate the state constitution. Since Robinson, the highest courts in all but nine states have addressed the school finance issue. As of 2007, plaintiff schoolchildren and their parents have prevailed in 18 states, while the state supreme court in 23 states upheld the existing school funding scheme against constitutional attack.

16. Robinson, however, was not the first suit in which a state supreme court invalidated a system of public school financing. Two years earlier, the California Supreme Court reached the conclusion that inequalities stemming from funding public education principally by the local property tax violated the Equal Protection Clause of the Fourteenth Amendment in Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971). The court concluded that wealth was a suspect classification, that education was a fundamental right, and that the state had failed to identify any compelling interest to justify the inequality in the state's system of public school funding. Following the ruling in Rodriguez, the California Supreme Court revised its judgment to rest entirely on its interpretation of the state constitution. See Serrano v. Priest, 18 Cal.3d 728, 133 Cal.Rptr. 345, 557 P.2d 929 (1976).
Until 1989, suits brought after Rodriguez emphasized inequalities among school districts and relied primarily on state equal protection language. To a lesser extent, they also cited clauses pertaining to education in the state constitution. Previously, many state courts determined that their state equal protection clauses meant the same as the Equal Protection Clause of the Fourteenth Amendment. But some courts, such as the New Jersey court in Robinson, did not hesitate to conclude that their state's equal protection clause could be more demanding than the federal counterpart. The Robinson case also demonstrated to potential plaintiffs that state courts might be more receptive to school-finance challenges than the federal courts had been.

From 1973 to 1988, state courts handed down school funding rulings in 21 states. Plaintiffs prevailed in only seven of them. It was clear to both plaintiffs and their attorneys that a different legal theory had to be developed if school-funding inequalities were to be successfully challenged. State courts were having a hard time declaring education to be a fundamental right because such a determination was pregnant with implications for other enumerated state constitutional rights. Unlike the federal Constitution, state constitutions are detailed and identify a wide variety of rights, such as entitlements to fire protection and welfare. State courts were legitimately concerned about declaring education a fundamental right lest it open the floodgates to equal protection suits involving other constitutional rights.

A switch in litigation strategy occurred in 1989. Post-1988 plaintiffs abandoned their reliance upon state equal protection clauses as a source of rights and shifted their focus to education clauses contained in state constitutions. They now argued that all schoolchildren were entitled to education of certain quality and that the poorest districts should be brought up to the level required by the public education provision of the state constitution. These suits, called “quality suits,” focused on the differences in quality of education provided rather than on the revenue base of the school district. This litigation shift seems to have been much more successful for the plaintiffs. Since 1989, plaintiffs have prevailed in school-finance challenges more than half the time; they have won in 11 of the 22 states where state supreme courts have heard such suits.17 Three of these were reversals by supreme courts in Arizona, Kansas, and Ohio of earlier judgments that their state systems were constitutional. The constitutional outcomes in the 43 states, whose high courts thus far have decided school finance cases, are depicted on the map in Exhibit 14.2 on p. 1280.


Illegitimacy

The treatment of illegitimate children as a potentially “suspect class” furnishes another example of the difference between the two approaches. Justice Black’s opinion for the Court in Labine v. Vincent (p. 1281) took care to distinguish the facts of that case from a previous Warren Court ruling, Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968), and thereby declined the invitation to bring legislation directly affecting illegitimates within the

17. Actually, they won on the merits of the argument in 12 states. However, plaintiffs failed to have the North Dakota school finance scheme struck down because, while they had a majority of the Justices voting in their favor, they did not secure the required super-majority which state law required to have a statute declared unconstitutional. Bismarck Public School District No. 1 v. State, 511 N.W.2d 247 (N.D. 1995).
purview of “strict scrutiny.” Through its rulings in Labine and subsequent cases, the Burger
Court indicated what criteria would have to be satisfied for the creation of any additional
“suspect classes” beyond that of race (the status of which as a “suspect class” is obvious in
view of the background of the Fourteenth Amendment). A recognition of three such
conditions emerged: (1) whether membership in the class “carries” an obvious badge, as
race and sex do”; (2) whether treatment of the class members has “approached the severity
or pervasiveness of the historic legal and political discrimination against women and
Negroes”; and (3) whether the disadvantaged class has been subjected to an “absolute
deprivation” of the benefit available to others. The Burger Court also established a
comparable upper-tier limitation on the recognition of “fundamental” rights. As Justice
Powell points out in Rodriguez, identification of such basic liberties depends upon whether
they are “explicitly or implicitly guaranteed by the Constitution,” not upon “the
importance of a service performed by the State * * *.” Justice Marshall’s dissent in
Rodriguez mounted a sustained attack on Justice Powell’s definition of what comprises the
two tiers in the Court’s bifurcated approach to equal protection and questioned both the
accuracy and the rigidity of the two-tier portrayal.

**EXHIBIT 14.2 STATE COURT RULINGS ON THE EQUAL FUNDING OF PUBLIC EDUCATION**

[Map of the United States showing states with different levels of public school financing, with legends for states where systems of public school financing were stricken down, upheld, or not yet decided.]
In 1962, a baby girl, Rita Vincent, was born to Lou Bertha Patterson (later Lou Bertha Labine) and Ezra Vincent. Lou Bertha Patterson and Ezra Vincent executed the proper form with the Louisiana State Board of Health acknowledging that Ezra Vincent was Rita's natural father. Although this public acknowledgment, under state law, did not give Rita the legal right to share equally with legitimate children in the parent's estate, it did give her a right to claim support from her parents or their heirs. The acknowledgment also gave Rita the right to be a limited beneficiary under her father's will in the event he left one.

Ezra Vincent, who had acquired substantial property, died intestate (that is, without leaving a will) six years later. Lou Bertha, as Rita's guardian, petitioned the state court to be appointed administrator of Ezra Vincent's estate, for a declaration that Rita was the sole heir, and for an order directing the administrator to pay support for the child. Alternatively, she sought $150 per month under the state's child support law. Relatives of Ezra Vincent contested the petition on grounds that they were entitled to the whole estate. The court ruled that, under Louisiana's law of intestate succession, Ezra Vincent's relatives took his property to the exclusion of acknowledged, but not legitimated, illegitimate children. In view of social welfare benefits totaling $100, which Rita was receiving from the federal government, the court also held that Rita's guardian was not entitled to child support from the estate.

After this judgment was upheld in higher state courts, Lou Bertha Labine appealed to the U.S. Supreme Court.

Mr. Justice BLACK delivered the opinion of the Court.

* * *

In this Court appellant argues that Louisiana's statutory scheme for intestate succession that bars this illegitimate child from sharing in her father's estate constitutes an invidious discrimination against illegitimate children that cannot stand under the Due Process and Equal Protection Clauses of the Constitution. Much reliance is placed upon the Court's decisions in Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968), and Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 88 S.Ct. 1515 (1968). For the reasons set out below, we find appellant's reliance on those cases misplaced, and we decline to extend the rationale of those cases where it does not apply. Accordingly, we affirm the decision below.

In Levy the Court held that Louisiana could not consistently with the Equal Protection Clause bar an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized. The cause of action alleged in Levy was in tort. It was undisputed that Louisiana had created a statutory tort and had provided for the survival of the deceased's cause of action, so that a large class of persons injured by the tort could recover damages in compensation for their injury. Under those circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort.

* * *

Once marriage is contracted there, husbands have obligations to their wives.
Fathers have obligations to their children. Should the children prosper while the parents fall upon hard times, children have a statutory obligation to support their parents. To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. The surviving spouse is entitled to an interest in the deceased spouse’s estate. Legitimate children have a right of forced heirship in their father’s estate and can even retrieve property transferred by their father during his lifetime in reduction of their rightful interests.

Louisiana also has a complex set of rules regarding the rights of illegitimate children. Children born out of wedlock and who are never acknowledged by their parents apparently have no right to take property by intestate succession from their father’s estate. In some instances, their father may not even bequeath property to them by will. Illegitimate children acknowledged by their fathers are “natural children.” Natural children can take from their father by intestate succession “to the exclusion only of the State.” They may be bequeathed property by their father only to the extent of either one-third or one-fourth of his estate and then only if their father is not survived by legitimate children or their heirs. Finally, children born out of wedlock can be legitimated or adopted, in which case they may take by intestate succession or by will as any other child.

We emphasize that this is not a case, like Levy where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father. Ezra Vincent could have left one-third of his property to his illegitimate daughter had he bothered to follow the simple formalities of executing a will. He could, of course, have legitimated the child by marrying her mother in which case the child could have inherited his property either by intestate succession or by will as any other legitimate child. Finally, he could have awarded his child the benefit of Louisiana’s intestate succession statute on the same terms as legitimate children simply by stating in his acknowledgment of paternity his desire to legitimize the little girl.

In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana. Affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS, Mr. Justice WHITE, and Mr. Justice MARSHALL join, dissenting.

In my view, Louisiana’s intestate succession laws, insofar as they treat illegitimate children whose fathers have publicly acknowledged them differently from legitimate children, plainly violate the Equal Protection Clause of the Fourteenth Amendment. The Court today effectively concedes this, and to reach its result, resorts to the startling measure of simply excluding such illegitimate children from the protection of the Clause, in order to uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates’ parents, but also the hapless, and innocent, children.

The Court nowhere mentions the central reality of this case: Louisiana punishes illegitimate children for the misdeeds of
The Supreme Court appears to have repudiated the clear implication in Labine that illegitimacy is a lower-tier interest and that legislation drawn along such lines would have to clear only the hurdle of “reasonableness.” Speaking for a plurality in Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518 (1978), Chief Justice Burger wrote: “Although, as decided in Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755 (1976), and reaffirmed in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977), classifications based on illegitimacy are not subject to ‘strict scrutiny,’ they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests.” Of the nearly dozen and a half cases involving plaintiffs challenging legislation discriminating against illegitimate children heard by the Court beginning with Levy in 1968, the Court has sided with those attacking the statutes roughly three-quarters of the time, so it seems fair to say that legislation drawn along such lines has been disfavored by the Court. The extent of that disfavor is reflected in the Court’s most recent rulings, referred to above, which would seem clearly to indicate that illegitimates are a quasi-suspect class and that legislation discriminating against them warrants intermediate scrutiny.

Gender

In view of the first two factors specified by the Burger Court as critical to identifying a suspect class (see p. 1280), whether members of the class are readily identifiable and whether historically they have suffered pervasive discrimination, legal categories drawn on the basis of gender naturally might be thought to provoke strict scrutiny. In fact, however, the early treatment of gender-based classifications by the Burger Court—which is to say the first sympathetic treatment of the matter by the Supreme Court—reflected considerable ambivalence. In its first encounter with a gender-based classification in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971), the Court held unconstitutional an Idaho statute that automatically gave preference to the father over the mother in the appointment of an administrator for the estate of a minor who died without leaving a will. Characterizing the question as “whether a difference in the sex of the competitive applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced” (emphasis supplied), the Court found it to be “the very kind of arbitrary
legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment” (emphasis supplied).

To be sure, this was worlds away from the Court’s ruling 100 years before in Bradwell v. Illinois (following), in which it upheld a state’s refusal to admit a woman to the practice of law who qualified in every respect except gender. In Bradwell, the majority repeated its holding, announced the day before, in the Slaughterhouse Cases (p. 473), that it was not the function of the Privileges and Immunities Clause to protect rights possessed by American citizens against state infringement. Justice Bradley’s concurring opinion in Bradwell, however, embraced the position of the dissenters in Slaughterhouse that practicing one’s lawful occupation was a privilege and immunity of American citizenship that the states were bound by the Fourteenth Amendment to respect, but women—by their nature—didn’t qualify for that protection. Government action for decades thereafter proceeded on this stereotypical view of the role of women.

**BRADWELL V. ILLINOIS**
Supreme Court of the United States, 1873
83 U.S. (16 Wall.) 130, 21 L.Ed. 442

**BACKGROUND & FACTS** Although she met the education and character qualifications to be an attorney, Myra Bradwell, an American citizen and resident of Illinois, was denied admission to the state Bar solely because she was a married woman. She challenged the refusal of the Illinois Supreme Court to admit her to the practice of law as a denial of one of the privileges and immunities guaranteed by the Fourteenth Amendment. The U.S. Supreme Court handed down its ruling in this case the day after its decision in the Slaughterhouse Cases, upon which a majority of the Court relied.

Mr. Justice MILLER delivered the opinion of the court:

* * *

The protection designed by the [Privileges and Immunities] clause * * * has no application to a citizen of the state whose laws are complained of. If the plaintiff was a citizen of the state of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

* * *

[C]ounsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them, and he proceeds to argue that admission to the bar of a state, of a person who possesses the requisite learning and character, is one of those which a state may not deny.

* * * We agree * * * that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them. * * *

The opinion just delivered in the Slaughterhouse Cases * * * renders elaborate argument in the present case unnecessary * * *

* * *

The judgment of the State Court is, therefore, affirmed.

Mr. Justice BRADLEY [with whom Mr. Justice FIELD and Mr. Justice SWAYNE join, concurring in the judgment]:

* * *

The claim that, under the 14th Amendment of the Constitution, * * * the statute law of Illinois, or the common law prevail-
ing in that state, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life.

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband’s consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman’s advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

[Mr. Chief Justice CHASE dissented.]
Two years after it took up the constitutionality of legal classifications drawn on the basis of sex in Reed, the Court reached a critical juncture: Would it bite the bullet and declare gender a suspect classification? In Frontiero v. Richardson below, it came within a vote of doing so. Justice Brennan’s plurality opinion, which announced the judgment in Frontiero, was poised to do just that, but it failed to secure Justice Stewart’s all-important fifth vote. Justice Powell, who also concurred in the judgment, resisted “invoking the strictest test of judicial scrutiny” precisely because the Equal Rights Amendment was then pending and “if adopted will resolve the substance of this precise question * * *.” In the years that followed, the Court hopscotched between Reed and Frontiero, alternately citing each as precedent, but without any declaration by the majority that classifications drawn on the basis of sex were suspect.

In Craig v. Boren (p. 1289), Justice Brennan was more successful. He got a majority of the Court to agree to a standard more demanding than the reasonableness test of Reed, but less than the strict scrutiny of his plurality opinion in Frontiero. Despite Justice Powell’s protestations that this did not spell the creation of a new level of constitutional review, “intermediate scrutiny” was born. With the advent of “middle-tier analysis”—as it also came to be called—the Court was on its way to adopting Justice Marshall’s proposal in his Rodriguez (p. 1275) and Murgia (p. 1307) dissents for flexible review based on a sliding scale of interests.

**FRONTIERO V. RICHARDSON**

Supreme Court of the United States, 1973

411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583

**BACKGROUND & FACTS** Federal statutes provided that married service-men automatically qualify to receive increased quarters allowances and medical and dental benefits for their wives, but female personnel in the armed services may not receive these fringe benefits unless their husbands are in fact dependent on them for over one-half of their support. Sharron Frontiero, a married Air Force officer, brought suit against Secretary of Defense Elliot Richardson in federal district court, challenging this sex-based differential treatment as a violation of the Fifth Amendment insofar as the statutes required a female servicewoman to prove the actual dependency of her husband. A three-judge panel denied relief, and she appealed.

Though the Fourteenth Amendment applies only to the states and not against the federal government, the Supreme Court recognized and validated the phenomenon of equal protection challenges to policies of the federal government when it held in Bolling v. Sharpe (p. 1140) that under some conditions a denial of equal protection could be so gross as to amount to a denial of due process in violation of the Fifth Amendment.

18. Bob Woodward and Scott Armstrong, The Brethren (1979), p. 255. According to Woodward and Armstrong, “Stewart indicated that he favored striking individual laws as they came up and, perhaps after a number of years, doing what Brennan proposed. * * * Besides Stewart was certain the Equal Rights Amendment would be ratified. That would relieve the Court of the burden.” According to the authors, “Stewart proposed a compromise”: If Brennan would limit the opinion to striking the one law, “Stewart would probably go along with his broad constitutional rule on the next sex discrimination case.” Brennan, said the authors, “rejected” the “deal” and continued to push for strict scrutiny; he lost Stewart, who opted for simply concurring in the judgment.

19. The proposed Equal Rights Amendment, which declared that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” was submitted by Congress to the states for ratification in March 1972. In 1978, the deadline for ratification was extended to June 1982. The amendment was ratified by 35 states before time ran out—three states short of adoption.
The attorney representing Sharron Frontiero in this controversy was future Supreme Court Justice Ruth Bader Ginsburg, then a lawyer with the American Civil Liberties Union. Frontiero was one of a half-dozen sex discrimination cases she argued before the Court.

Mr. Justice BRENNAN announced the judgment of the Court in an opinion in which Mr. Justice DOUGLAS, Mr. Justice WHITE, and Mr. Justice MARSHALL join.

Appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree * * *

Our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre–Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. * * * And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena. * * *

Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility * * *.” Weber v. Aetna Casualty & Surety Co., 466 U.S. 164, 175, 92 S.Ct. 1400, 1407 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. * * *

We can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

The Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere “administrative convenience.” In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.
The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits rather than through the more costly hearing process, the Government’s explanation of the statutory scheme is, to say the least, questionable.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, “the Constitution recognizes higher values than speed and efficiency.” * * * And when we enter the realm of “strict judicial scrutiny,” there can be no doubt that “administrative convenience” is not a shibboleth, the mere recitation of which dictates constitutionality. * * * On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands “dissimilar treatment for men and women who are * * * similarly situated,” and therefore involves the “very kind of arbitrary legislative choice forbidden by the [Constitution] * * *.” Reed v. Reed, 404 U.S., at 77, 76, 92 S.Ct., at 254. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

Reversed.

Mr. Justice STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed, * * *.

Mr. Justice REHNQUIST dissents * * *.

Mr. Justice POWELL, with whom THE CHIEF JUSTICE [BURGER] and Mr. Justice BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice BRENNAN, which would hold that all classifications based upon sex, “like classifications based upon race, alienage, and national origin,” are “inherently suspect and must therefore be subjected to close judicial scrutiny.” * * * It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, * * * which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the tradi-
tional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

* * *

CRAIG V. BOREN
Supreme Court of the United States, 1976
429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397

BACKGROUND & FACTS Oklahoma law prohibits the sale of beer with 3.2% alcoholic content to males under 21 and to females under 18. Craig, a male between the ages of 18 and 21, and Whitener, a licensed vendor of 3.2 percent beer, brought suit for declaratory and injunctive relief against the governor and other state officials, asserting that the gender-based age difference in the statute constituted invidious discrimination in violation of the Equal Protection Clause. A three-judge federal district court denied relief, and the plaintiffs appealed.

Mr. Justice BRENNAN delivered the opinion of the Court.

* * * The question to be decided is whether such a gender-based differential constitutes a denial to males 18–20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

* * *

Analysis may appropriately begin with the reminder that Reed [v. Reed] emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." ** To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in Reed, the objectives of "reducing the workload on probate courts," ** and "avoiding intrafamily controversy," ** were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following Reed similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. **

* * *

We accept for purposes of discussion the objective underlying **[the beer sales restrictions] as the enhancement of traffic safety. Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18–20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period. Similarly, youths aged 17–21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard. Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts. Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence."
Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. Conceding that "the case is not free from doubt," the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification."

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18–20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here. Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer—albeit apparently not of the diluted 3.2% variety—reached results that hardly can be viewed as impressive in justifying either a gender or age classification.

Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18–20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under Reed, Oklahoma's 3.2% beer statute invidiously discriminates against males 18–20 years of age.

In the remainder of its opinion, addressing the argument that the Twenty-First Amendment "strengthened" the states' police power with regard to the regulation of alcoholic beverages, the Court concluded that neither the Amendment's text, history, nor any of the Court's decisions interpreting it modified the protections guaranteed by the Fourteenth Amendment.

In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. We thus hold that the operation of the Twenty-First Amendment does not alter the application of equal protection standards that otherwise govern this case.
We conclude that the gender-based differential contained in Okla.Stat., Tit. 37, § 245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18–20 and reverse the judgment of the District Court.

It is so ordered.

Mr. Justice POWELL, concurring.

***

With respect to the equal protection standard, I agree that Reed v. Reed, * * * is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court’s language may imply. Reed and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when ‘fundamental’ constitutional rights and ‘suspect classes’ are not present.

I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, had adopted a means that bears a ‘fair and substantial relation’ to this objective. * * *

It seems to me that the statistics offered by appellees and relied upon by the District Court do tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that it so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Mr. Justice STEWART, concurring in the judgment.

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The disparity created by these Oklahoma statutes amounts to total irrationality. For the statistics upon which the State now relies, whatever their other shortcomings, wholly fail to prove or even suggest that 3.2% beer is somehow more deleterious when it comes into the hands of a male aged 18–20 than of a female of like age. The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination. See Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971).

Mr. Justice REHNQUIST, dissenting.

The Court’s disposition of this case is objectionable on two grounds. First is its conclusion that men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court’s enunciation of this standard, without citation to any source, as being that ‘classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.’ * * *

The only redeeming feature of the Court’s opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973), from their view that sex is a ‘suspect’ classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the ‘rational basis’ equal protection analysis * * * and I believe that it is constitutional under that analysis.

***

The Court’s conclusion that a law which treats males less favorably than females ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty
with the two standards of review which our cases have recognized—the norm of “rational basis,” and the “compelling state interest” required where a “suspect classification” is involved—so as to counsel weightily against the insertion of still another “standard” between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is “substantially” related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at “important” objectives or, whether the relationship to those objectives is “substantial” enough.

I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are “important,” and which are not. As for the second part of the Court’s new test, the Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is any rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb “substantially” requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them. * * *

* * *

The Court’s criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies, and are entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents. In this situation, they could reasonably infer that the incidence of drunk driving is a good deal higher than the incidence of arrest. * * *

The Oklahoma Legislature could have believed that 18–20-year-old males drive substantially more, and tend more often to be intoxicated than their female counterparts; that they prefer beer and admit to drinking and driving at a higher rate than females; and that they suffer traffic injuries out of proportion to the part they make up of the population. Under the appropriate rational-basis test for equal protection, the statute should accordingly be upheld. [Chief Justice BURGER also dissented.]

The Oklahoma statute challenged in Craig v. Boren explicitly distinguished between persons permitted to purchase 3.2 beer on the basis of sex, but what about the constitutionality of legislation that simply has the effect of strongly favoring individuals of one sex over another? In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1979), the Supreme Court confronted the constitutionality of a state law that gave an advantage to veterans over nonveterans in the hiring of state employees. Helen Feeney had scored very highly on the examination for a position with the Massachusetts Board of Dental Examiners twice but had been placed well down the hiring lists because several male candidates with lower scores, but prior military service, had been placed ahead of her. Indeed, of some 47,000 state civil service employees, approximately 57% were men and 43% were women; 54% of the men were veterans, but less than 2% of the women had served in the military. The Court held that the uneven effect of the veterans’ preference alone was not sufficient to make this a case of discrimination based on sex. Although “[a]ny state law
overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause. * * * the settled rule is that the Fourteenth Amendment guarantees equal laws, not equal results." Justice Stewart, speaking for the Court, continued, "If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." He observed, "Veteran status is not uniquely male," and added, "Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, so this is not a law that can plausibly be explained only as a gender-based classification." In short, the veterans' preference aided men more than women, not because it was designed to do so, but because "more men than women have served in the military." Indeed, the Court pointed out that "significant numbers of nonveterans are men * * * [and they, too] are placed at a disadvantage." In dissent, Justices Brennan and Marshall thought the absolute preference given to veterans did not have "a substantial relationship to * * * legitimate governmental objectives." (assisting veterans in their readjustment to civilian life, encouraging military enlistment, and rewarding service to the country); and, in light of the fact that it was such an obstacle to women's employment opportunities (for any but the lowest ranked jobs), it simply could not withstand heightened Equal Protection Clause scrutiny.

As Justice Marshall noted in his Murgia dissent (see p. 1307), the application of strict scrutiny invariably resulted in a judgment that the legislation in question was unconstitutional. When the courts employed the standard of mere reasonableness, on the other hand, the outcome was nearly always to sustain the law. Cases decided after Craig showed that the mortality rate of statutes examined under intermediate scrutiny has been over 60%. In other words, more than three out of every five statutes subjected to middle-tier analysis were struck down. In the context of Justice Marshall's observations, then, although proponents of the Equal Rights Amendment lost the fight for its ratification, the Court's adoption of intermediate scrutiny appears to have achieved much of the proposed amendment's likely effect. Although gender-based classifications are usually unfriendly to women, sex-based laws that disadvantage men are also constitutionally vulnerable. This aspect of the decision in Craig particularly nettled Justice Rehnquist. In cases decided after Craig, the Court struck down an Alabama law that provided that husbands, but not wives, could be required to pay alimony following divorce (Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979)); invalidated a New York statute that allowed an unwed mother, but not an unwed father, to block the adoption of their child by withholding consent (Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760 (1979)); and declared unconstitutional a policy of a state-run nursing school that denied men admission to its nursing program (Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331 (1982)). On the other hand, the Court upheld a California statute that punished men, but not women, for committing the crime of statutory rape (Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S.Ct. 1200 (1981)) and sustained the requirement that men, but not women, register for the draft (Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646 (1981)).

Although space does not permit further discussion here, it is important to note that the Court has also ruled against gender-based discrimination under the Sixth Amendment by striking down the state practice of automatically exempting women from jury duty. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975), and Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979), the Court held that an automatic exemption based on gender violated the principle that juries reflect "a fair cross-section of the community." Numerous Court rulings have also given effect to Title VII of the 1964 Civil Rights Act, which bans sex discrimination in employment, and Title IX of the Education Amendments of 1972, 86 Stat. 373, which prohibits discrimination based on sex in "any education program or activity
receiving Federal financial assistance.’ And in Roberts v. United States Jaycees (p. 1208), the power of the states to prohibit sex discrimination in places of public accommodation, sustained over the constitutional challenge that it infringes the freedom of association, has been held to allow states to forbid all-male membership policies of private clubs and social organizations.

In a more recent ruling on gender bias, United States v. Virginia below, the Supreme Court struck down the restricted admissions policy of Virginia Military Institute (VMI). In the Court’s opinion, which follows, Justice Ginsburg explains why the state’s creation of a separate program for women failed to pass constitutional muster. Moreover, Chief Justice Rehnquist’s concurring opinion takes note that the majority appears to have ratcheted up the applicable constitutional standard in this case and perhaps future sex discrimination cases as well.

UNITED STATES V. VIRGINIA
Supreme Court of the United States, 1996
518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735

BACKGROUND & FACTS
Virginia Military Institute (VMI), one of the country’s first state military colleges, was Virginia’s only single-sex public institution of higher education. Its distinctive mission—to produce “citizen-soldiers”—was achieved through a challenging “adversative” approach to training that features “physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.” Cadets live in spartan barracks, wear uniforms, eat together in mess halls, are subjected to constant surveillance, and drill extensively. The “adversative” regimen includes a good deal of harassment, often of an intensity comparable to boot camp. The object is to produce men of extraordinary will and self-control, with high moral character, well aware of their limits and capabilities. The Institute’s alumni, which include a substantial number of military leaders and public figures, have a strong tradition of retaining close ties to the school, such that VMI has the largest per-student endowment of any undergraduate institution in the country.

The federal government brought suit against both Virginia and VMI, challenging the male-only admissions policy as a violation of equal protection. A federal district court rendered judgment in the defendants’ favor, but it was reversed by the appeals court. In response, Virginia proposed a parallel military education program for women, styled the Virginia Women’s Institute for Leadership (VWIL), to be located at Mary Baldwin College, a private liberal arts school for women. The district court held the state’s creation of the VWIL program remedied any denial of equal protection, and its judgment for the state was affirmed by the appellate court. In deferentially reviewing Virginia’s plan, the U.S. Court of Appeals for the Fourth Circuit found that single-sex education accomplished a legitimate objective and concluded that students attending VMI and VWIL would receive “substantively comparable” benefits. The Supreme Court then granted certiorari at the request of the federal government. Justice Thomas did not participate in the decision because his son attends VMI.

Justice GINSBURG delivered the opinion of the Court.

***

[T]his case presents two issues. First, does Virginia’s exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women “capable of all of the individual activities required
of VMI cadets" * * * the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI’s “unique” situation * * *—as Virginia’s sole single-sex public institution of higher education—offends the Constitution’s equal protection principle, what is the remedial requirement? * * *

The Court * * * has carefully inspected official action that closes a door or denies opportunity to women (or to men). * * * To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. * * * The State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” * * * The justification must be genuine, not hypothesized or invented [after the fact] in response to litigation. And it must not rely on overboard generalizations about the different talents, capacities, or preferences of males and females. * * *

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. * * * Physical differences between men and women, however, are enduring * * *

“Inherent differences” between men and women * * * [may] not [be used] for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” * * * to “promote[s] equal employment opportunity,” * * * to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, * * * to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, * * * Virginia has shown no “exceedingly persuasive justification” for excluding all women from the citizen-soldier training afforded by VMI[,] * * * [Because] the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit’s final judgment in this case. * * * Virginia * * * asserts two justifications in defense of VMI’s exclusion of women. First, the Commonwealth contends, “single-sex education provides important educational benefits,” * * * and the option of single-sex education contributes to “diversity in educational approaches” * * *.

Second, the Commonwealth argues, “the unique VMI method of character development and leadership training,” the school’s adversative approach, would have to be modified were VMI to admit women. * * *

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, * * * [b]ut Virginia has not shown that VMI was established, or has been maintained, with a view of diversifying, by its categorical exclusion of women, educational opportunities within the State. * * *

Neither recent nor distant history bears out Virginia’s alleged pursuit of diversity through single-sex educational options. In 1839, when the State established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting widely held views about women’s proper place, the Nation’s first universities and colleges * * * admitted only men. * * * VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the State’s flagship school, the University of Virginia, founded in 1819. * * *
Virginia eventually provided for several women’s seminaries and colleges. * * * By the mid-1970s, all four schools had become coeducational. * * *

Ultimately, in 1970, “the most prestigious institution of higher education in Virginia,” the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. * * *

The historical record indicates * * * [three stages]: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. * * *

** * * * A purpose genuinely to advance an array of educational options * * * is not served by VMI’s historic and constant plan—
a plan to “affor[d] a unique educational benefit only to males.” * * * However “liberally” this plan serves the State’s sons, it makes no provision whatever for her daughters. This is not equal protection.

Virginia next argues that VMI’s adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be “radical,” so “drastic.” Virginia asserts, as to transform, indeed “destroy,” VMI’s program. * * * Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would “eliminate[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia.” * * *

** * * * State actors controlling gates to opportunity * * * may not exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females.” * * *

It may be assumed, for purposes of this decision, that most women would not choose VMI’s adversative method. * * * The issue, however, * * * is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. * * *

The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is * * * a prediction hardly different from other “self-fulfilling prophec[ies],” * * * once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. * * *

Medical faculties similarly resisted men and women as partners in the study of medicine. * * * More recently, women seeking careers in policing encountered resistance based on fears that their presence would “undermine male solidarity,” * * * deprive male partners of adequate assistance, * * * and lead to sexual misconduct * * *. Field studies did not confirm these fears. * * *

Women’s successful entry into the federal military academies, and their participation in the Nation’s military forces, indicate that Virginia’s fears for the future of VMI may not be solidly grounded. The State’s justification for excluding all women from “citizen-soldier” training for which some are qualified, in any event, cannot rank as “exceedingly persuasive.” * * *

Virginia chose not to eliminate, but to leave untouched, VMI’s exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution’s equal protection requirement, Virginia was obliged to show that its remedial proposal “directly address[ed] and relate[d] to” the violation, * * * the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers, * * *
VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. * * * Instead, the VWIL program “deemphasiz[es]” military education, * * * and uses a “cooperative method” of education “which reinforces self-esteem” * * *

VWIL students participate in ROTC and a “largely ceremonial” Virginia Corps of Cadets, * * * but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day. * * * VWIL students thus do not experience the “barracks” life “crucial to the VMI experience,” the spartan living arrangements designed to foster an “egalitarian ethic.” * * * Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their “leadership training” in seminars, externships, and speaker series, * * * episodes and encounters lacking the “[physical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values]” made hallmarks of VMI’s citizen-solder training * * *. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI’s adversative training, * * * VWIL students will not know the “feeling of tremendous accomplishment” commonly experienced by VMI’s successful cadets * * *

Virginia maintains that these methodological differences are “justified pedagogically,” based on “important differences between men and women in learning and developmental needs,” “psychological and sociological differences” Virginia describes as “real” and “not stereotypes.” * * *

Virginia’s VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court’s 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848 (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State
set up a separate school for Herman Sweatt and other black law students.

***

* * * Facing the marked differences reported in the Sweatt opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. * * * Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. * * * In line with Sweatt, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the State supports at VWIL and VMI.

***

[T]he initial judgment of the Court of Appeals *** is affirmed, the final judgment of the Court of Appeals * * * is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS took no part in the consideration or decision of this case.

Chief Justice REHNQUIST, concurring in the judgment.

* * *

While terms like “important governmental objective” and “substantially related” [used in Craig v. Boren] are hardly models of precision, they have more content and specificity than does the phrase “exceedingly persuasive justification.” * * * To avoid introducing potential confusion, I would have adhered more closely to our traditional, “firmly established,” * * * standard that a gender-based classification “must bear a close and substantial relationship to important governmental objectives.” * * *

* * *

*** Virginia has sought to justify VMI’s single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the State are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only. * * *

Even if diversity in educational opportunity were the State’s actual objective, the State’s position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. * * *

* * * [I would not define the violation * * * as the “exclusion of women” that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI, or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the State does not need to create two institutions with the same number of faculty PhD’s, similar SAT scores, or comparable athletic fields. * * * Nor would it necessarily require that the women’s institution offer the same curriculum as the men’s one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall calibre.

* * *

In the end, the women’s institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men’s institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is
substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

Justice SCALIA, dissenting.

***

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking whether the State has adduced an “exceedingly persuasive justification” for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education.

***

The rationale of today’s decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. * * *

***

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to “support[1] [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting.” * * *(emphasis added). “The evidence in this case,” for example, “is virtually uncontradicted” to that effect. * * *

Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court * * * and the Detroit Board of Education voted to abandon the litigation and thus abandon the plan * * *. Today’s opinion assures that no such experiment will be tried again.

There are few extant single-sex public educational programs. The potential of today’s decision for widespread disruption of existing institutions lies in its application to private single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College—which designed and runs VWIL—notes that private institutions of higher education in the 1990–1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, not including financial aid to students. * * * Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today’s decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex. See Bob Jones Univ. v. United States, 462 U.S. 574, 103 S.Ct. 2107 (1983). * * *

***

Justice Brandeis said it is “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386–387 (1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a “more perfect Union,” * * * can impose its own favored social and economic dispositions nationwide. * * *

***

What troubled Chief Justice Rehnquist—and especially irked Justice Scalia—was the suspicion that the majority in the VMI case had racheted up the constitutional test applied in gender discrimination cases. In a more recent sex discrimination case, which follows,
Justice O'Connor had exactly the opposite concern. She thought that the analysis the Court employed was substantially weaker than that promised in Craig v. Boren. The decision in the Nguyen case below is muddied by the fact that it also involved Congress's power to set the conditions for acquiring citizenship. For Justices Scalia and Thomas, this prerogative of the national government was decisive. In a portion of her dissenting opinion not excerpted here, Justice O'Connor thought the citizenship scheme in question "was paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." Possibly, the law served another unworthy motive: Given the increasing restrictiveness of American immigration policies following World War II, it may well have been that the inequality imposed where the father was American and the mother was a foreign national served to address a concern created by the stationing of so many American troops abroad. Since American servicemen were quite likely to be stationed in countries much less favored than Western European nations by post-war U.S. immigration quotas, the law made the acquisition of American citizenship less easy than it would have been had the offspring of a sexual relationship between an American citizen and a foreign national been automatic, regardless of which parent was the U.S. citizen. The citizenship dimension to the legislation in the Nguyen case therefore can be seen from quite different perspectives: as an exercise of power essential to national sovereignty that is clearly committed by the text of the Constitution to the national government, or as an illuminating dimension that makes gender-based discrimination a handy instrument to discourage the influx of illegitimate offspring from cultures very different from that of the United States.

You may wonder why Nguyen is an equal protection case at all. Recall that in Bolling v. Sharpe (p. 1140) the Supreme Court had held that denials of equal protection can be so great as to deny due process of law. Thus de jure racial discrimination violated both the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. Nguyen calls into play the "equal protection component" of the Fifth Amendment, a provision as applicable to the national government as any other in that amendment. The constitutional standard for judging the constitutionality of gender-based discrimination is the same for both amendments, so the test announced in Craig v. Boren applies.

NGUYEN V. IMMIGRATION & NATURALIZATION SERVICE
Supreme Court of the United States, 2001
533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115

BACKGROUND & FACTS In the statute defining the acquisition of American citizenship (8 U.S.C.A. § 1409(a)(4)), Congress provided that a child born overseas, out of wedlock, and of mixed American and foreign-national parents becomes an American citizen at birth if the mother is an American citizen. But if the father is the American citizen and the mother is the foreign-national, one of three steps must be taken by the time the child turns 18 if he or she is to acquire the status of an American-born citizen: legitimization, a declaration of paternity under oath by the father, or a court order of paternity.

Tuan Anh Nguyen was born September 11, 1969, in Saigon to Joseph Boulais, an American citizen working in Vietnam and to a Vietnamese woman whom Boulais never married. After the relationship ended, Nguyen lived for a while with the family
of Boulais's new girlfriend and at the age of six returned with Boulais to live in Texas
where he was a lawful permanent resident. In 1992, when he was 22, Nguyen pleaded
guilty to two sex crimes with a child and was sentenced to a prison term. Some years
later, the Immigration & Naturalization Service (INS) initiated proceedings to have
Nguyen deported because he testified that he was a Vietnamese citizen. His appeal to
the Board of Immigration Appeals was denied because he had not met any of the
three conditions within the time period identified by the federal statute. In the
meantime, Boulais obtained an order of parentage from a state court based on DNA
testing. Nguyen then sought review by the U.S. Court of Appeals for the Fifth
Circuit, arguing that the different rules for attaining citizenship by children born
abroad and out of wedlock depending on whether the father or the mother was an
American citizen violated the equal protection component of the Fifth Amendment.
After the appellate court rejected the constitutional challenge, Nguyen successfully
petitioned the U.S. Supreme Court for certiorari.

Justice KENNEDY delivered the opinion
of the Court.***

For a gender-based classification to
withstand equal protection scrutiny, it must
be established “at least that the [challenged]
classification serves important governmen-
tal objectives and that the discriminatory
means employed are substantially related to
the achievement of those objectives.”***

***

The first governmental interest to be
served is the importance of assuring that a
biological parent-child relationship exists.
In the case of the mother, the relation is
verifiable from the birth itself. The mother’s
status is documented in most instances by
the birth certificate or hospital records and
the witnesses who attest to her having given
birth.

The father *** need not be present at
the birth. If he is present, furthermore, that
circumstance is not incontrovertible proof
of fatherhood. *** Fathers and mothers are
not similarly situated with regard to the
proof of biological parenthood. The imposition
of a different set of rules for making
that legal determination with respect to
fathers and mothers is neither surprising nor
troublesome from a constitutional perspec-
tive. *** Section 1409(a)(4)’s provision of
three options for a father seeking to
establish paternity—legitimation, paternity
oath, and court order of paternity—is
designed to ensure an acceptable documen-
tation of paternity.

Nguyen argue[s] that the requirement of
§ 1409(a)(1), that a father provide clear
and convincing evidence of parentage, is
sufficient to achieve the end of establishing
paternity, given the sophistication of mod-
ern DNA tests. *** Section 1409(a)(1)
does not actually mandate a DNA test,
however. The Constitution, moreover, does
not require that Congress elect one particu-
lar mechanism from among many possible
methods of establishing paternity, even if
that mechanism arguably might be the most
scientifically advanced method. With re-
spect to DNA testing, the expense, reliabil-
ity, and availability of such testing in
various parts of the world may have been
of particular concern to Congress. *** The
requirement of § 1409(a)(4) represents a
reasonable conclusion by the legislature that
the satisfaction of one of several alternatives
will suffice to establish the blood link
between father and child required as a
predicate to the child’s acquisition of
citizenship. *** Given the proof of
motherhood that is inherent in birth itself,
it is unremarkable that Congress did not
require the same affirmative steps of
mothers.

*** Here, the use of gender specific
terms takes into account a biological differ-
cence between the parents. The differ-
ential treatment is inherent in a sensible
statutory scheme, given the unique relationship of the mother to the event of birth.

The second important governmental interest furthered in a substantial manner by [the statute] is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.

In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.

The same opportunity does not result from the event of birth in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock.

These facts demonstrate the critical importance of the Government’s interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable for the opportunity manifest between mother and child at the time of birth. Indeed, especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility. Even if a father knows of the fact of conception, moreover, it does not follow that he will be present at the birth of the child. Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet. Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship.

The importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test. The fact of paternity can be established even without the father’s knowledge, not to say his presence. Paternity can be established by taking DNA samples even from a few strands of hair, years after the birth. Yet scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child’s minority.

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth of the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.

[w]The question remains whether the means Congress chose to further its objective—the imposition of certain additional requirements upon an unwed father—substantially relate to that end.

[w]Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case before citizenship is conferred. Or Congress could excuse compliance with the formal requirements when an actual father-child relationship is proved. It did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie. Instead, Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop.

[w][The statute] should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative.
A statute meets the equal protection standard so long as it is "substantially related to the achievement of the governmental objective in question." [A] policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond. None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.

In this difficult context of conferring citizenship on vast numbers of persons, the means adopted by Congress are in substantial furtherance of important governmental objectives. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process in a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

The judgment of the Court of Appeals is Affirmed.

Justice O’CONNOR, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

[Presumably,] the importance of this interest lies in preventing fraudulent conveyances of citizenship.

The gravest defect in the Court’s reliance on this interest is the insufficiency of the fit between [the statute’s] discriminatory means and the asserted end. Section 1409(c) imposes no particular burden of proof on mothers wishing to convey citizenship to their children. By contrast, § 1409(a)(1), which petitioners do not challenge before this Court, requires that “a blood relationship between the person and the father [be] established by clear and convincing evidence.” Atop § 1409(a)(1), § 1409(a)(4) requires legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18. It is difficult to see what § 1409(a)(4) accomplishes in furtherance of “assuring that a biological parent-child relationship exists” that § 1409(a)(1) does not achieve on its own. The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of § 1409(a)(1).

It is also difficult to see how § 1409(a)(4)’s limitation of the time allowed for obtaining proof of paternity substantially furthers the assurance of a blood relationship. Modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time.

No one argues that § 1409(a)(1) mandates a DNA test. Petitioners’ argument rests instead on the fact that, if the goal is to obtain proof of paternity, the existence of a statutory provision governing such proof, coupled with the efficacy and availability of modern technology, is highly relevant to the sufficiency of the tailoring between § 1409(a)(4)’s sex-based classification and the asserted end. Because § 1409(a)(4) adds little to the work that § 1409(a)(1) does on its own, it is difficult to say that § 1409(a)(4) “substantially furthers” an important governmental interest.

The majority concedes that Congress could achieve the goal of assuring a biological parent-child relationship in a sex-neutral fashion, but then, in a surprising turn, dismisses the availability of sex-neutral alternatives as irrelevant.

In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification.
The INS asserts the governmental interest of "ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent—and thus to the United States—to justify the conferment of citizenship upon them." ***

Assuming, as the majority does, that Congress was actually concerned about ensuring a "demonstrated opportunity" for a relationship, it is questionable whether such an opportunity qualifies as an "important" governmental interest apart from the existence of an actual relationship. By focusing on "opportunity" rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie. Children who have an "opportunity" for such a tie with a parent, of course, may never develop an actual relationship with that parent. *** If a child grows up in a foreign country without any postbirth contact with the citizen parent, then the child's never-realized "opportunity" for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose.

*** As the facts of this case demonstrate, *** it is entirely possible that a father and child will have the opportunity to develop a relationship and in fact will develop a relationship without obtaining the proof of the opportunity during the child's minority. ***

*** Under the present law, the statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the "opportunity" for a relationship. The mother can transmit her citizenship at birth, but the father cannot do so in the absence of at least one other affirmative act. The different statutory treatment is solely on account of the sex of the similarly situated individuals. This type of treatment is patently inconsistent with the promise of equal protection of the laws. ***

Indeed, the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. ***

*** If Congress wishes to advance the goal of "establish[ing] . . . a real, practical relationship of considerable substance"), it could easily do so by employing a sex-neutral classification that is a far "more germane basis of classification" than sex. ***. For example, Congress could require some degree of regular contact between the child and the citizen parent over a period of time. ***

The claim that § 1409(a)(4) substantially relates to the achievement of the goal of a "real, practical relationship" thus finds support not in biological differences but instead in a stereotype—i.e., "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationship with their children." ***

*** The hallmark of a stereotypical sex-based classification under this Court's pre-
cedents is * * * whether the classification
* * * “relie[s] upon the simplistic, outdated
assumption that gender could be used as a
‘proxy for other, more germane base of
classification.’ ” Mississippi Univ. for
Women v. Hogan], 458 U.S., at 726, 102
S.Ct., at 3337 * * *.

Age

The use of an individual’s age as an index of his or her ability to perform on the job is also a
matter of substantial controversy. In 1967, 1975, and 1978, Congress passed legislation to
end discrimination based on age. As a constitutional matter, however, the Court turned its
attention in Massachusetts Board of Retirement v. Murgia to whether state mandatory
retirement laws violated the equal protection guarantee. The suit presented an attack on a
Massachusetts statute that forced state policemen off the force when they reached 50. By
posing the relevant question to be whether age was reasonably related to job performance,
the Court rejected the contention that age constituted a classification that required any
form of elevated scrutiny. The Court reaffirmed this position in Vance v. Bradley, 440 U.S.
93, 99 S.Ct. 939 (1979), three years later, when it upheld a mandatory retirement age of 60
for foreign service officers, even though no mandatory retirement age existed generally in
the federal civil service. The Court sustained the age ceiling on the grounds that it was
reasonably related to the special rigors and requirements of overseas duty.

Although older people do not fit the description of a “discrete and insular minority”20
“because all of us may someday belong to it and voters may be reluctant to impose
deprivations that they themselves could eventually have to bear,” Justice Marshall’s dissent
in Bradley argued, neither should treatment of them be lumped together with economic
regulation in the tier of least scrutiny. In the context of the sliding scale of interests along
which he argued different levels of constitutional review should be proportioned, Justice
Marshall’s Murgia dissent proposed that classifications based on age be judged by
intermediate scrutiny.21

MASSACHUSETTS BOARD OF RETIREMENT V. MURGIA

Supreme Court of the United States, 1976
427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520

BACKGROUND & FACTS Robert Murgia, a uniformed officer in the
Massachusetts State Police, was forced to retire by law upon reaching his 50th
birthday. Murgia, who was in excellent physical and mental health, argued that such
compulsory retirement, occasioned only by age, discriminated in violation of the
Equal Protection Clause. A three-judge federal district court ultimately held the

20. Nor, as a matter of practical politics, could older people really be thought to constitute a powerless minority.
The demographics are such that the elderly are increasing significantly as a proportion of our society, voting
studies show they vote at a substantially higher rate than young voters, and their interests are very effectively
represented in the legislative process by such organizations as AARP. Finally, it should not be forgotten that
individuals over 60 regularly occupy positions of power in all the branches of government and at all levels.
21. Marshall’s statement of this in his Murgia dissent is somewhat garbled because Craig (articulating the standard
of intermediate scrutiny) was not decided until the following Term. But Justice Marshall made his position on
statute unconstitutional as lacking "a rational basis in furthering any substantial state interest" and enjoined its enforcement. The Retirement Board appealed to the U.S. Supreme Court.

PER CURIAM.

** * * *

[The Uniformed Branch of the Massachusetts State Police * * * participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide back-up support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." * * * "High versatility is required, with few, if any, backwaters available for the partially superannuated." * * *]

These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must pass annually a more rigorous examination, including an electrocardiogram and tests for gastrointestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.

** * * * We agree that rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection. We disagree, however, with the District Court's determination that the age 50 classification is not rationally related to furthering a legitimate state interest.

** * * * San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.

This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. * * * Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." * * *

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. Rodriguez * * * observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute * * * cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a "discrete and insular" group, United States v. Carolene Products Co., 304 U.S. 144, 152–153, n. 4, 58 S.Ct. 778, 783 (1938), in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently
akin to those classifications that we have found suspect to call for strict judicial scrutiny.

* * *

The Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State’s classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State’s objective. There is no indication that * * * [the law] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” Dandridge v. Williams, 397 U.S., at 485, 90 S.Ct., at 1161.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. * * * We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the law.

The judgment is reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proven medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated—involuntarily “retired”—because they have reached the age of 50. * * * [T]he Court finds that the right to work is not a fundamental right. And, while agreeing that “the treatment of the aged in this Nation has not been wholly free of discrimination,” * * * the Court holds that the elderly are not a suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be “wholly unrelated” to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

The rigid two-tier model still holds sway as the Court’s articulated description of the equal protection test. * * * The model’s two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification. * * *

Although the Court outwardly adheres to the two-tier model, it has apparently lost interest in recognizing further “fundamental” rights and “suspect” classes. See San Antonio School District v. Rodriguez, (rejecting education as a fundamental right); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) (declining to treat women as a suspect class). In my view, this result is the natural consequence of the limitations of the Court’s traditional equal
protection analysis. If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always * * * is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.22

But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld.

* * * There remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forgo all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed "wholly irrelevant" to the legislative goal. * * *

* * *

The danger of the Court's verbal adherence to the rigid two-tier test * * * is demonstrated by its efforts here. There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests. * * *

Whether "fundamental" or not, "the right of the individual * * * to engage in any of the common occupations of life" has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701 (1972) * * *. Even if the right to earn a living does not include the right to work for the government, it is settled that because of the importance of the interest involved, we have always carefully looked at the reasons asserted for depriving a government employee of his job.

While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health

22. In a footnote, Justice Marshall continued: "Some classifications are so invidious that they should be struck down automatically absent the most compelling state interest, and by suggesting the limitations of strict scrutiny analysis I do not mean to imply otherwise. The analysis should be accomplished, however, not by stratified notions of 'suspect' classes and 'fundamental' rights, but by individualized assessments of the particular classes and rights involved in each case. Of course, the traditional suspect classes and fundamental rights would still rank at the top of the list of protected categories, so that in cases involving those categories analysis would be functionally equivalent to strict scrutiny. Thus, the advantages of the approach I favor do not appear in such cases, but rather emerge in those dealing with traditionally less protected classes and rights." Justice Marshall's position might therefore be summarized as advocating what could be called "proportional scrutiny."
and life expectancy of the retired person, and these consequences of termination for age are not disputed by appellant.\

Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and “quasi-suspect” classes such as women or illegitimates. The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment. The advantage of a flexible equal protection standard, however, is that it can readily accommodate such variables. The elderly are undoubtedly discriminated against, and when legislation denies them an important benefit—employment—I conclude that to sustain the legislation the Commonwealth must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest.\

I agree that the purpose of the mandatory retirement law is legitimate, and indeed compelling. The Commonwealth has every reason to assure that its state police officers are of sufficient physical strength and health to perform their jobs. In my view, however, the means chosen, the forced retirement of officers at age 50, is so overinclusive that it must fall.

The Commonwealth is already individually testing its police officers over 40 for physical fitness, conced[es] that such testing is adequate to determine the physical ability of an officer to continue on the job, and conced[es] that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.

Mental Impairment

As with age, a classification in law based on mental impairment also does not prompt elevated scrutiny. Although the mentally handicapped, along with others who are physically disabled, are protected from discrimination by statute, as a matter of constitutional law, categories in law drawn on that basis need only meet the test of reasonableness. This is so regardless of the Supreme Court’s recent ruling in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), that executing mentally retarded criminals amounted to cruel and unusual punishment. That such offenders were significantly less morally blameworthy than others made imposing the death penalty on them excessive, disproportionate, and indecent, but it did not convert mental retardation into a suspect classification.

In Heller v. Doe, 509 U.S. 312, 113 S.Ct. 2637 (1993), the Court reaffirmed its conclusion that a state statute that categorizes individuals on the basis of mental retardation

23. Such as § 504 of the Rehabilitation Act of 1973, 87 Stat. 355; the Education for All Handicapped Children Act of 1975, 89 Stat. 773; the Developmental Disabilities Act Amendments of 1978, 92 Stat. 2955; and the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 349. Among other things, these statutes prohibit a federally funded program from discriminating against a handicapped individual solely on the basis of his or her handicap and require that the mentally ill be treated in the least restrictive setting.

24. In addition to the 1973 and 1975 federal statutes cited in the preceding note, see the Americans With Disabilities Act of 1990, 104 Stat. 327. This legislation prohibits employment discrimination against otherwise qualified individuals, assures equal admission to places of public accommodation, and requires handicapped accessibility to infrastructure, transportation, and communications.
requires only the most minimal scrutiny. At issue in that case was a Kentucky law that treats mentally retarded persons differently from mentally ill persons in the process of involuntarily committing them to mental institutions. In mental retardation commitment proceedings, the state requires proof that the patient is mentally retarded, that the person presents a danger or threat of danger to himself or others, that the least restrictive alternative mode of treatment requires confinement in a residential treatment center, and that the treatment that could reasonably be expected to benefit him is available in that setting—all by clear and convincing evidence. In mentally ill commitment proceedings, the state requires proof that the patient is mentally ill and that the three other parts of the above standard are satisfied, but by proof beyond a reasonable doubt. State law also permits family members to participate as parties in proceedings to commit mentally retarded persons but not the mentally ill persons. A closely divided Court held that mental retardation is easier to diagnose than mental illness and thus a more demanding level of proof might reasonably be required to establish the accuracy of the latter. The difference in level of proof is also justified, the Court held, by the fact that treatment for mental illness is much more intrusive than treatment for mental retardation. As to participation in the commitment proceedings by relatives, the Court reasoned that close relatives and guardians might have extensive and intimate knowledge of the patient’s history of mental retardation, whereas mental illness might only arise in adulthood when members of the afflicted person’s family have stopped providing care and support.

The case of City of Cleburne v. Cleburne Living Center, which follows, deals with city efforts to restrict the establishment of a halfway house for mentally retarded men and women through the use of zoning regulations. Increased reliance upon the use of group living arrangements in the community is a product of the view—statutorily and sometimes constitutionally mandated—that mental patients must receive treatment in a setting and manner that constitute the least restrictive alternative. Where it is possible for mentally impaired individuals to live in a supervised environment in the community, this is to be preferred to their confinement in state mental institutions. The Cleburne case points up local government resistance to this development by employing zoning regulations that many times have exaggerated a perceived threat to community safety and resulted from political pressure applied by community residents exhibiting the NIMBY (Not In My Back Yard) syndrome.

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**NOTE—CITY OF CLEBURNE v. CLEBURNE LIVING CENTER**

A building was purchased in July 1980 at 201 Featherston Street in Cleburne, Texas, with the intent of the landlord to lease it to the Cleburne Living Center (CLC) for operation as a group home for 13 mentally retarded men and women, who would be under the constant supervision of CLC staff members. When CLC was informed by the city that a special use permit would be required for operation of a group home at that address, CLC submitted a permit application. The city further explained that, under zoning regulations applicable to that site, a special use permit, renewable each year, would be required for the construction of "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions." The city determined that the home should be classified as a "hospital for the feeble-minded." After a public meeting was held on CLC’s application, the city council voted not to grant the permit. A federal district court upheld denial of the permit, but a panel of the Court of Appeals for the Fifth Circuit "held that mental retardation is a 'quasi-suspect' classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose."

In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985), the Supreme Court held that "a lesser standard of scrutiny is appropriate, but conclude[d] that under that
standard the ordinance is invalid as applied in this case.” The Court believed that the appeals court erred in concluding that mental retardation warranted heightened scrutiny as a quasi-suspect classification because (1) the wide range of specialized care for the mentally retarded requires technical knowledge the exercise of which would be impeded by judicial intrusion into those substantive judgments; (2) the mentally retarded have benefited from the provision of services and statutory protection against discrimination motivated not by antipathy but by concern, and heightened scrutiny might well chill these civilized efforts; (3) the legislative response to the needs of the mentally retarded belies their characterization as politically powerless; and (4) “it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.”

Writing for the Court, Justice White explained: “The lesson of Murgia is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system, and with respect for our separation of powers, to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.”

The Court found the constitutional issue in this case “clearly posed.” Justice White wrote: “The City does not require a special use permit in * * * [the same] zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home and it does so * * * because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple dwelling facilities are freely permitted?” Although the mentally retarded are different from others and “may be different from those who would occupy other facilities that would be permitted in * * * [the same] zone without a special permit,” in the Court’s view “the record d[d] not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests.” The classification was therefore irrational in this case.

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment invalidating the ordinance as applied, but otherwise dissented. Reaffirming his view that the level of constitutional scrutiny imposed should vary in direct relation to the constitutional and societal importance of the interest affected, Justice Marshall objected to the Court’s announced application of a standard no more demanding than that “normally accorded economic and social legislation,” in the face of both the importance of the habitation interest involved and the “lengthy and tragic” history of discrimination against the mentally retarded and argued that a heightened standard of review was required. Finally, Justice Marshall took issue with what he regarded as the Court’s novel action of only voiding the ordinance as it was applied in this case. Given the “impermissible assumptions or false stereotypes regarding individual ability and need” common to classifications such as mental retardation, he faulted “the Court’s narrow, as-applied remedy * * * [for] leaving future retarded individuals to run the gauntlet of this overbroad presumption.”

**Sexual Preference**

Although categorizing individuals on the basis of their sexual preference does not require an elevated degree of constitutional scrutiny and is not prohibited by federal antidiscrimination legislation, some states and localities have taken action to end such discrimination. In *Steffan v. Perry* (p. 1312), the U.S. Court of Appeals for the District of Columbia Circuit took up a constitutional challenge to Naval Academy regulations, following those of the Department of
Defense, that provide for the discharge of gay men and lesbians who disclose their sexual preference while in or associated with the armed services. The appeals court’s discussion of the constitutional issue in Steffan reviewed the principles of rationality analysis reaffirmed by the Supreme Court in the Heller case and sustained Defense Department policy by analogizing discrimination on the basis of sexual preference to legitimate discrimination on the basis of age upheld by the Supreme Court in the Murgia case. Throughout, the appeals court majority asserted that the deference due the regulation in light of its reasonableness is reinforced by the deference due the military in the realm of military affairs. The dissenters in Steffan pointedly maintained that the academy regulation flunks the test of rationality cold.

**STEFFAN v. PERRY**

United States Court of Appeals, District of Columbia Circuit, 1994

41 F.3d 677

**BACKGROUND & FACTS** Joseph Steffan was a midshipman at the U.S. Naval Academy in 1987. His exemplary performance at the academy had brought him numerous honors and praise from his superior officers and resulted, most notably, in his selection senior year as battalion commander, one of the academy’s ten highest-ranking midshipmen. Six weeks before his expected graduation, he was forced to resign, which meant denial of both a degree and a commission in the Navy, after he truthfully answered, “Yes, sir,” to a senior officer’s question, “Are you a homosexual?” In dismissing Steffan, the academy acted pursuant to Department of Defense Directives that state “[h]omosexuality is incompatible with military service” and require the discharge of any member of the armed services who “has stated that he or she is a homosexual or bisexual” unless the serviceman or servicewoman falls within certain designated exceptions.

Steffan brought suit against Secretary of Defense William J. Perry and others for declaratory and injunctive relief. He argued that forcing his resignation violated the equal protection component of the Fifth Amendment’s Due Process Clause. A federal district court rejected that claim and found for the government, whereupon Steffan appealed. A three-judge appellate panel subsequently reversed this judgment and held for Steffan. The U.S. Court of Appeals for the District of Columbia Circuit then voted to rehear the case en banc.

Before: MIKVA, Chief Judge, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, Ginsburg, sentelle, HENDERSON, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

* * *

The familiar parameters of rational basis review were recently reiterated by the Supreme Court in Heller v. Doe, 509 U.S. 312, 113 S.Ct. 2637 (1993). * * * The government * * * “has no obligation to produce evidence to sustain the rationality of a [regulatory] classification.” * * * Because “a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity,” * * * “[t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record.” * * * This presumption of rationality * * * extends to administrative regulatory action as well * * *. [W]hen judging the rationality of a regulation in the military context, we owe even more special deference to the “considered professional

Under this line of precedent we are required to ask two questions of the regulations. First, are they directed at the achievement of a legitimate governmental purpose? Second, do they rationally further that purpose? The first of these questions is not even in dispute in this case. * * * Steffan concedes that the military may constitutionally terminate service of all those who engage in homosexual conduct—wherever it occurs and at whatever time the conduct takes place. * * *

* * *

We consider * * * whether * * * banning those who admit to being homosexual rationally furthers the end of banning those who are engaging in homosexual conduct or are likely to do so. * * *

[I]t is conceivable that someone would describe himself as a homosexual based on his orientation or tendencies (and, perhaps, past conduct), notwithstanding the absence of any ongoing conduct or the probability of engaging in such conduct. That there may be exceptions to the assumption on which the regulation is premised is irrelevant, however, so long as the classification (the regulation) in the run of cases furthers its purpose * * *.

The military * * * may rely on presumptions that avoid the administratively costly need to adduce proof of conduct or intent, so long as there is a rational basis for believing that the presumption furthers that end. And the military certainly furthers its policy of discharging those members who either engage in, or are likely to engage in, homosexual conduct when it discharges those who state that they are homosexual. * * * The military is entitled to deference with respect to its estimation of the effect of homosexual conduct on military discipline and therefore to the degree of correlation that is tolerable. Particularly in light of this deference, we think the class of self-described homosexuals is sufficiently close to the class of those who engage or intend to engage in homosexual conduct for the military's policy to survive rational basis review.

* * *

The controversy before us is quite analogous to Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976) * * * [which upheld] a classification based on age * * * aimed prophylactically at preventing the risk of unsatisfactory conduct. The connection between homosexuality and homosexual conduct is at least as strong * * * as the relationship upheld in Murgia between age * * * and unsatisfactory job performance. * * * Similarly, in this case, the possible existence of some self-identified homosexuals who do not and would not act on their desires in a military or civilian setting does not render irrational a regulation that reaches the class as a whole. Just as age can be used as a rough proxy for diminishing physical capacities, here we think that a statement that one is a homosexual can rationally be used by the Navy as a proxy for homosexual conduct—past, present, or future.

* * *

[The judgment of the district court is affirmed.]

So ordered.

* * *

Dissenting opinion filed by Circuit Judge WALD, with whom Chief Judge EDWARDS and Circuit Judge ROGERS join.

* * *

The majority disposes of Steffan's appeal by transforming his unadorned admission of "homosexuality" from a statement of homosexual orientation into a declaration of past or intended homosexual conduct, thus avoiding the difficult question this case actually presents: whether an individual may be constitutionally discharged from the military on the sole basis of an admission of homosexual orientation. * * *
When government action deprives individuals of the equal protection of the laws for arbitrary reasons, or for reasons founded solely upon irrational and invidious prejudices, a court must declare the action unconstitutional under rational-basis review. Otherwise, rationality review would be tantamount to no review at all.

The military itself recognizes a fundamental distinction between homosexual orientation and homosexual conduct. The DOD Directives under which Steffan was separated expressly distinguish between them.

The military’s recognition of the distinction between homosexual orientation and conduct rises to a full-blown status in the Secretary’s newest policy on homosexuals in the military. On July 19, 1993, after Steffan’s separation, the Secretary issued a memorandum to the Defense Department command structure, stating:

It is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by conduct.

The most recent policy not only explicitly acknowledges the distinction between homosexual status and homosexual conduct, but, even more significantly, admits that homosexual orientation by itself is not incompatible with military service.

In light of this change in the military’s stance toward homosexuality per se, we are stunned by the court’s attempt to justify as rational a conflation of conduct and orientation that it attributes to the military, but that the military may never have endorsed and has now explicitly forsworn.

Given that homosexual orientation and conduct are analytically distinct concepts, the “propensity” question reduces to whether an admission of homosexuality alone, without elaboration of any kind, may rationally give rise to an inference that a particular individual will “one day” engage in homosexual conduct, regardless of the inhibitions of his or her environment. Neither the majority nor the government offers any indication that such a presumption is rooted in reality.

The majority’s attempt to analogize this case to Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976), misses the mark, as do examples of height and blindness disqualifications from government service.

There is nothing a blind or tall person can do to negate those characteristics that disqualify him from military service. There is no will power that will spare an aging person the eventual loss of physical ability. And certainly there is no way that these people merely by conforming to the law can qualify for military service. But a service-member who has homosexual desires can; he need only refrain from engaging in prohibited homosexual conduct, and by the Navy’s own admission he will be as “fit” as the next person. Since a decision not to act is within the control of the individual servicemember—unlike the “decision” whether to age or be blind—it is not rational to assume that he will choose to engage in conduct that would subject him to discharge or even incarceration.

The assumption that forcing heterosexuals to serve with homosexuals will, in fact, lower morale, impair discipline, and discourage enlistment is belied by the utter falsity of similar predictions voiced by opponents of President Truman’s 1948 executive order requiring racial integration of the armed forces.
any class of its citizens solely to give effect to the likes or dislikes of others. Such discrimination plays directly into the hands of bigots; it ratifies and encourages their prejudice.

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879 (1984)], [City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249 (1985)] and the fundamental constitutional principle that they embody compel us to reject the government’s argument that individuals of homosexual orientation may be excluded from the military because others may be offended or angered by their mere presence. The Constitution does not allow government to subordinate a class of persons simply because others may not like them.

The constitutionality of the Clinton Administration’s policy of “Don’t Ask, Don’t Tell,” referred to by the dissenters in Steffan v. Perry, was readily upheld by several federal appeals courts. Before 1993, Defense Department policy excluded from military service any person “who engages in, desires to engage in, or intends to engage in homosexual acts” and the military services conducted inquiries of prospective servicemen and women to see whether they fell within the ban. In July 1993, the Secretary of Defense announced a new policy: A servicemember’s sexual orientation was a personal and private matter and was not a bar to military service, unless manifested by homosexual conduct. Applicants for military service would not be asked or required to reveal their sexual orientation, but servicemembers would continue to be excluded or separated from the military for homosexual conduct. As confirmed by statute, 10 U.S.C.A. § 654, the policy provided that a statement by a servicemember that he or she is a homosexual created a rebuttable presumption that he or she “engages in, attempts to engage in, or intends to engage in” homosexual acts and would be excluded or separated from the military. In other words, once such a disclosure had been made, the serviceman or woman bore the burden of disproving it. In litigation challenging the policy on grounds it violated equal protection, freedom of speech, or both, the policy was sustained by several divided federal appeals courts, and the Supreme Court subsequently denied certiorari in each. See Thomasson v. Perry, 80 F.3d 915 (4th Cir. en banc 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997); Witt v. U.S. Department of Air Force, 444 F.Supp.2d 1138 (W.D.Wash. 2006).

By contrast, the Supreme Court’s decision in Romer v. Evans, which follows, addressed the constitutionality of a state constitutional amendment adopted by Colorado voters that abolished local ordinances protecting gays, lesbians, and bisexuals against discrimination based on sexual preference and prevented the passage of similar ordinances in the future unless the state constitution was first amended to permit such antidiscrimination legislation. As Steffan v. Perry and other decisions make apparent, sexual preference is not a suspect classification triggering strict scrutiny, but Justice Kennedy, speaking for the
Court in Evans, approached the issue from a different angle—whether the state could single out specific groups and impose special hurdles to policymaking not encountered by other groups in the political process. Although Evans is a case about discrimination based on sexual preference, it is also a case on the equality of participatory rights in the democratic process.

**Romer v. Evans**
Supreme Court of the United States, 1996
517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855

**BACKGROUND & FACTS** By 53% to 47%, Colorado voters adopted Amendment 2 to the state constitution at the November 1992 general election, repealing existing statutes, ordinances, and policies of the state and local municipalities that barred discrimination based on sexual orientation. The amendment also forbade any governmental entity in the state from adopting any policies prohibiting discrimination based on sexual preference unless the state constitution was first amended to permit such measures. Evans, other individuals, and various governmental entities of the cities of Denver, Aspen, and Boulder brought suit against Colorado, Governor Roy Romer, and the state attorney general to enjoin enforcement of the amendment. After an initial ruling granting a preliminary injunction and holding that it would apply strict scrutiny to assess the legitimacy of Colorado's restriction on the gay and lesbian plaintiffs' fundamental right to "participate equally in the political process," the Colorado Supreme Court later held the merits that the amendment violated the Equal Protection Clause. The U.S. Supreme Court then granted certiorari.

Justice KENNEDY delivered the opinion of the Court.

* * *

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. * * *

* * * Homosexuals, by state decree, are put in 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. * * *

Colorado's state and municipal 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 service, 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 antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. * * * 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 [including employment discrimination and discrimination at state colleges]. * * *

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.* * *

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates.* * *[E]ven if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.* * * 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 relationship 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 * * * 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.
Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. * * * By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. * * *

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. * * *

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. * * * 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. * * *

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. * * * [A] law must bear a rational relationship to a legitimate governmental purpose, * * * and Amendment 2 does not.

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. * * * Amendment 2 * * * 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. * * *

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. * * * 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.
It is so ordered.

Justice SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST] and Justice THOMAS join, dissenting.

* * * The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, * * * but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws. That objective, and the means chosen to achieve it, are * * * unimpeachable under any constitutional doctrine hitherto pronounced * * *.

* * * The amendment prohibits special treatment of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the "life partner" of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

* * * The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws, * * *

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. * * * [It] seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking * * * the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection * * *.

* * * Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. * * * But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. * * *

The Court cannot be unaware of * * * [a] problem * * * [that] occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternate life style." The problem * * * (for those who wish to retain social disapprobation of homosexuality) is that, because * * * [people] who engage in
homosexual conduct tend to reside in disproportionate numbers in certain communities, * * * and of course care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. * * *

By the time Coloradans were asked to vote on Amendment 2, * * * [three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed “sexual orientation” as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. * * * I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well. * * *

Rights pertaining to the democratic process, however, are not the only kind of rights that courts have recognized as fundamental. As discussed extensively in Chapter 10, the right to marry, the right to have or not have children, and the right to exercise primary decisionmaking authority over the raising of those children, have also been classified as fundamental rights. Generally, these rights have been protected under the umbrella concept of the right to privacy. The recognition of such fundamental rights naturally raises the question of how equally these rights are shared—whether they are possessed only by traditional married couples, or whether committed same-sex couples (who may also have children, whether adopted or by previous marriage) have an equal entitlement to the prerogatives and benefits that go with marriage. In the following case, Goodridge v. Department of Public Health, the highest court in Massachusetts held, as a matter of state constitutional law, that the state could not restrict marriage only to opposite-sex couples. A few states have opted, instead, for the recognition of civil unions or domestic partnerships—presumably, marriage without the title.

**GOODRIDGE v. DEPARTMENT OF PUBLIC HEALTH**

Supreme Judicial Court of Massachusetts, 2003

440 Mass. 309, 798 N.E.2d 941

**BACKGROUND & FACTS** Several gay and lesbian applicants sued the Massachusetts Department of Public Health challenging its policy and practice of denying marriage licenses to same-sex couples in accordance with the General Laws of Massachusetts, chapter 207. The plaintiffs argued that this violated the equal protection and due process guarantees of the state constitution. The trial judge found in the department’s favor on the constitutional questions. Hillary Goodridge and others bringing the suit then appealed to the state’s highest court.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

MARSHALL, C.J.

* * *

* * * Does [government action that bars same sex couples from civil marriage] offend the [Massachusetts] Constitution’s guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs’ right to marry their chosen partner? * * * [T]he two constitutional concepts frequently overlap, as they do here.
As was the case in Bolling v. Sharpe, much of what we say concerning one standard applies to the other.

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. While only the parties can mutually assent to marriage, the terms of the marriage—who may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms.

Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. It is among life’s momentous acts of self-definition. Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases. Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage. Other “family member” preference to make medical decisions for an incompetent or disabled spouse, the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce, and priority rights to administer the estate of a deceased spouse who dies without a will.

Where a married couple has children, their children are also directly or indirectly the recipients of the special legal and economic protections obtained by civil marriage. Marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a “civil right.” See, e.g., Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967).

Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s “avowed commitment to an intimate and lasting human relationship.” Baker v. State, 170 Vt. 194, 744 A.2d 864. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual’s right to marry against undue government incursion.

Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. But that same logic cannot hold for a qualified individual who would marry if she or he only could.

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. Losing m[aj][dr] [it] clear [that] the right to marry means little if it does not include the right to marry
the person of one’s choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. * * * As in * * * Loving, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in Loving, sexual orientation here. As it did in * * * Loving, history must yield to a more fully developed understanding of the invul-

The Massachusetts Constitution requires, at a minimum, that the exercise of the State’s regulatory authority not be “arbitrary or capricious.” * * * Regulatory authority must, at very least, serve “a legitimate purpose in a rational way”; a statute must “bear a reasonable relation to a permissible legisla-
tive objective.” * * * Any law failing to satisfy the basic standards of rationality is void.

The department argues that no fundamental right or “suspect” class is at issue here, and rational basis is the appropriate standard of review. * * * Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.

The judge in the Superior Court endorsed the * * * rationale * * * that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.” This is incorrect. Our laws of civil marriage do not privilege pro-

creative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 con-
tains no requirement that the applicants for a marriage license attest to their ability or in-
tention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. * * * People who cannot stir from their deathbed may marry. * * *

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. * * *

The attempt to isolate procreation as “the source of a fundamental right to marry” * * * overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. * * *

The “marriage is procreation” argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like “Amendment 2” to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly “identifies persons by a single trait and then denies them protection across the board.” Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996). In so doing, the State’s action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.

The department’s * * * [second] rationale * * * [is] that confining marriage to opposite-sex couples ensures that children are raised in the “optimal” setting. Protect-
ing the welfare of children is a paramount
State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the “optimal” child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be “excellent” parents. These couples (including four of the plaintiff couples) have children for the reasons others do—to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves in highly unpredictable terrain. Given the wide range of public benefits reserved only for married couples, we do not credit the department’s contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children.

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex couples furthers the Legislature’s interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the legislature logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department’s generalization that same-sex couples are less financially dependent on each other than opposite-sex couples ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to
marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. * * *

* * * The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether the criteria of constitutionality have been exceeded. * * * To label the court’s role as usurping that of the Legislature is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.

* * * Alarms about the imminent erosion of the “natural” order of marriage were sounded over the demise of antimiscegregation laws, the expansion of the rights of married women, and the introduction of “no-fault” divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

* * *

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs’ constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature’s broad discretion to regulate marriage. * * *

* * * We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. * * *

GREANEY, J. (concurring).

* * *

[Constitutional protections extend to individuals and not to categories of people. Thus, when an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a constitutional violation has occurred. * * * I find it disingenuous to suggest that such an individual’s right to marry has not been burdened at all, because he or she remains free to choose another partner, who is of the opposite sex.

* * * To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible [evaded] the core question we are asked to decide. * * *

As a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families. * * *

SPINA, J. (dissenting, with whom SOSMAN and CORDY, JJ., join).

* * * [The statute] creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender, as both men and women are similarly limited to marrying a person of the opposite sex. * * *

[The Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage, anyone is free to marry. * * *. In the absence of any discriminatory purpose, the State’s marriage statutes do not violate principles of equal protection. * * *

* * * Same-sex marriage, or the “right to marry the person of one’s choice” as the court today defines that right, does not fall within the fundamental right to marry. Same-sex marriage is not “deeply rooted in this Nation’s history” * * * [S]ame-sex marriage is not a right, fundamental or otherwise, recognized in this country. * * *
The remedy that the court has fashioned amounts to a statutory revision that replaces the intent of the Legislature with that of the court. [T]he alteration of the gender-specific language alters precisely what the Legislature unambiguously intended to preserve, the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic process.

SOSMAN, J. (dissenting, with whom SPINA and CORDY, JJ., join).

In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses. Reduced to its essence, the court's opinion concludes that, because same-sex couples are now raising children, and withholding the benefits of civil marriage from their union makes it harder for them to raise those children, the State must therefore provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples. Of course, many people are raising children outside the confines of traditional marriage, and, by definition, those children are being deprived of the various benefits that would flow if they were being raised in a household with married parents. That does not mean that the Legislature must accord the full benefits of marital status on every household raising children. Rather, the Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries.

Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do. It is therefore understandable that the court might view the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.

It is not, however, our assessment that matters. Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

The issue is whether it is rational to reserve judgment on whether this change can be made at this time without damaging the institution of marriage or adversely affecting the critical role it has played in our society. Absent consensus on the issue (which obviously does not exist), or unanimity amongst scientists studying the issue (which also does not exist), or a more prolonged period of observation of this new family structure (which has not yet been possible), it is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such
time as it is certain that that redefinition will not have unintended and undesirable social consequences. Through the political process, the people may decide when the benefits of extending civil marriage to same-sex couples have been shown to outweigh whatever risks are involved.

It is inappropriate for us to arrogate that power to ourselves merely because we are confident that “it is the right thing to do.”

CORDY, J. (dissenting, with whom SPINA and SOSMAN, JJ., join).

Although some of the Supreme Court’s privacy cases speak in terms of personal autonomy, no court has ever recognized such an open-ended right. “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected....” Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258 (1997). Such decisions are protected not because they are important, intimate, and personal, but because the right or liberty at stake is “so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty” that it is protected by due process.

While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not. No matter how personal or intimate a decision to marry someone of the same sex might be, the right to make it is not guaranteed by the right of personal autonomy.

Massachusetts is the only state that recognizes same-sex marriage. The legislatures of Connecticut, New Hampshire, New Jersey, Oregon, and Vermont voted to legalize civil unions (rather than permit same-sex marriage), but only after the highest court in two of those states held that restriction of marital benefits only to opposite-sex couples violated the state constitution. Civil union or domestic partnership legislation has been criticized for not necessarily affording exactly the same rights as marriage. Being newly-invented, those concepts do not have a well-established track record of equal protection and,

26. Opponents of gay marriage sought to overturn the ruling in Goodridge by amending the state constitution to prohibit same-sex unions. Massachusetts law requires that, before a constitutional proposition can appear on the ballot in a general election, it must first secure 50 votes from the combined membership of both houses of the state legislature in two consecutive legislative sessions. Although the proposed amendment garnered 62 favorable votes in January 2007, it received only 45 favorable votes in June 2007. Consequently, the effort of gay-marriage opponents to get the measure on the November 2008 ballot failed. New York Times, June 15, 2007, p. A13.

27. The Vermont Supreme Court decision was the first in the nation affording equal rights to same-sex couples, see Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999). The legislature enacted civil union legislation the following year. In Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006), the New Jersey Supreme Court unanimously held that same-sex couples were entitled to equal rights but then, dividing 4–3, left the state legislature to choose between either amending the marriage statutes or enacting civil union legislation to achieve that result. The state legislature chose the latter. The California legislature passed a domestic partnership law that gave same-sex couples all the privileges of married opposite-sex couples except the right to file a joint state income-tax return. Although both houses of the California legislature handily passed a same-sex marriage law in September 2005, it was vetoed by Governor Arnold Schwarzenegger. A lawsuit challenging the constitutionality of the state law currently restricting marriage to heterosexual couples is awaiting decision by the state supreme court. In the remaining states, same-sex marriage is prohibited either by statute or by the state constitution. In some states, challenges to the bans on same-sex marriage have been decided by a very narrow margin on the state supreme court. See, for example, Hernandez v. Robles, 7 N.Y.3d 388, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006); and Andersen v. King County, 138 Wash. 1, 138 P.3d 963 (2006). Other states (such as Delaware, Hawaii, and Maine) recognize some legal rights inhering in same-sex relationships.
therefore, it is not clear that the only difference between them and marriage is a difference in name. 28

Fearing that state legislatures or state courts (relying on the interpretation of state constitutional provisions) would legalize same-sex marriage, civil unions, or domestic partnerships, various members of Congress introduced bills to relieve other states of any obligation to respect these arrangements. Article IV, section 1 of the U.S. Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” As a consequence, Congress passed the Defense of Marriage Act, 110 Stat. 2419, in 1996 which provides: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” Another section of the law goes on to define “marriage” for purposes of federal law: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only the legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The legislation passed the House on a vote of 342–67 and the Senate by a margin of 85–14, and it was signed into law by President Clinton in September 1996.

Opponents of gay marriage also attempted to amend the U.S. Constitution as a further pre-emptive strike against more rulings like that in Massachusetts. Their effort, the proposed Marriage Protection Amendment, read as follows: “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.” The June 2006 vote in the Senate was 49–48, well shy of the 60 votes needed to shut off debate and vote on the proposal. A month later, the House failed to pass the amendment as well; the vote there was 236–187, or 47 votes short of the two-thirds majority required. Congressional Quarterly Weekly Report, June 12, 2006, pp. 1616–1617; July 24, 2006, p. 2044. In any case, a subsequent ruling by the Massachusetts Supreme Judicial Court in Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 844 N.E.2d 623 (2006), upheld the validity of a state law barring out-of-state couples from marrying there if their marriages would not be recognized in their home states. The Rhode Island attorney general has indicated, however, that there is no bar in that state to recognition of a same-sex marriage performed in Massachusetts.

In June 2005, the Canadian House of Commons voted 158–133 to pass Bill C-38, legislation redefining marriage as “the voluntary union for life of two persons to the exclusion of all others.” Approval by the Canadian Senate and assent by the Governor General then followed, which completed the legislative process. Parliamentary action followed rulings by the courts in eight provinces and one Canadian territory striking down the common-law definition of marriage (“the voluntary union for life of one man and one woman to the exclusion of all others”) as a violation of § 15(1) of the Charter of Rights and


Alienage

Alienage, the last of the classifications that this section examines, is unique because it ranges across all three tiers of constitutional scrutiny. This parsing of the various interests comprising alienage is a comparatively recent development and one not lacking in controversy. Until the 1970s, constitutional limitations on the treatment of aliens varied by level of government with little regard for the sorts of benefits or privileges alienage limited.

Historically, American constitutional law embodied the view that the national government could pretty much do what it wanted with aliens. Although the Constitution in Article I, section 8, clause 4, explicitly authorizes Congress “to establish a uniform Rule of Naturalization * * * throughout the United States,” the Supreme Court long ago recognized that the powers of the national government over the admission of aliens to this country, their regulation once here, and the bestowing of citizenship upon them were attributes of sovereignty possessed by any nation. Congress had the power, said the Court in Fong Yue Ting v. United States, 149 U.S. 698, 711, 13 S.Ct. 1016, 1021 (1893), “to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [i]t being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare * * *.” The states, on the other hand, increasingly have been denied legal authority to discriminate against aliens, and the Court has struck down numerous state laws that severely restricted or entirely banned aliens from certain occupations, denied or limited their receipt of education or welfare benefits, and prohibited them from holding civil service posts. As the Court pointed out in Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883 (1976), with respect to distinguishing between citizens and aliens in the distribution of benefits and privileges, the national government continues to retain far greater leeway than do the states, principally because of the Constitution’s delegation of broad powers over immigration and naturalization to Congress. After reviewing the holdings of many past cases, the Supreme Court adopted the position in Ambach v. Norwick that, despite the fact that aliens constituted a suspect classification, the states might rightfully exclude individuals who were not citizens from certain categories of public employment.

Ambach v. Norwick

Supreme Court of the United States, 1979

441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49

Background & Facts Certification by the New York State Department of Education is required in order to teach in the state’s public elementary and secondary schools. Section 3001(3) of the state’s Education Law denies teacher certification to any person who is not an American citizen unless the individual has declared his or her intent to become a citizen. Norwick and another resident alien, both married to American citizens, refused to seek citizenship despite their eligibility to do so and were consequently denied teacher certification. They brought suit against
the New York State commissioner of education, alleging a denial of equal protection. Applying "strict scrutiny," a three-judge federal district court declared the blanket ban on resident aliens from teaching unconstitutional for overbreadth because it excluded all resident aliens from all teaching positions without regard to subject taught, nationality, relationship of alien’s country to the United States, or willingness of the alien to substitute some other sign of loyalty, such as taking an oath of allegiance. The state appealed to the U.S. Supreme Court.

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

***

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional constraints. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien’s “right to work for a living in the common occupations of the community.”

Over time, the Court’s decisions gradually have restricted the activities from which States are free to exclude aliens. This process culminated in Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848 (1971), which for the first time treated classifications based on alienage as “inherently suspect and subject to close judicial scrutiny.” Applying Graham, this Court has held invalid statutes that prevented aliens from entering a State’s classified civil service, Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842 (1973), practicing law, In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851 (1973), working as an engineer, Examining Bd. v. Flores de Otero, 426 U.S. 572, 96 S.Ct. 2264 (1976), and receiving state educational benefits, Nyquist v. Maucier, 432 U.S. 1, 97 S.Ct. 2120 (1977).

Recent decisions have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court.

Applying the rational basis standard, we held that New York could exclude aliens from the ranks of its police force. Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067 (1978). Because the police function fulfilled “a most fundamental obligation of government to its constituency” and by necessity cloaked policemen with substantial discretionary powers, we view the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. Accordingly, the State was required to justify its classification only “by a showing of some rational relationship between the interest sought to be protected and the limiting classification.”

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and govern-
ment of a State. The Constitution itself refers to the distinction no less than 11 times, * * * indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. * * * Governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.

* * *

* * * The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions. * * * Other authorities have perceived public schools as an “assimilative force” by which diverse and conflicting elements in our society are brought together on a broad but common ground. * * * These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. * * *

Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. * * * Through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects. More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher’s function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the “governmental function” principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to the legitimate state interest. * * *

It remains only to consider whether § 3001(3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship. * * * The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001(3) furthers that judgment.

Reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS join, dissenting.

* * *

* * * The Court has held more than once that state classifications based on alienage are “inherently suspect and subject to close judicial scrutiny.” *Graham v.*

There is thus a line, most recently recognized in *Foley v. Connelle*, between those employments that a State in its wisdom constitutionally may restrict to United States citizens, on the one hand, and those employments, on the other that the State may not deny to resident aliens. For me, the present case falls on the *Sugarman-Griffiths-Flores de Otero-Mauclet* side of that line, rather than on the narrowly isolated *Foley* side.

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*The Court, to the disadvantage of appellees, crosses the line from *Griffiths* to *Foley* by saying * * * that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." It then concludes that public school teaching "constitutes a governmental function," * * * and that public school teachers may be regarded as performing a task that goes "to the heart of representative government." * * *

I perceive a number of difficulties along the easy road the Court takes to this conclusion:

First, the New York statutory structure itself refutes the argument. * * * The State apparently, under § 3001.3, would not hesitate to employ an alien teacher while he waits to attain citizenship, even though he may fail ever to attain it. And the stark fact that the State permits some aliens to sit on certain local school boards * * * reveals how shallow and indistinct is New York's line of demarcation between citizenship and noncitizenship. * * *

Second, the New York statute is all-inclusive in its disqualifying provisions: "No person shall be employed or authorized to teach in the public schools of the state who is * * * not a citizen." It sweeps indiscriminately. * * *

Third, the New York classification is irrational. Is it better to employ a poor citizen-teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently. That is the way to accomplish the desired result. An artificial citizenship bar is not a rational way. * * *

Fourth, it is logically impossible to differentiate between this case concerning teachers and *In re Griffiths* concerning attorneys. * * * [An attorney] represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. * * *

If an attorney has a constitutional right to take a bar examination and practice law, despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York. The District Court expressed it well and forcefully when it observed that New York's exclusion "seems repugnant to the very heritage the State is seeking to inculcate." * * *

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In *Bernal v. Fainter*, 467 U.S. 216, 104 S.Ct. 2312 (1984), five years later, a resident alien challenged the possession of American citizenship as a prerequisite to appointment as a notary public in Texas. Notaries were empowered to authenticate documents, administer
oaths, and take out-of-court depositions. As a general matter, the Court observed, a state law that discriminates on the basis of alienage must survive strict scrutiny, except where the state can demonstrate that the limitation is in exercise of a “public function.” The Court held that such an exception was not implicated here, since the functions of notaries public do not bear upon the process of democratic self-government. Notaries are not vested with policymaking responsibilities or broad discretion in the execution of public policy that requires the routine exercise of authority over other individuals. Over Justice Rehnquist’s dissent, the Court went on to hold that Texas’s requirement could not survive strict scrutiny because the interests proffered by the state—ensuring familiarity with Texas law and possible future appearance to give testimony—were manifestly insubstantial in their relationship to the citizenship requirement.

However, when the Supreme Court decided Plyler v. Doe, which is discussed in the following note, it found the deprivation of access to public education imposed by Texas law on the children of illegal aliens to be suitably judged neither by strict scrutiny nor by mere reasonableness. Invoking intermediate scrutiny for the reasons spelled out in Justice Brennan’s opinion, the Court went on to find that none of the asserted governmental interests supporting exclusion was substantially related to a legitimate public purpose.

NOTE—ILLEGAL ALIENS AND PUBLIC EDUCATION

In 1975, the Texas legislature revised its education laws to withhold from local school districts any funds for the education of children who had not been legally admitted into the United States. The legislation, section 21.031 of the Texas Education Code, also empowered local school districts to deny enrollment in public schools to these children. A class action challenging the legislation as a violation of equal protection of the laws was brought against Plyler, a local school superintendent, on behalf of certain school-age children of Mexican origin who could not establish that they had been legally admitted into this country. A federal district court found for the plaintiff children and awarded injunctive relief.

On appeal, the Supreme Court, in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982), held that Texas could not deny “to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.” Writing for the Court, Justice Brennan at the outset rejected arguments made by the state that aliens are neither “persons” nor within the state’s jurisdiction and thus are without standing to raise a Fourteenth Amendment claim. He pointed out that “the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.” The Court went on to conclude that intermediate scrutiny was applicable in judging the constitutionality of the statute. Summing up the Court’s reasoning on the matter, Justice Brennan wrote:

** Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a “constitutional irrelevancy.” Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. ** But more is involved in this case than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime handicap on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.
The remainder of the Court’s opinion was then devoted to assessing whether the classification at issue bore a substantial relationship to a legitimate governmental purpose.

The Court rejected the principal justification proffered by the state—that the undocumented status of the children itself constituted a sufficient reason for denying them benefits. Justice Brennan pointed out that Article I, section 8 of the Constitution clearly committed the regulation of immigration and aliens to the federal government and “only rarely are such matters relevant to legislation by a State.” Although the Court acknowledged that “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal,” in this case there was “no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy.” Justice Brennan concluded: “In other contexts, undocumented status, coupled with some articulable federal policy, might enhance State authority with respect to the treatment of undocumented aliens. But in the area of constitutional sensitivity presented by this case, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education.”

The Court also went on to reject the argument that “the classification at issue furthers an interest in the preservation of the State’s limited resources for the education of its lawful residents.” Standing alone, the Court found this little more than “a concise expression of an intention to discriminate.” Rejecting more specific articulations of this interest, the Court concluded (1) that “charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration”; (2) that excluding undocumented children was nowhere established by the record as a likely method of improving the quality of public education; and (3) that while, as Texas asserted, many of the undocumented children would not remain in this country indefinitely, some would, and “[i]t is difficult to understand what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.” Justices Blackmun and Powell, each concurring separately in the opinion of the Court, emphasized the unique character of this case—the permanent, lifelong disadvantage imposed on the children by the Texas statute.

Chief Justice Burger dissented in an opinion in which Justices White, Rehnquist, and O’Connor joined. Acknowledging that “[d]enying a free education to illegal alien children is not a choice I would make were I a legislator,” the Chief Justice stated that this was not the issue. “[T]he fact that there are sound policy arguments against the Texas legislature’s choice does not render that choice an unconstitutional one.” Applying the relevant equal protection test announced in Rodriguez, the Chief Justice concluded that the state had selected a rational means to prevent a potentially devastating financial drain on its educational resources. Indeed, he noted that “the federal government has seen fit to exclude illegal aliens from numerous social welfare programs, such as the food stamp program, * * * the old age assistance, aid to families with dependent children, aid to the blind, aid to permanently and totally disabled, and supplemental security income programs, * * * the medicare hospital insurance benefits program, * * * and the medicaid hospital insurance benefits for the aged and disabled program.” Finally, he chided the majority for producing “yet another example of unwarranted judicial action that in the long run tends to contribute to the weakening of our political processes.” Said the Chief Justice:

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* * * While the “specter of a permanent caste” of illegal Mexican residents of the United States is indeed a disturbing one, * * * it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result—that it would fail to deport these illegal alien families or to provide for the education of their children. Yet instead of allowing the political processes to run their course—albeit with some delay—the Court seeks to do Congress’ job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the judiciary.
The inability of the national government to stem the tide of illegal immigration has magnified the impact of *Plyler v. Doe* on state expenditures, particularly—but by no means exclusively—in states such as Arizona, California, Florida, and Texas. Public fears about the mounting cost spurred California voters to pass Proposition 187 in November 1994. The note that follows discusses the provisions of that ballot initiative, their invalidation by a federal district court, and congressional response to the problem as reflected in legislation designed to assert federal authority by sharply curtailing the number of recipients qualified to receive public benefits.

**Note—The Constitutionality of State Action Denying Benefits to Illegal Aliens**

On November 8, 1994, the voters of California adopted Proposition 187 by a vote of 59% to 41%. The stated purpose of the initiative measure was to "provide for cooperation between agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California." Provisions of the measure required state personnel in law enforcement, social services, health care, and public education "to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education." Following the adoption of Proposition 187, the League of United Latin American Citizens and other plaintiffs brought suit for declaratory and injunctive relief against Governor Pete Wilson, the state attorney general, and other officials. The plaintiffs argued that the measure was preempted by federal law and that it violated the Equal Protection Clause as construed by the Supreme Court in *Plyler v. Doe*. The district court granted a preliminary injunction, which maintained the status quo until it could hear arguments on the constitutional questions.

In *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D.Cal. 1995), a federal district court held that the verification, notification, and reporting provisions of the law were unconstitutional because they were preempted by the power of the federal government to regulate immigration and naturalization and that state denial of benefits under federally funded programs violated various statutes passed by Congress. The district court also concluded that denial of education benefits directly contravened the Supreme Court’s ruling in *Plyler v. Doe* and thus violated the Supremacy Clause. However, the federal court did sustain California’s constitutional authority to deny benefits to illegal aliens in areas other than education where such programs were funded exclusively by the state.

In brief, the district court reasoned Proposition 187 ran afoul of federal constitutional authority over immigration and naturalization by empowering various state officials to make judgments independent of those reached by the federal Immigration and Naturalization Service (INS) as to which of the individuals within the state’s borders were in the country legally. The court held California could rely upon determinations made by the INS in this regard if it wanted to deprive illegal aliens of state benefits, but the state itself could not judge whether any of its residents were lawfully in the United States.

Where federal authorities had determined that an individual was not lawfully in the country, California was also precluded by federal law from denying such persons benefits under programs that were subsidized in part by the national government. In the absence of Congress’s say-so, California could not unilaterally impose lawful residence in the United States as an extra eligibility requirement where federal law otherwise entitled an individual to receive benefits. Since most benefit programs operated by the state were funded on a matching basis by the national government, California could not on its own deprive illegal aliens of housing, health, and welfare services. Of course, California
could control the availability of benefits under programs it alone funded, but their financial size and scope remained undetermined by the district court and, in any event, was certainly much less than the impact Proposition 187 sought to achieve. An exception, even within the area of exclusively state-funded programs, was the availability of access to public education by children of illegal immigrants. This matter had been settled by the Supreme Court's ruling in Plyler, and barring the Court's reconsideration of that question, the state was precluded from using illegal immigrant status as a barrier to providing free public education. Federal courts have also rejected suits by state officials to compel the national government to enforce the immigration laws more effectively and to reimburse the states for the financial burden they incurred by providing public services to illegal aliens. Half a dozen states (Arizona, California, Florida, New Jersey, New York, and Texas) brought suit. The federal courts consistently rejected the states' claims and the Supreme Court denied review. For example, see Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 517 U.S. 1188, 116 S.Ct. 1674 (1996).

The district court's decision in League of United Latin American Citizens, at least with respect to federally subsidized programs, rested on the fact that Congress had said nothing about lawful residence in the United States as a condition for the receipt of housing, health, and welfare benefits. But in 1996, Congress did say something about it. The states most affected by the heavy influx of illegal immigrants may have failed using tactics such as Proposition 187 or suits against the federal government to obtain more money, but their representatives and senators were highly successful in securing Congress's enactment of two major pieces of legislation, the Welfare Reform Act, 110 Stat. 2105, and the Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009-546. These laws added legal immigrant status as a condition of eligibility for the receipt of public benefits, with certain exceptions such as emergency medical care and aid to victims of domestic violence. The states were to be reimbursed for the cost incurred in providing emergency medical aid to illegal aliens. The legislation also tightened border controls, increased penalties for document fraud and alien smuggling, and tightened various detention and deportation procedures.

After this legislation passed, the district court modified its original ruling. The court concluded that it was now Congress's intent to occupy the entire field of determining alien eligibility for public benefits—whatever the funding source: federal, state, or local—and limiting benefits to "qualified aliens." The legislation defined a "public benefit" to include everything from public grants, contracts, loans, and professional and commercial licenses, to support from government retirement, health, welfare, disability, housing, and unemployment programs. Congress also established a procedure for verifying immigrant eligibility for any public benefit. The legislation recognized that the Supreme Court's decision in Plyler v. Doe was binding and thus did not authorize state or local governments to deny public elementary and secondary education to nonqualified aliens. Modification of the federal district court's original ruling is reported at 997 F.Supp. 1244 (1997). The district court then entered a final order enjoining enforcement of virtually all the provisions of Proposition 187, see 1998 WL 141325 (C.D. Cal. 1998).

The 1996 legislation also terminated both Supplementary Security Income and Medicaid benefits to legal aliens. Following a public outcry and prodding from the Clinton Administration, Congress voted a year later to restore these benefits to most legal immigrants who were in the country when the 1996 legislation was signed. 111 Stat. 251. In 1998 Congress also restored these benefits to thousands of noncitizens whose immigration status was in doubt until the INS could complete its verification. 112 Stat. 2926.

In the wake of the 2006 congressional debate over how to secure U.S. borders against illegal immigration and how to deal with the 11–12 million undocumented workers across the country, state officials have reacted in very different ways. Georgia has adopted one of the most far-reaching laws: It denies to illegal immigrants many state services, forces
contractors doing business with the state to verify the legal status of their employees, requires police to report to immigration authorities any illegal aliens who are charged with crimes, and prosecutes anyone who brings illegal immigrants into the state under a new offense—human trafficking. See Rick Lyman, “As Congress Dithers, Georgia Tackles Immigration,” New York Times, May 12, 2006, p. A17. Colorado lawmakers followed suit, denying non-emergency services (such as health care, unemployment insurance, and energy assistance) to illegal immigrants and forcing a million current recipients of state or federal aid to verify their citizenship. An estimated 50,000 illegal aliens would be denied benefits they are now receiving. (Children are exempt from the law.)

The governor of Arizona, on the other hand, vetoed a bill that would have allowed the prosecution of undocumented workers as trespassers. Under the bill’s terms, a first offense would be a misdemeanor punishable by up to six months in jail; a repeat offense would be punishable as a felony carrying a jail term of up to a year. And a state judge in New York has held, in Khrapunsky v. Doar, 2005 WL 2248249 (N.Y.Sup. 2005) (unpublished decision), that the state must restore higher aid payments to thousands of disabled immigrants who face eviction after being cut off from federal and state disability benefits because they did not become U.S. citizens within the seven-year period specified by Congress. The trial judge ruled that New York could not give low-income persons—who are predominantly elderly, blind, or handicapped—less aid just because they are aliens, even though the federal government has stopped paying its share. State aid officials have indicated that the state will appeal the decision because of its “severe fiscal impact.” New York Times, Aug. 19, 2005, p. A18.

Legislative proposals in Texas, a third of whose population was listed as Hispanic in the 2000 census, would go further. Bills have been introduced to tax money transfers to Mexico and Latin America and to sue the federal government for costs incurred in patrolling the border. A Texas municipality has enacted ordinances fining landlords who rent to illegal immigrants.29 One of the most draconian proposals would deny all state benefits to illegal aliens—including schooling and health care—in the hope of getting the U.S. Supreme Court to reexamine its decision in Plyler v. Doe. See New York Times, Nov. 16, 2006, p. A20.

29. A federal district court has issued a temporary restraining order halting its enforcement. See Villas at Parkside Partners v. City of Farmers Branch, 2007 WL 1498763 (N.D.Tex. 2007). In its specification of what constituted adequate documentary proof that an alien was in this country lawfully, the ordinance conflicted with applicable federal law. Under the Supremacy Clause of the Constitution, Art. VI, ¶ 2, the ordinance was preempted and, therefore, unconstitutional because, said the district judge, “The [Supreme] Court has repeatedly held that the ‘[p]ower to regulate immigration is unquestionably exclusively a federal power.’ ”
The Modes of Constitutional Interpretation

Judicial Review is the power of courts to pass upon the constitutionality of actions taken by any of the coordinate branches of government. Constitutional interpretation is concerned with the justification, standards, and methods by which courts exercise the power of judicial review. The exercise of judicial review is said to create a serious dilemma for the American system, which the alternative theories of constitutional interpretation—with varying degrees of success—strive to resolve. The nature of the apparent dilemma has been succinctly summarized by former federal appellate judge Robert Bork as follows:

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority’s legitimate right to govern. How can that be done?1

This is a greatly revised and expanded version of my “Constitutional Interpretation” originally published in Encyclopedia of the American Judicial System (1987), Ed. Robert J. Janosik, Vol. 3, pp. 972–986. To read more about the particular cases cited in this chapter, see the Table of Cases at the back of this volume.

This problem is compounded by the fact that federal judges are appointed, not elected, and that they enjoy life tenure. In a nation that emphasizes the responsiveness of officeholders to the wishes of the people as expressed through the ballot box, by what authority, then, do appointed, life-tenured judges sit in judgment on the validity of policies enacted by democratically elected officeholders?

Concern over judicial review’s inconsistency with democratic institutions deepens with the recollection that nowhere does the Constitution explicitly authorize the federal judiciary to engage in any sort of constitutional review. When the Supreme Court laid claim to legitimacy of judicial review in Marbury v. Madison, 5 U.S. (1 Cr.) 137, 2 L.Ed. 60 (1803), the reasons it offered had to go beyond the text of the Constitution. Although British, colonial, and state courts had occasionally asserted the power of judicial review and the Supreme Court itself apparently had assumed such a power to lie within its grasp even before 1803, the Court’s disposition of Marbury is regarded as both its first and its most authoritative statement justifying this seemingly extraconstitutional practice. Because the traditional argument in support of judicial review, as presented in Marbury and as supplemented by the writings of later proponents, has long been thought to be fatally defective in certain important respects, the controversy surrounding judicial review continues unabated.

The various modes of constitutional interpretation are concerned not only with addressing how the practice of judicial review is to be harmonized with democratic institutions, but also with the standard courts should use to determine whether a given legislative, executive, administrative, or judicial action contravenes the Constitution. The debate over constitutional interpretation, in short, is carried on through several alternative modes of judicial review that address the logical interconnection among three elements: the justification for the review power, the standard of constitutionality to be applied by the courts, and the method by which judges support the conclusion that a given governmental action does or does not violate the Constitution.

The Traditional Theory of Judicial Review:
Constitutional Absolutism or Interpretivism

It makes sense to begin consideration of constitutional interpretation with the theory articulated by Chief Justice Marshall in Marbury, not only because it is the oldest mode of interpretation but also because it is the view many, if not most, Americans hold. In the discussion that follows, strands of arguments advanced by Justice Hugo Black—surely the member of the Court in modern times to embrace most completely all aspects of this approach—are woven together with those of Marshall to lend clarity and coherence to its presentation.

Interpretivism or constitutional absolutism rests on the premise that there is no necessary inconsistency between the practice of judicial review and the principles of democratic government because the American system is a constitutional system, not a parliamentary system. A parliamentary system, such as Great Britain’s, is one in which the acts passed by the national legislature occupy an equal footing with the other documents that comprise Britain’s unwritten constitution. The legal equivalency shared by acts of Parliament and ancient documents like Magna Carta (1215) and the Bill of Rights (1689) make Parliament supreme, since the legislature can change the constitution at will. Judicial review would be out of place in such a system because it would contradict the deference that is constitutionally due Parliament. Ours, however, is a constitutional system, which means that the Constitution, not the legislature, is supreme. The Constitution limits all officers in all branches at all levels of government. The Supremacy Clause (Art. VI, ¶ 2) says so.

The connection between constitutional supremacy and judicial review requires two important arguments and several key assumptions. The first critical assumption is that the Constitution is a
collection of rules. The assertion that ours is a constitutional system merely makes the point that the rules contained in the Constitution are to be regarded as supreme. When Congress passes a bill and that bill is duly approved by the President (or his veto of it is overridden), the law that results also contains rules. In a constitutional system, it is imperative that we distinguish between these two sets of rules. The rules contained in the Constitution are superior; the rules embodied in legislation are inferior. In the event that legislation passed by Congress conflicts with the Constitution, the inferior rules must give way to the superior ones. The provisions of the Constitution must prevail over legislation enacted by Congress because “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof *** shall be the supreme Law of the Land ***.” But this simply establishes that there must be some kind of constitutional review, not that there must be judicial review.

Chief Justice Marshall’s second line of argument in Marbury seeks to address why this constitutional determination is the function of courts, particularly the Supreme Court. This argument is drawn from Article III’s vesting of the judicial power of the United States in the federal courts. Judicial power is the power to decide real cases and controversies, which requires that judges apply rules to facts in order to decide cases. Where the facts of a case call into play two contradictory rules, the judge must first decide which is the valid rule before he or she can apply it. Thus, to use Marshall’s words in Marbury, “It is emphatically, the province of the judicial department, to say what the law is.” As the Supremacy Clause also makes undeniably clear, when a collision occurs between a constitutional rule and a statutory one, judges are duty-bound to respect the Constitution. Judicial review is, therefore, made to appear simply as the logical consequence of exercising judicial power. This line of argument appears to effectively sidestep the serious problem posed at the outset by adopting the position that the democratic quality of the American system is limited by its constitutional character.

In order for the Constitution itself to be supreme, the traditional theory of constitutional interpretation requires some additional stipulations. The most important of these assumptions characterizes the relationship of judges to the constitutional rule that they are applying. It is the relevant text of the Constitution that provides the standards for evaluating rules laid down by Congress and the President or others. The standard for assessing constitutionality, in other words, must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. For constitutional absolutists, judicial review must be something akin to a ministerial, not a discretionary, act.

How, then, can an objective meaning of constitutional provisions be ascertained? The answer lies in two tools of constitutional interpretation: the “plain meaning” rule and the “intention of the Framers.” The former embodies the notion that the words of the Constitution are to be taken at face value and are to be given their “ordinary,” “accepted” meaning; the latter requires fidelity to what those who wrote or adopted the Constitution intended its provisions to mean. By relying upon these two tools, advocates of the traditional theory of constitutional interpretation seek to constrain judges to act only as faithful extensions of the document and thus give effect to constitutional supremacy.

Although Marshall’s decisions largely stressed the broad interpretation of constitutional provisions, the traditional approach to constitutional interpretation is typified by what is commonly called “strict construction.” The term “strict construction” means reading constitutional provisions literally so that government is permitted to do nothing more than what is explicitly stated in the document. Application of constitutional provisions in a literal fashion conveys the impression that constitutional interpretation is essentially a mechanical, uncreative enterprise. During the 1930s, when various Justices employed this mode of constitutional interpretation, critics caricatured it as “mechanical jurisprudence.” It is now immortalized in the following passage from Justice Roberts’s opinion for the Court in United States v. Butler, 297 U.S. 1, 62–63, 56 S.Ct. 312, 318 (1936):
There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

This posture of judicial detachment conveys a cut-and-dried, black-or-white impression about the existence of legal powers, rights, and duties. Seemingly, judges “don’t make policy”; they “just work here.”

This theory of constitutional interpretation is not without serious flaws. In the first place, the contention that provisions of the Constitution are capable of objective definition is dubious at best. Research by many political scientists (the classic works of Glendon Schubert and Harold Spaeth are illustrative) has amassed overwhelming evidence that demonstrates that the different political attitudes and values of judges are closely related to their voting behavior in cases where they disagree. That judicial decisions are correlated with political attitudes can be readily confirmed by observing as you read the cases in this volume how judicial creation or application of a constitutional doctrine changes with the political composition of the Court. Such evidence clearly supports the conclusion that judges do not decide controversial cases “objectively” and effectively refutes the pretension that adjudication is a mechanical enterprise.

Nor is it very likely that the interpretive tools of absolutism can assure objectivity. The plain meaning rule falls short because many words have more than one meaning, because reading is more than stringing together the standard meanings of words that make up a sentence, because the manner in which something is said may be much more important in conveying its meaning than the substance of what is said, and because the meaning of a word or phrase may only become apparent when considered in light of a paragraph, a whole page, or an entire document.

As a surefire guide, the intention of the Framers does not fare much better. The Framers, of course, were distinct individuals, who doubtless had strong opinions on many things and who quite often were probably forced to settle for less than they wanted. It is, therefore, highly unlikely that any of the products of their constitutional compromises could accurately be attributed to some single-minded purpose. It is also not obvious just


who should be counted as a Framer. Should the term include everyone involved in the process of adopting the Constitution, just those who actually voted on ratification plus those who proposed the Constitution, or just those actually at the Constitutional Convention? The larger the group defined as Framers, the spottier the body of historical evidence. And what about those who spoke or wrote little? Should we assume they agreed with others who left a more extensive record of their intentions behind?

Relying upon the intention of the Framers also affords scant protection against judges who settle upon a desired result in a case and then rummage through history until they find a Framer who agrees with them. There is, in other words, no insurance against judges who play the game of “pick your Framer.”

The attractiveness of the Framers’ intentions as an interpretive tool is often based on the tacit premise that fashioning a constitution is a truly historic event in the life of any political system—a unique opportunity to achieve justice by adopting rules that have the greatest prospect of being fair to all because they were agreed to before the game began and thus before anyone could know exactly how their interests would ultimately fare in the political process. So, it is argued, the intentions of those who wrote the rules are due special respect. However, since so many groups and interests were omitted from the framing of the Constitution—minorities, women, and the working class come readily to mind—what special claims to fairness do the rules adopted by an all-white, all-male, all-comfortable group of Framers, now long dead, have upon us? These are questions for which answers are sorely needed.

As Ronald Dworkin has shown, the assumption that law is a system of rules—some superior, some inferior—is also inaccurate. The depiction of constitutional provisions as superior rules was critical to the characterization of the judicial process as simply the application of rules to facts in deciding cases. But not all constitutional provisions can be accurately described as rules. While some provisions are rules, such as that specifying that a representative’s term shall be two years, or that each state shall have two senators, or that the President shall be at least 35 years old; other provisions of the Constitution are not, and they are the ones we argue about. The constitutional guarantees—that no person shall be deprived of life, liberty, or property without due process of law, or that no person shall be subjected to cruel or unusual punishment, or that private property shall not be taken for public use without just compensation—are principles, not rules.

The difference between principles and rules, as Dworkin has pointed out, is significant and has important consequences for the arguments of the constitutional absolutists. A rule has one of two conceivable relationships to a set of facts: Either the facts fall within the rule, in which case the consequence specified by the rule must be accepted, or the facts have no relationship to the rule, in which case the rule is irrelevant. Thus, Dworkin concludes, rules have an absolute, black-or-white, either-or quality.

Principles, on the other hand, are distinguished both by their generality and by the fact that they apply on a more-or-less basis, not an either-or basis. This is because principles embody concepts. They are ambiguous with respect to a set of facts unless the concept is more particularly defined. We cannot move from the generality of a concept to its consequences for a set of facts without some intervening standard. This want is supplied by adopting a particular conception of the idea stated by a constitutional principle. To ask whether the death penalty violates the Eighth Amendment’s prohibition on cruel and unusual punishments requires a specific conception of what is meant by cruelty. Does the proscription on inflicting cruelty ban the imposition of certain punishments per se or the manner in which any given punishment is to be carried out (requiring that suffering be

minimized, perhaps), or does it require that a sense of proportion be maintained between the offense and its legal consequence so that "the punishment should fit the crime"? Does the Eighth Amendment require only one or some combination of these? Likewise, when the Fourteenth Amendment guarantees "equal protection of the laws," which conception of equality must be adhered to: equality of opportunity, equality of result, or some other version? If due process is defined as the completion of certain procedural steps before a person can be deprived of life, liberty, or property by government, how many and which steps are required? Would all the requisites of a trial-type hearing be required in every instance where deprivation is imposed: suspension or expulsion from a public school, revocation of a driver's license, denial of an application for food stamps? If the principle underlying due process is fairness, would the same conception of fairness be appropriate in every instance?

Principles, therefore, are distinguished by the degree of their relevance in a case, and it is the particular conceptions of these principles that judges adopt that are used to measure the facts in a given case. Principles afford judges far greater latitude in interpretation because the question is one of how much process is due or what degree of equality the Constitution requires. The doctrines created by judges embody the specific conceptions that are necessary to give meaning to the principles in constitutional provisions. The clear-and-present-danger test, the original-package rule, the doctrine of separate-but-equal are but a few of the thousands of doctrines that together make up constitutional law. Those doctrines cannot be found in the Constitution; they are created by judges. So, the study of constitutional law is essentially the study of doctrines created by the Court because the Justices must construct doctrines to give specific meaning to the otherwise general principles contained in the Constitution. This is what Chief Justice Hughes was referring to when he declared that "the Constitution is what the judges say it is." Recognizing that the Constitution contains principles as well as rules, therefore, means that the reality of interpretive freedom must be accepted and addressed. Absolutism does not accept this or appears to accept it only insofar as judges adopt the Framers' conceptions or those of the common law. But this does little but return us to the difficulties just identified in dealing with the Framers' intentions.

The cumulative impact of these criticisms is lethal for constitutional absolutism, at least in anything like its traditional form, since the cornerstone of the theory is the unstated, but crucial, assumption that judges do not exercise discretion. It was the implicit denial that judges have important matters of choice in interpretation that permitted the absolutists to assert that the Constitution itself was supreme—that the judges are merely a conduit through which the document speaks. But the constitution is an inanimate object and cannot speak, the instruments for divining its "objective" meaning have now largely been discredited, and the most important provisions of the Constitution declare principles, not rules. Although Dworkin would deny that this entitles judges to exercise discretion in applying the principles of the Constitution, that is, practically speaking, exactly what empirical research in political science suggests. That principles necessarily require interpretive discretion and that the exercise of discretion is substantially influenced by political values are things Presidents have intuitively understood when they have selected their nominees for seats on the federal courts, particularly the Supreme Court, or else why

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7. A view strongly to the contrary is explained and vigorously defended in Antonin Scalia, A Matter of Interpretation (1997). Justice Scalia mounts a strong defense of textualism (that is, relying on the words of the Constitution) but is very critical of those who invoke the intentions of the Constitution's Framers. His essay is published together with the reactions of four scholars (two of whom are tough critics) and Justice Scalia's response.

go to the trouble—as Ronald Reagan and others did—to ask prospective nominees to disclose their position on abortion and other issues?

It is, therefore, quite inaccurate to imply, as Chief Justice Marshall did in Marbury, that the power of judicial review is justified because the judge confronts an immutable collision between an inferior rule and a superior one. In light of these criticisms, the fact is surely otherwise. The collision that Chief Justice Marshall portrayed is by no means inevitable. The truth is that a law is unconstitutional not because it conflicts with the Constitution, but because it conflicts with a doctrine created by the Justices to interpret the Constitution. Collisions between statutes and the Constitution are not inevitable; they are judge-made.

The Balancing of Interests or Judicial Self-Restraint

The failure of constitutional absolutism to recognize and address the reality of judicial discretion makes it highly vulnerable. Rather than evade the dilemma, the other modes of interpretation have attempted to deal with it directly. Although the two remaining frameworks of constitutional interpretation differ significantly in their enthusiasm for judicial review, they share a candid acknowledgment that courts are political institutions—that judges, like other government officials, have a wide range of choice in the decisions they make, and, in making such choices, their values and attitudes have a substantial influence. This concession activates the asserted dilemma, for if the Justices can be said to have the last word on the constitutionality of policy and if that judgment is substantially influenced by their political values, then—to use Justice Gibson's words—"the judiciary must be a peculiar institution." To adequately justify the power of constitutional review, appointed, life-tenured judges must be shown to possess a unique quality—one so paramount that it transcends the importance of democratic accountability. Justice is probably the only such value. Insofar, then, as courts actively exercise the power of judicial review, they must be shown to possess a unique capacity to do justice. Failing this, the exercise of constitutional review by judges is defenseless against the simple and devastating retort, "Who elected you?"

It is an undeniable fact of life to interest balancers that courts are political institutions. Although the quaint trappings and peculiar format of the judicial process make it appear unique, in fact the act of judging is really very much like the act of legislating. Every case requires a choice between competing social interests. Even an apparently uncomplicated personal injury case in which a pedestrian sues an automobile driver involves a form of policymaking. While the litigants obviously must have a personal interest in the dispute, they also personify the competing social interests of pedestrians and drivers. To decide, as the judge might, that the defendant must compensate the injured plaintiff is to hold that pedestrians and drivers have respective rights and obligations. When applied as precedent to decide similar cases in the future, such a holding distributes benefits and burdens and, therefore, constitutes public policy. Every case, then, calls upon a judge to weigh conflicting social claims and to allocate gains and losses. This process of balancing competing social interests, influenced as it is by the values of the decision maker, demonstrates the essential similarity between judges and other government officials. In accordance with the basic tenets of democracy, judges should strive to satisfy as many of these claims as is possible, since the happiness of the many is to be preferred over the satisfaction of the few.

This interest-balancing perspective readily translates into judicial self-restraint. When the constitutionality of a law is called into question, judges in a democratic society, it is argued, are duty-bound to respect the balance among interests struck by the statute for the
logical reason that, having been passed by a majority of legislators, it presumably satisfies more rather than fewer interests. It stands to reason, then, that statutes should be assumed to be constitutional.

Does this mean that judges should renounce judicial review? If not, on what basis could judicial review be justified? The uneasy answer is to hold judicial review to the minimum. According to Justice Frankfurter, who was as great an apostle of judicial self-restraint as Justice Black was of absolutism, the Due Process Clauses of the Fifth and Fourteenth Amendments furnished the only possible justification for judicial review and provided the only relevant standard for its use. The guarantee of due process supplied a justification for the exercise of judicial review because due process, by definition, refers to the assurance of procedural fairness. The restraintists’ test of constitutionality follows directly from this, since procedural fairness in this context is a guarantee only that the statute be a rational response to the problem it seeks to address. If a statute is presumed to be constitutional, the burden of proving that a law is unconstitutional rests with the party challenging it, and that burden can be met only by showing the law in question is unreasonable—that it is arbitrary, capricious, or patently discriminatory. This constitutional standard is known as the test of reasonableness.

A judgment of reasonableness is not to be confused with an opinion about the wisdom or desirability of a law. In no sense is it a question of whether the legislative branch enacted the best policy. If one visualizes the enactment of a law as the legislature’s response to a public problem, it is usually the case that the policy selected was just one option among many. In applying the test of reasonableness, the restraintists assert, a judge must focus on the policy selected by the legislature and answer the following straightforward question: Could this policy have been selected as a reasonable response to the problem? Under no circumstances is a judge entitled to compare the policy selected by the legislature with others it might have chosen, for this would be a test not of whether the policy enacted was reasonable, but of whether it was the best policy. In a democracy, the choice as to which is the best policy is reserved for popularly elected officeholders. When the Justices engage in comparative assessments to see whether the legislative branch enacted the best policy, the Court in effect substitutes its judgment about the wisdom of policy for that of the people’s elected representatives and assumes the role of a “super-legislature.”

This description of the method used by restraintists or interest balancers in constitutional cases would not be complete without two additional observations. First, all interests are to be treated equally. Since the Fifth and Fourteenth Amendments place life, liberty, and property on the same footing—that is, none is to be denied without due process of law—the test of reasonableness is to be applied to all statutes regardless of the different kinds of interests they touch. Second, the effect of applying the lenient test of reasonableness will be to sustain the validity of virtually all statutes subjected to constitutional challenge. This result is not surprising, since lessening the mortality rate of statutes was one of the principal aims of this mode of constitutional interpretation in the first place.

Although the perpetual claim of deference to majority rule dominates the case to be made for judicial self-restraint, other grounds contribute to the persuasiveness of this theory of constitutional interpretation. For the sake of clarity, these points can be summarized under three major headings: the functioning of the democratic system, the institutional capacity of the judiciary, and political prudence. The lines of argument that follow are drawn principally, but by no means exclusively, from the writings of two celebrated proponents of self-restraint, Justice Frankfurter and Alexander Bickel, late Yale law professor and former Frankfurter law clerk. Justice Frankfurter penned two famous dissenting opinions that are widely acclaimed as particularly insightful and eloquent statements of judicial self-restraint, those in West Virginia State Board of Education v.

To be sure, the insistence on respect for majority rule—and the assertion that anything less is tantamount to sanctioning minority rule—constitutes the flagship argument of judicial self-restraint. This is bolstered, however, by a related contention about the detrimental impact that the active use of judicial review has on the capacity of the democratic system to function effectively. Large-scale reliance upon the courts for the resolution of public problems, restraintists argue, will lead in the long run to the atrophy of institutions of popular government. Political parties and legislative institutions may not actually fall into disuse and completely fade away, but there is the distinct possibility that minorities, long subjected to discrimination, may—by taking their political demands to the courts rather than to parties and legislatures—consign political parties to perpetual domination by narrow, special interests. This would have the effect of collapsing the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system.9

Advocates of judicial restraint also argue that many issues are simply beyond the institutional capacity of courts to resolve. Because the adversary system limits the sort of information that is presented and because cases are decided through reasoning by analogy from precedents, the institutional attributes of courts limit the kinds of things courts can do well or even do at all. As Bickel put it:

The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.10

It may be that the limited problem-solving capacity of courts is best illustrated by their inability to resolve what is called a “polycentric problem”—a tangle of interconnected issues that cannot be separated so the issues can be argued about by the affected parties one at a time within the framework of the adversary system.11 The distinctive feature of polycentric problems is that the questions comprising them can only be dealt with by addressing all of them simultaneously. The parts of our society—and particularly the sectors of our economy—have grown so interdependent that problems have increasingly assumed a polycentric form. This development does not bode well for greater reliance upon courts to solve our problems in the future.12 Furthermore, the institutional limitations of courts make them very unsuited to monitoring and supervising government policy in order to ensure long-run compliance with judicial decisions.13 And the judicial process is notoriously conservative. The most prominent characteristics of its dispute resolution—not deciding something unless it is absolutely necessary, resolving disputes on the narrowest ground,

closely adhering to precedent—work to minimize change, so that when minorities take
their demands for large-scale change to courts, any victory they gain is likely to produce
much less change than they could have achieved through the application of pressure in the
democratic process. It can be argued that, in the last analysis, racial desegregation came to
the Old South not because courts ordered it, but because citizens initiated marches, lunch
counter sit-ins, boycotts, demonstrations, and other forms of militant nonviolence.

Even if these arguments can somehow be surmounted, important considerations of
political prudence remain. If the judiciary is, to use Alexander Hamilton’s phrase in
Federalist No. 78, “the least dangerous” branch, it is because it is the weakest. Strictly
speaking, Justice Roberts was right when he described the power of the Supreme Court as
“only * * * the power of judgment.” Courts may decide things, but the power to enforce
them always lies in the hands of the executive branch. Although it is likely he never
actually said it, there is more than a grain of truth about the Court’s vulnerability in the
angry retort attributed to Andrew Jackson, an old Indian fighter, after the decision in
Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) upholding the land claims
of the Cherokees, that “John Marshall has made his decision, now let him enforce it.” It was
just such an awareness of the Court’s vulnerability when it comes to compliance with its
decisions that moved Justice Frankfurter, during oral argument in the school desegregation
cases, to observe, “Nothing could be worse from my point of view than for this Court to
make an abstract declaration that segregation is bad and then have it evaded by tricks.”
Justice Frankfurter’s point is simple, but effective: The Court should select occasions for
exercising its power with care because the effectiveness of its decisions depends upon
cooperation from the executive branch and whether people will accept its judgment. Above
all, the Court should avoid putting itself in the humiliating position of announcing an
important ruling and then having its command ignored.

The restraintists also counsel prudence because of the damage to the Court’s power and
prestige that can result when Congress engages in political retaliation out of disagreement
with the Court’s decisions. The weapons that stock Congress’s arsenal—proposing
constitutional amendments, packing the Court, withdrawing some of the Court’s appellate
jurisdiction, and initiating impeachment proceedings—ensure that in any war with
Congress the Court will surely come out the loser. If so, then due regard for the
vulnerability of its political position should lead the Justices to choose their battles wisely
and conduct them carefully. Justice Frankfurter summed it up best in Baker when he
warned: “The Court’s authority—possessed of neither the purse nor the sword—ultimately
rests on sustained public confidence in its moral sanction. Such feeling must be nourished
by the Court’s complete detachment, in fact and in appearance, from political
entanglements and by abstention from injecting itself into the clash of political forces in
political settlements.”

Despite the strength of these arguments, interest-balancing itself has been weighed and
found wanting. A major source of difficulty lies in the restraintists’ misreading of both
democratic theory and practice. To begin with, it requires either an astonishing or a willful
ignorance of the workings of Congress to contend that it so superbly measures up to the
majority rule criterion as to warrant all the deference the restraintists claim in the name of
democracy. Many features of Congress, such as the committee system, seniority, the
filibuster, plurality election and low voter turnout, and the dominance of the trustee
model of representation, regularly frustrate what might uncritically be called “the popular
will.” Why should the Court feel compelled to defer to an institution so many features of

which—while perhaps justifiable on other grounds—nevertheless flunk the restraintists' own test of representativeness cold and "prevent the full play of the democratic process"—to use the words of Justice Frankfurter's Barnette dissent.

But the real fallacy in the restraintists' indictment of the Court stems from a badly flawed definition of democracy. Characterizing the Court as undemocratic because its members are not elected and, therefore, are not responsive to the popular will assumes that democracy can be defined simply as majority rule, but this is a grossly inadequate definition. Surely any concept of democracy must include recognition of those rights that make it possible for minorities to become majorities. In short, the restraintists have forgotten that minority rights are just as important a component of the democratic equation as majority rule is.\(^{16}\)

Whether it is an undemocratic institution depends upon what the Court does. If the Court uses the power of judicial review to guarantee rights fundamental to the democratic process (freedoms of speech, press, and association, and the right to vote, for example) so that citizens can form political coalitions and influence the making of public policy, then why isn't the Court just as "democratic" as Congress is?

Democracy is a term that describes a process by which citizens compete for the power to turn their preferences into law. It is a game of numbers that makes several important assumptions: that all votes are equal; that citizens have an equal right to participate; that the resources necessary to political competition are relatively evenly spread; and that wins and losses in the political process will be more or less evenly distributed over the populace. Different political majorities, it was expected, would rise and fall from one issue to another. Above all, the Founders supposed this to be a system that would avoid the specter of perpetual winners who make policy at the expense of perpetual losers; that is the definition of tyranny. It is a political truth too obvious to require demonstration here that women and various racial and ethnic minorities have been victimized by such pervasive discrimination that they have not enjoyed "equal" opportunity to participate in the political process. Since judicial self-restraint converts the Court into a virtual rubber stamp of Congress, chronic deference to policymaking by the legislative branch amounts to judicial complicity in exploitation. The fine impartiality with which the restraintists insist that abridgments of free speech, press, and association and other basic constitutional rights be given the same deference as is accorded legislation affecting property rights is likely to do little else than maintain the effective suppression of political grievances.

The institutional and prudential arguments that judicial self-restraint invokes are not beyond criticism either. Portraying the Court rather like a patient in delicate condition, the restraintists, rather in the manner of constitutional physicians, prescribe plenty of bed rest. But is the Court so weak? The fragile state of the Court's political health may be more imagined than real. Restraintists never tire of asserting that the Court is a weak institution, but their endless repetition of this makes it so. Instead of husbanding judicial resources for a rare exertion, building the Court's political muscle may depend on a regimen of more frequent exercise.\(^{17}\)

And criticizing the Court for failure to deliver on public policy all by itself doesn't ring true. That the Court should not involve itself with the larger problems of the day because it cannot solve them all alone is defeatist and fatalistic. The Court cannot solve problems all by itself because no institution of American government can. A system founded on principles such as the separation of powers and checks and balances necessarily requires cooperation among governing institutions; it does not permit unilateral policymaking. In such a system, the Court has a useful—indeed, indispensable—role as the legitimator of political rights and as a catalyst for those aggrieved to join together and assert their claims.

in the democratic process. Furthermore, to the extent that the Court foreswears its use of judicial review, it also fails to maintain an essential element in the system of checks and balances.

**Strict Scrutiny or the Preferred Freedoms Approach**

It was especially the problem of permanent minorities that gave rise to the brand of judicial activism with which we are familiar today. In its modern garb of strict scrutiny (known originally as the preferred freedoms approach), the active use of judicial review casts the Court as the institutional defender of the politically disadvantaged. It was not always so with judicial activism. Until the triumph of New Deal liberalism over the staunch conservatism of the Old Court in the late 1930s, the Supreme Court maintained an almost unblemished record throughout American history as the defender of the rich and powerful, something President Franklin Roosevelt’s political lieutenants never tired of pointing out. There was complete agreement among FDR’s appointees, who soon swarmed onto the Court, about pursuing a restraintist posture when it came to reviewing laws imposing business and economic regulation, but they broke into warring factions over whether similar deference was due legislation that directly infringed the constitutional guarantees of the First Amendment.

Because the wording of the Fifth and Fourteenth Amendments seemed to accord the interests of life, liberty, and property equal weight, as noted earlier, Justice Frankfurter and others asserted that all legislation must be judged by the same due process standard. Justices such as William O. Douglas, Frank Murphy, and Wiley Rutledge, however, argued that all constitutional rights were not equal. Embracing the premise that minority rights were absolutely essential to the democratic enterprise, these modern-day activists enthusiastically carried the implications of the argument to their natural constitutional conclusion: Since First Amendment rights and other freedoms are fundamental to the democratic process, legislation affecting their exercise is entitled to much less deference than that accorded to statutes regulating property rights and economic liberties. A democracy could still function without the vigilant protection of economic rights associated with capitalism but not without those communicative and associational freedoms that make it possible for political coalitions to form. The rights of speech, press, association, assembly, and other liberties necessary to the democratic process, they argued, constituted “preferred freedoms.”

The essential link between protecting these fundamental rights and ending the problem of permanent minorities was first alluded to by Justice Harlan Stone in his now-famous footnote 4 to an otherwise undistinguished opinion disposing of a perfectly anonymous business regulation case, United States v. Carolene Products Corp., 304 U.S. 144, 152–153, 58 S.Ct. 778, 783–784 (1938). Justice Stone mused:

> 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. * * *

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. * * *

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, * * * or national, * * * or racial minorities * * * 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. * * *
Although tentatively expressed, the connection is readily apparent. Precisely because the Court is not a majoritarian institution, it has a constitutional responsibility to carefully scrutinize majority-passed legislation that directly limits the exercise of those rights by which minorities could express their political demands. Given the social isolation and prejudice encountered by easily identifiable minorities, without the guarantee of these fundamental rights their participation in the political process would be effectively muted, and conditions of exploitation would be perpetuated.

Although judicial practitioners of strict scrutiny agree with the restraintists that, in the area of economic policy and other laws regulating nonfundamental rights, the standard of mere reasonableness is justified, legislation directly abridging liberties fundamental to a democratic system must clear a higher hurdle. While the Justices employing this mode of constitutional interpretation do not always proceed in this neat and orderly way, it may provide clarity to set out the standard they apply as the following tripartite test (although somewhat different words have been used from time to time):

1. Where legislation directly abridges a preferred freedom, the usual presumption of constitutionality is reversed; that is, the statute or other enactment is assumed to be unconstitutional, and this presumption can be overcome only when the government has successfully discharged its burden of proof.
2. The government must show that the exercise of the fundamental right in question constitutes "a clear and present danger" or advances "a compelling interest."
3. The legislation must be drawn in such a way as to present a precisely tailored response to the problem and not burden basic liberties by its overbreadth; that means, the policy adopted by the government must constitute the least restrictive alternative.

As compared with the test of reasonableness, this constitutional standard in a sense does demand that governmental policy be the best—not merely a rational—alternative. If the "best" policy is defined as that which is limited to addressing the problem while maximizing the freedom remaining, it is clear that only the "best" policy can be constitutional.

Strict scrutiny also can be contrasted with judicial self-restraint in another important sense. It is readily apparent that problems of conflict between governmental power and civil liberties cannot be resolved by somehow merely maximizing satisfaction of the competing interests. To the extent that strict scrutiny can be said to "maximize" satisfactions, it does so in a much more sophisticated way than does interest-balancing. If some rights occupy a preferred position, it stands to reason that everyone is entitled to those rights before claims to nonfundamental liberties can be granted. In any conflict, then, between persons attempting to have their claims to basic rights satisfied and other citizens seeking to have less important rights extended (for example, a property owner's right to do with his property as he wishes), the claims of the former must prevail over the claims of the latter, even if the number of individuals in the first group is significantly smaller than that in the second.

The logic of Justice Stone's Carolene Products footnote, however, carries the activists beyond the concept of preferred freedoms. The problem of permanent minorities requires more than just applying strict scrutiny to legislation directly limiting the means by which citizen demands are conveyed to policy makers; it also sometimes requires similar

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18. Early applications of strict scrutiny refer to the requirement that government demonstrate the existence of a "clear and present danger" rather than a compelling interest. That is because this mode of interpretation got its start in free speech cases during the 1940s where the battle lines were drawn between those who sought to toughen the "clear and present danger" test that had been put forward by Justices Holmes and Brandeis and those who argued that abridgments of free speech should be judged, as limitations on other rights were judged, by the test of reasonableness. See the discussion in Chapter 11, section A.
constitutional scrutiny of the outputs of the political process. All legislation creates categories according to which rights and obligations are distributed. All legislation, therefore, necessarily discriminates. Guaranteeing equal protection of the laws means only that government may not *invidiously* discriminate. This does not mean that government is forbidden to make any distinctions in the way it treats people, but it does require that categories in law not be drawn along lines of social prejudice to the detriment of “discrete and insular minorities”—to use Justice Stone’s phrase. Legal categories drawn on the basis of race or alienage, for example, are said to constitute “suspect classifications.”

The justification for strictly scrutinizing legislation that inflicts deprivations or imposes burdens on individuals on the basis of suspect classifications can be traced directly to the problem of permanent minorities. If “discrete and insular minorities” have been denied fundamental rights and are, therefore, excluded from the democratic process, the chances of their being victimized by “unfriendly” legislation are increased, if not ensured. Until obstacles to equal access have been removed from the political process, the Court owes an equal obligation to permanent minorities to carefully scrutinize legislation that imposes burdens that single them out.

In applying strict scrutiny to legislation containing a suspect classification, the judicial activists use the same three-part constitutional standard used to judge laws infringing a preferred freedom. A statute that explicitly discriminates on the basis of race, for example, is presumed to be unconstitutional. Government bears the burden of demonstrating that it has a compelling interest for distinguishing among citizens on that basis. Finally, it must also show that no other basis for categorization in the law could serve that compelling interest as effectively.

Impressive as these arguments drawn from democratic theory and practice may be, strict scrutiny exhibits several serious shortcomings. Some of these result from the democratic process-based justification offered for judicial review. In the first place, recent judicial activists such as Justices William Brennan and Thurgood Marshall, like original advocates of preferred freedoms such as Justice Douglas, labeled “fundamental” rights that have little connection to the functioning of the democratic process. When freedoms such as the right to interstate travel and the right to privacy are also acclaimed as fundamental, the class of freedoms placed in the preferred position has outstripped the democratic-process criterion. It is, therefore, incumbent upon the activists to reformulate their justification for determining which rights are fundamental and which are not. Without adequate justification, labeling some freedoms as “preferred” smells of subjectivity and arbitrariness, and the determination of which rights are in and which are out becomes rudderless.

The process-based justification of strict scrutiny rooted in democratic theory is not only insufficient, but also potentially objectionable. For example, to argue that the right to free speech depends upon the importance of speech to the democratic process appears to put the cart before the horse. Human happiness is the end, and democracy is a method for attaining that end, not vice versa. This misconception of democracy as an end in itself, rather than as a means to an end, has important consequences for the exercise of free speech and other important rights. Fundamental rights, after all, are rights possessed by individuals. Justifying a liberty in terms of its contribution to democracy implies that the extent to which it can be exercised depends upon its utility to others. Thus, the Court has said repeatedly that impermissible speech (such as “fighting words,” obscenity, and libel) is distinguishable from permissible speech because the former lacks “redeeming social importance” (Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957)). This appears to accept the proposition that, to justify its sufferance by the state, what you say must have some utility to the community. The notion that your right to speak depends on whether your neighbors find it useful is repressive in roughly the same sense that majoritarian interest-balancing is thought to be
repressive. It contradicts our belief that a free society is one where individuals are ends in
themselves and not merely means to an end. Citizens are entitled to constitutional rights for
the simple reason that they are persons, not that they are members of a social group.

Strict scrutiny also does not take account of two important practical difficulties. One of
these asks what we are to do when two fundamental liberties collide, as when someone’s
free speech conflicts with another’s right to privacy or when freedom of the press seems
incompatible with guaranteeing the fair trial of a criminal defendant. Strict scrutiny can
guide our judgment when it is a matter of governmental regulatory power versus the
exercise of civil liberties, but what are we to do when a dispute pits one preferred freedom
against another? Nor is this a difficulty peculiar to strict scrutiny; it is one that also plagues
constitutional absolutism, since the collision of two absolute rights also requires some rule
of choice—something the text of the Constitution does not provide.

Finally, there remains the fact that the Court is politically vulnerable. Repeatedly
invoking strict scrutiny will necessarily turn the Court into the representer of society’s
underdogs. This invites efforts by a majoritarian Congress to curb the Court. Even if it is
conceded that there are a number of permanent minorities, it does not follow that gathering
all of them together will produce a viable political base from which the Court can hope to
withstand the attack. The permanent minorities, after all, are “discrete and insular”
principally in relationship to white, middle-class society. Permanent minorities often share
overlapping characteristics: African-Americans and Hispanics, for example, count very
heavily among another minority, the poor. So when one combines minorities, the
increment gained by adding another group is offset by the fact that many of those
individuals have already been counted. Then, too, there is the obvious point that, even if
adding the minorities together does create a majority, they are politically disadvantaged and
powerless, which is why the judicial activists involved the Court on their behalf in the first
place. And the appearance of showing perpetual favoritism to the permanent minorities
may well jeopardize broad-based public respect for the Court as an even-handed and
principled institution. Injudicious and unrestrained applications of strict scrutiny invite
political campaigns against the Court from politicians anxious to curry favor with the
middle of American society.

The Court in American History:
Judicial Values and Constitutional Interpretation

Because the modes of constitutional interpretation can only be discerned from the opinions
the Justices write, at best they are but frameworks for the justification of decisions. Opinions,
of course, cannot explain how a decision was reached, much less account for all the factors
that influenced it, such as the interaction with other Justices, the indirect effect of public
opinion, the impact of current events, and subtle pressures indirectly exerted by the
President and members of Congress. But by far the most important factor in explaining
judicial decisions, as political science research has demonstrated over and over again, is a
judge’s political attitudes and values. This was what Charles Evans Hughes was implicitly
referring to when he asserted that “the Constitution is what the judges say it is.” The modes
of interpretation essentially embody statements about the role of a judge, but what role a
particular Justice selects depends substantially upon his attitudes and values not only with
respect to specific public policies but also certain conceptions of justice. These factors
interact to produce decisions at particular points in time, so historical context is relevant to
forming any impressions about how Justices as individuals behave and how the Court as an
institution operates.
This is not surprising, since many Justices have had previous experience in public office and it would be difficult to hold office without developing opinions on the political issues of the day. The fact that the office seeks the individual, rather than the other way around, underscores the accuracy of Hughes’ characterization. Indeed, appreciating that their appointments to the Court are a legacy that may endure for decades to come, most Presidents take care to choose judges that reflect their values. By and large, most Presidents are reasonably successful in the judicial legacy they intend to leave (and when they fail, it is most conspicuously in their first or only appointment to the Court). Because appointments to the federal judiciary are inescapably a product of politics, it would be naive indeed to expect any Justice to escape the influence of values and attitudes merely by donning a robe.

The invalidation of federal statutes by judicial review has not been a random occurrence in American history. Political forces both cause it and cure it. The negative impact of judicial review rises dramatically when the prevailing majority on the Court is of a different ideology than that controlling the Congress. In American history, this usually, but not always, occurs because there has just been a critical election that has reflected the impact of a major crisis (such as the outbreak of the Civil War or the onset of the Great Depression). In such an election—sometimes referred to as a realigning election—key groups in the electorate have shifted their political allegiance with the effect of handing the reins of government to the leaders of a new political coalition, usually the former minority party. Since members of Congress and the President are elected, the political complexion of those institutions (especially the House of Representatives) will register the change far sooner than will the Court, which lags behind by about a decade. The institutional disharmony between the political values of past and present usually provokes a Court-curbing confrontation leading to threatened or actual deployment of sanctions against the Court and, ultimately, to judicial retreat. This pattern has cycled through American history, creating several clearly recognizable Court eras.

Despite the appearance of Supreme Court Justices as being somehow above it all and the fact that the modes of interpretation deal with the Court’s activism and restraint in the abstract, the role of the Supreme Court in American history is probably best understood when the Court is seen in the context of what Samuel Lubell once called “the sun and moon theory” of American politics. Although the American party system has always been described as two-party-competitive, there is no denying that during long stretches of American history, one of the two major parties has dominated: The majority party, that is the party usually controlling the Congress and the Presidency, has been the center of the political system, setting the agenda and adopting the policies that have governed the Nation. It is within the majority party that the great issues of the day have been fought out. The minority party, occasionally electing a President (often a military hero) and sometimes controlling one house of Congress, has enjoyed only intermittent political influence. The political values that color an era of American history are painted by the majority party. The minority party, basking in the light radiated by the majority coalition, usually reflects a paler hue and normally assumes a me-too posture in campaigns, customarily arguing, not that the values and policies are wrong, but that it could do the job better. Thus, the

19. The best example is Franklin Roosevelt’s appointment of Justice William O. Douglas in 1939. Roosevelt died six years later, but Douglas served for 30 years beyond that.
20. It is reasonable to say that the Supreme Court lags a decade behind the elected branches of the government because the practical effect of giving federal judges life tenure has meant that the average Justice has served 16 years. Presidents average two appointments to the Court during a single four-year term.
Democratic Party dominated the American political system from 1801 to 1861, the Republicans from 1861 to 1933, and the Democrats again from 1933 to 1969. Since 1969, the country has been marked by a remarkable stretch of divided government, and this, like the earlier political watersheds that have marked the American party system, has had an effect on the Supreme Court as an institution and its relationships with the other branches of government.

From Jefferson to the Civil War

As explained in the background to Marbury v. Madison in Chapter 1, the election of 1800 was a watershed event. The defeat of John Adams by Thomas Jefferson converted the Federalists into a minority party, a status from which they never recovered (they were gone entirely by the early 1820s). The Democratic-Republicans under Jefferson and his successors held sway until Andrew Jackson emerged as a national political force in the mid-1820s and renamed the party Democratic to distinguish his followers from the National Republicans led by John Quincy Adams and Henry Clay. By 1840, the National Republicans were taken over by the Whigs who constituted the opposition to the majority-party Democrats until the Civil War. The era is usually broken into two separate periods, before and after the Era of Good Feelings that marked the administration of James Monroe. For purposes of discussing the Supreme Court, it makes more sense to break it into the periods of its two Chief Justices: John Marshall (1801–1835) and Roger B. Taney (1835–1864). Nevertheless, throughout the period, political control of the Presidency and both houses of Congress was nearly always in the hands of the Democratic-Republicans or the Democrats. For 52 of the 60 years between 1801 and 1861, unified government prevailed, that is the same party simultaneously controlled the Presidency, the Senate, and the House of Representatives.

Marshall and Taney were Justices with different visions of the country, largely reflecting the respective Presidents who appointed them, John Adams and Andrew Jackson. The constitutional doctrines employed by the Marshall Court23 reflected a vision of American society most famously articulated, perhaps, by Marshall's fellow Federalist, Alexander Hamilton. America, in their imagination, was to be a commercial republic with a high standard of living that resulted from the sort of economic growth produced by financial and industrial capitalism and a society whose dynamism emanated from its cities. This stood in stark contrast to Jefferson's preference for a rural society comprised mainly and, he thought, virtuously of yeoman farmers. Since the Federalists had permanently lost control of the elected branches of the federal government, advancement of the Federalist agenda fell to the Marshall Court, which devised many constitutional doctrines instrumental to furthering its vision of America.

23. Usually when the Supreme Court is referred to by its Chief Justice, this is done purely as a handy chronological cue and is not meant to connote that the particular Chief Justice exercised political control over the Court's decisions. The Marshall Court, however, was distinctive not only for its outlook on constitutional interpretation, but for the unusual persuasive power possessed by the Chief Justice himself. It was Marshall who originated the notion of an Opinion of the Court, which replaced the existing convention that each of the Justices should write separate opinions (what were called seriatim opinions; that is, opinions delivered “one after another”). Of the nearly 1,100 Opinions of the Court delivered during his 34 years as Chief Justice, Marshall wrote nearly half; during his first decade on the Court, he wrote more than four out of five. Although Federalists ceased to be appointed to the Court after 1801, Marshall converted on-coming Jeffersonian Justices to his views and maintained an intellectual hold over them until his final years. The 15 Justices who served between 1801 and 1835 cast an astonishing total of only 104 dissents; Marshall himself accounted for just eight (the fewest of all in proportion to length of service). And, for the most part, the handful of cases disposed of by seriatim opinions while Marshall was on the Court were cases in which he did not participate.
The intertwined strands in the constitutional fabric woven by the Marshall Court are each discussed elsewhere in this book. The Marshall Court did much to develop and legitimate judicial review in *Marbury v. Madison*, *Martin v. Hunter’s Lessee*, *Marshall v. Martin*, *Lessee v. Martin*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), because judges from the bygone Adams Administration were the only Federalists still left in power, and judicial review was the only political means available to achieve their policy goals. Doctrines of the Marshall Court favored the national government over the states because the national government was thought to provide greater stability and uniformity of policy than could the states, and these conditions were essential to the growth of commercial enterprise and economic development (see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1826)). The Marshall Court also vigorously enforced the Contract Clause (see Chapter 7, section A) to vindicate creditors’ rights, because investors would not put their money in business enterprises and fuel economic development if debtors could wriggle out of financial obligations. Since anti-elitist forces—politicians more sympathetic to debtor interests—were in control of many state legislatures, this only reinforced the pro-national government bias of the Marshall Court, fueled its antipathy to lenient bankruptcy laws, and led it to expand the application of the Contract Clause to prevent the states from escaping bad business deals they themselves had made with investors.

Andrew Jackson’s appointment of Roger B. Taney to succeed Marshall as Chief Justice signaled the dawn of a new era. The Taney Court tended toward a much looser view of the federal system and the Marshall Court’s nationalist tone was replaced by a greater tolerance of state interests and local control (see *Mayor of City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837)). It also permitted a greater state role in the regulation of interstate commerce (*Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852)), a view broadly reflective of the democratic values of the Jacksonian Age: a commitment to greater popular rule and a firm belief that governmental policies should serve the broader interests of the community. A loosening of the joints in the federal system was accompanied by a receptiveness to maintaining competition in a world of small business capitalism, there being no giant corporations yet. The democratic capitalist values evident in Andrew Jackson’s hostility to the National Bank, his deep distrust of the concentration of economic power in the hands of an economic elite—typified by the Bank’s president, Nicholas Biddle—and his refusal to sign off on rechartering the Bank were paralleled by the Taney Court’s decision in *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837). In clear disagreement with the defense of vested rights that Marshall would have mounted, the Taney Court ruled that, in the absence of an explicit statement, a contract would not be read so as to give a state-chartered corporation a monopoly.

The same Taney Court that tolerated a good deal of decentralization in the American political system when it came to economics also tolerated slavery. In what probably is still regarded as the most infamous decision in American history, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), the Taney Court held that slaves were not “citizens” within the meaning of the Constitution and thus could not claim any of the rights secured to citizens of the United States. Nor could the national government regulate, much less prohibit, slavery in the territories since the right to own slaves was a local property right. The *Dred Scott* decision effectively invalidated the Missouri Compromise, reopened the argument over the expansion of slavery into the territories, fueled the rise of the Republican Party, and lit the fuse that touched off the Civil War.
The Era of Republican Dominance: From the Civil War to the Great Depression

The election of Abraham Lincoln as President in the critical election of 1860 began an era of Republican dominance that lasted seven decades. Talking of this time-span as a whole conceals some real differences, however, and the period therefore is best broken in two at the mid-1890s.

What emerged from the war was a renewed sense of nationhood—“an indestructible Union of indestructible States”—rather than a confederation. Both literally and figuratively, reference to “the United States” changed from that of a plural noun to a singular one. People no longer said “the United States are”; instead they said “the United States is.” Unfortunately, during and in the immediate aftermath of the Civil War, the Supreme Court found the political going particularly tough. The time lag that so severely marks the institution had its effect: Holdover Democratic Justices, in combination with some of Lincoln’s moderate appointees, locked horns with the Radical Republicans in Congress. The Radicals were bent on imposing punitive policies on the South and were deaf to many claims about the violation of civil liberties during the war and after. The consequence was a full-blown version of the Court-curbing phenomenon in which Congress sawed off part of the Court’s appellate jurisdiction. The wrath of the Radicals was even more fiercely aimed at Lincoln’s successor, Andrew Johnson. Johnson was impeached for violating the Tenure of Office Act (which required Senate approval of the President’s decision to fire a department head, legislation the Court gratuitously invalidated in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21 (1926)), but the President survived removal from office by a one-vote margin in the Senate. Johnson, never the diplomat and always the moderate, was also stripped of the power to make any appointments to the Court when Congress legislated a reduction in the Court’s size from 10 to eight. This meant that the next two vacancies on the Court would go unfilled. Moderation, although in short supply on Capitol Hill, was much more abundant among the electorate, who showed this at the polls by making control of Congress really competitive.

What emerged in the 1870s and 1880s was a renewed Whig version of Republicanism that promoted expansion of the country across the continent by policies that encouraged settlement and economic development and emphasized internal improvements. Governmental policies, particularly at the state level, constrained the greedier and more destructive aspects of capitalism. The Granger Laws, for example, which sought to prevent gouging by grain elevator operators and other businessmen farmers dealt with, were easily sustained (see Munn v. Illinois, 94 U.S. (4 Otto) 113, 24 L.Ed. 77 (1877); and see also The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873)).

The regulation of business, which the Court generally viewed with constitutional approval before the 1890s, provoked increasingly fierce judicial opposition after that because the attitudes and values of a majority of Supreme Court Justices shifted substantially to the political right. In what Mark Twain dubbed “The Gilded Age,” the turn-of-the-century Court came to be dominated by corporation lawyers partial to the interests of business and the wealthy.24 The result was a Court that used judicial review to impose on the country an approach known as Social Darwinism.25 As Chapter 7, section B explains, this vision of society, characterized by such notions as “the survival of the fittest,” embraced the principle of political economy known as laissez-faire capitalism according to

See also Arthur S. Miller, The Supreme Court and American Capitalism (1968).
which the determination of most matters in life was consigned to the free market. The role
of government was strictly limited to maintaining order, protecting private property, and
preserving the sanctity of economic rights that made possible the accumulation of wealth.

Wielding the club of judicial review wrapped in doctrines such as dual federalism and the
“liberty of contract,” the Court between 1895 and 1936 repelled efforts by Congress and
state legislatures to legalize the right to join unions, require safe conditions on the job,
establish a minimum wage, limit the maximum hours employees could be made to work,
and end child labor. It took the adoption of the Sixteenth Amendment in 1913 to trump
the Court’s decision in Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912
(1895), striking down the most modest of graduated income taxes (2% on all income in
excess of $4,000 a year). In judging regulatory policies adopted by the elected branches of
government, the Court elevated economic liberties and property rights to a forbidding
constitutional plane, demanding that government clearly demonstrate some special interest
to permit their restriction. Blind to the economic exploitation of working people whose
labor made possible the economic development of the country, the Court also turned a deaf
ear both to the ever-increasing segregation of African-Americans and the political,
economic, and social subordination of women.

By the 1930s, Professor (later Judge) Henry Edgerton could write with discomforting
accuracy that the role of the Supreme Court in American history had been marked by an
almost single-minded devotion to defending the interests of the powerful and wealthy.
Speaking of the acts of Congress that the Court had declared unconstitutional up to that
point, Edgerton said: “There is not a case in the entire series which protected the ‘civil
liberties’ of freedom of speech, press, and assembly; * * * not one that protected the right to
vote; * * * not one which protected the vital interests of the working majority of the
population in organizing or in wages * * *.” On the contrary, he found the Court’s record
littered with “the Dred Scott case, which helped to entrench slavery, * * * cases which
protected the oppression of Negroes; the employers and workmen’s compensation cases,
which protected the hiring of women and children at starvation wages; the income tax case,
which prevented the shifting of tax burdens from the poor to the rich; and * * * many * * *
[other] instances in which the Court’s review * * * [did] harm to common men.”

Democratic Dominance Returns: From the New Deal to the 1950s
The prolonged and widespread misery of the Great Depression brought a keen apprecia-
tion that legal doctrines could not long survive when they squarely contradicted real-world facts.
Among the many lessons taught by the economic hardship of the 1930s were the reality of
interdependence among the sectors of the modern industrial economy and the error of
leaving people’s welfare exclusively to be determined by the free market. With a quarter of
the workforce unemployed by 1934, President Franklin Roosevelt presented an historic
agenda of recovery and reform policies that carved out for government a new role of
stewardship over the economy. In the realigning election of 1932, the American electorate
handed political control to the Democratic Party. Four years later, by a huge popular
margin, the public registered its emphatic approval of FDR’s policies, which were based on
the acceptance of positive government, that is the concept that government should do for
the people what they could not do for themselves or could not do as well. As in previous
instances where the abrupt coming to power of a new political coalition set the elected
branches at loggerheads with the judiciary, so the New Deal forces controlling the
Presidency and the Congress faced a head-on collision with the Court caught in a

(1937).
time-warp. After the Old Court repeatedly invoked constitutional doctrines now thoroughly out of popular favor to stymie the policies favored by FDR and his political allies, the President launched his controversial campaign to “pack the Court.” Although Roosevelt was unsuccessful in actually adding more Justices, his effort ultimately succeeded when the Court conducted one of its face-saving retreats (see Chapter 5, section B). As more and more vacancies occurred and the President filled them with appointees who shared his values, the Court fell solidly in line behind his economic policies and those of future Democratic administrations.

This “constitutional revolution” put an end to several things: the Court’s role as special protector of the wealthy and powerful, the Court’s use of constitutional doctrines to impose on the country its preferred view of economic policy, and the Justices’ proclivity for justifying decisions in the language of constitutional absolutism (or “mechanical jurisprudence”). When it came to reviewing statutes imposing economic regulation, the Court saw the issues through the lens of judicial self-restraint. But the constitutional revolution of the 1930s also left a legacy of disagreement: Were the Justices bound to apply judicial self-restraint to all legislation, regardless of the interest affected? Was the Court required to apply the same test of constitutionality in judging whether civil liberties were infringed as when there were claims that economic rights were violated? Roosevelt’s appointees (which by 1943 constituted eight of the nine Justices) split (evenly) over the answer.

Since the early 1940s, this controversy has been at the core of the Court’s politics. In terms of the modes of constitutional interpretation, it is reflected in the great debate among the Justices over interest-balancing, on the one hand, and strict scrutiny, on the other. At their cores, these frameworks of judicial review embrace very different concepts of justice and therefore reflect different political values and attitudes about civil rights and liberties. Generally speaking, fairly cohesive control over the Court’s constitutional decisions by advocates of strict scrutiny has been concentrated in two modern periods: 1943–1949, during which the Court did much to lay the foundation for the protection of First Amendment rights; and the years of the Warren Court (1953–1969), which saw the flowering of strict scrutiny in the protection of civil rights and liberties, both generally and in reinvigorating the meaning of “equal protection of the laws.”

The Warren Court

The vision of American society that animated most of the Warren Court’s constitutional decisions had at its center a firm belief that individuals were ends in themselves, not simply means to an end, and therefore were morally and legally entitled to equal dignity and respect. The specific conceptions of constitutional principles that the Warren Court articulated strongly reflected the values of libertarianism and egalitarianism. For the first time in American history, the Court came to see itself as the defender of out-groups in society. The means for the achievement of this liberal vision was the application of strict scrutiny to laws that directly infringed fundamental rights, or unequally distributed fundamental rights, or invidiously discriminated among citizens on the basis of suspect classifications (characteristics such as race over which people had no control, which were a basis for stereotyping, and which historically made individuals targets of prejudice). A Court committed to the protection of fundamental rights and equal treatment necessarily assumes the role of defending the powerless and unpopular because, although all citizens are equally entitled to what the law guarantees, the exercise of constitutional rights means more to powerless individuals. Since people with unpopular views often must resort to confrontational means to voice their message, this makes it more likely they will lock horns with the police or other officials, and therefore that a legal controversy will arise. If the change
in constitutional doctrines in the 1930s from absolutism to interest-balancing amounted to a "constitutional revolution," the Warren Court's shift to regularly applying strict scrutiny in civil rights and liberties cases created a "second constitutional revolution" in the 1950s and 1960s.27

There were flickers of this vision during the early Warren Court years (1954–1957), especially in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), which abandoned the "separate but equal" doctrine that perpetuated racial segregation, and other decisions in which the Court defended the First Amendment rights of individuals targeted in anti-Communist "witch hunts" of the early 1950s. These rulings provoked an unsuccessful Court-curbing campaign in 1958 by certain elements in Congress (see Chapter 3, section C) and a brief intermission in the Court's judicial activism resulted. But with the retirement of Justice Frankfurter in 1962, the Warren Court's commitment to its role as a defender of politically powerless out-groups in American society resumed. Among the many facets of the Warren Court's constitutional revolution were the vigorous expansion of First Amendment rights, the application of virtually all provisions of the Bill of Rights against state infringement (see Chapter 8, section A), the reapportionment revolution (see Chapter 14, section D), the recognition of the constitutional right of privacy (Chapter 10), and the extensive development of Fourth, Fifth, and Sixth Amendment rights, including the application of adversary system protections to the pretrial stage of the criminal process (see Chapters 8 and 9).

The Justices in the Era of Divided Government:
The Burger and Rehnquist Courts

The Warren Court era ended with the retirement of the Chief Justice and the resignation of Justice Fortas under politically charged circumstances.28 This spelled substantial change for the Court because the new appointments would come from a President with political values noticeably to the right of the out-going Johnson Administration that had appointed liberal Justices such as Abe Fortas and Thurgood Marshall. Moreover, as presidential candidate in the 1968 election, Richard Nixon had made an issue of the Warren Court's criminal justice decisions, which he characterized as "weakening the peace forces as against the criminal forces in our society." As a self-described "judicial conservative," Nixon pledged to nominate individuals to the Court who would "interpret the Constitution, and not * * * [go] outside the Constitution." Nixon appealed during both his 1968 and 1972 presidential campaigns to "Middle America"—that broad segment of average men and women—unblack, unpoor, and unyoung—* * * [who were] harassed by minority and youth protest, bewildered by assassinations, frustrated by an aimless war, victimized by mounting crime, and threatened by wide-spread rioting, * * * who thought society was coming apart at its seams and * * * felt powerless to do anything about it."29 The election of 1968 was unusual in American history because—unlike the realigning elections of 1800, 1860, 1932, and 1936—it brought an era of party dominance to an end but did not replace it with unified control by a new political coalition. In stark contrast to previous periods of American history, nearly two-thirds of the time between 1969 and 2006, political control of the national government was divided between the parties (with one party controlling the Presidency but not Congress or vice versa, or one party controlling the Presidency and one house of Congress but not the

other). Some experts on political parties have called this “dealignment,” but whatever the term used, the primary features of this era of divided government are clearly evident: polarized political party leaders frequently using harsh rhetoric sitting atop parties that are narrowly based; a disaffected electorate that feels alienated from both parties and turns out to vote less and less; a growth in third parties, political independents, and ticket-splitting; government that never starts and elections that never end; politicians preoccupied with symbolic actions rather than solving problems; a thoroughly personalized Presidency less attached than ever to the party in Congress; and televised politics of confrontation instead of informal negotiation and workable compromise. In the case of the Court, where the margin of decision has been close and the stakes high, this was reflected in a long line of bruising, demeaning, and embittering judicial confirmation battles (beginning with the Fortas Affair in 1968 and extending through the rejection of two Nixon nominees to the Court in the early 1970s, the failure to approve the nomination of Robert Bork in 1986, and the paper-thin 52–48 Senate vote to confirm Justice Clarence Thomas in 1990). In the Court’s performance, it was reflected in the proliferation of opinions that run longer and reflect less agreement than ever among the Justices. Polarization in the political system has been matched by polarization on the Court, where like-minded Justices at the extremes vote together more and more and move further and further away from those at the other end.

Beginning with Nixon’s appointment of Warren Burger to succeed Earl Warren as Chief Justice in 1969, every Supreme Court Justice but two (Justices Ginsburg and Breyer) has been named by a Republican President. In 1986, Burger was persuaded to retire and was replaced by President Reagan’s elevation of William Rehnquist to the post (he had been appointed an Associate Justice by Nixon in 1972). The themes that dominated the constitutional rulings of the Burger and Rehnquist Courts were very similar, quite definitely to the right of the Warren Court, and the Justices’ decisions grew more and more conservative. Although landmark decisions of the Warren Court (on school desegregation, reapportionment, Miranda rights, privacy, and freedoms of speech, press and association) were not overturned, they were not expanded. Mostly, they were trimmed, sometimes severely. Because of the preeminence of divided government and an apparent interest of Justices in remaining on the Court as long as humanly possible, nominees did not stream on to the Court in sufficient numbers to jettison strict scrutiny in favor of across-the-board interest-balancing in civil liberties cases. Indeed, despite repeated efforts by Republican Presidents to appoint Justices who would overturn Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, the 1973 Burger Court decision constitutionalizing a woman’s right to choice on abortion, the decision stands, although it has been pared (see Chapter 10). The result has been a redirecting of the Court’s constitutional jurisprudence toward the interests of Middle America and away from the interests of women and minorities. Evidence of this constitutional compromise or moderation is particularly evident in the emergence of what has come to be known as intermediate or middle-tier scrutiny (see Chapter 14, section E), an approach that might be described as half-way between strict scrutiny and interest-balancing. The Burger and Rehnquist Courts applied this constitutional approach to judge statutes distinguishing between individuals on the basis of gender and illegitimacy (Chapter 14, section E) and laws regulating symbolic speech (Chapter 11, section C) and advertising (Chapter 11, section E).

The Burger and Rehnquist Courts increasingly adopted a “dual federalist” view of the federal system, buttressing the decision-making independence of the states against regulatory policies

Notably, Justices on the Rehnquist Court for the most part sharpened the teeth of the Takings Clause of the Fifth Amendment by strengthening or expanding the rights of property owners to just compensation in the face of zoning regulation by the states and municipalities (see Chapter 7, section C). The Burger and Rehnquist Courts also showed far greater sensitivity to the interests of corporations and property-owners than could have been imagined by the Warren Court, especially when First Amendment issues were raised: striking down substantial campaign finance regulation on the grounds that the expenditure of money is a form of expression (Chapter 11, section D), protecting the free speech rights of corporations (Chapter 11, section D), recognizing a constitutionally protected right of commercial speech (advertising) (Chapter 11, section E), and negating any free speech right to picket on private property, such as shopping malls (Chapter 11, section B). All of this is hardly surprising, since the interests served by these constitutional developments are those of business and the wealthy, groups usually associated with the Republican Party, which has controlled the White House (and therefore nominations to the Court) for most of the last four decades. Whether these trends of the recent past deepen or are arrested under Rehnquist’s successor, Chief Justice John Roberts, depends on whether the pattern of divided government confirmed by the 2006 election continues or whether, because of the Iraq war and the many scandals that are the legacy of George W. Bush’s administration, a dramatic realignment of the political system may be underway.

Speaking Up and Speaking More

Highlighting political trends in the Court’s constitutional decisions of the past necessarily supposes clarity in the Court’s rulings. Regardless of the era, the Court speaks most clearly, and therefore most effectively, when it speaks with a single voice—a principle that Chief Justice Marshall took very much to heart. Even as late as the 1920s, Chief Justice Taft admonished his colleagues to abide by a rule of “No dissent unless absolutely necessary.”

Beginning, however, with the escalating disagreement among Franklin Roosevelt’s appointees over which mode of interpretation should be applied in judging the constitutionality of statutes challenged as violating a “preferred freedom,” the Justices have foregone an institutionally-oriented perspective for one that has been increasingly individualistic. Rather than minimizing the prospect of many voices speaking, the Justices have come to regard it as more important to get on the record with their own views, or to address an audience beyond the conference room, or to rebut every opposing point of view. As the graph on p. 1361 shows, conflict on the Court, as measured by the level of dissent, escalated rapidly during the 1940s and remains high. Except for a dozen of the last 80 Terms, the level of dissent in constitutional cases has been higher than statutory cases and, over the last decade, has run 15–20 percentage points higher.

The readiness to dissent has been accompanied by a shrinking output of cases, greater fragmentation among the Justices, and more frequent and longer opinions. Anyone who reads the Justices’ opinions unedited cannot fail to notice that they frequently contain long, discursive paragraphs and footnotes that have the feel of scoring debater’s points in rebutting and often re-rebutting the arguments of fellow Justices. In short, members of the Court today decide less, speak more often, and take longer to say it than at anytime in history. The table on p. 1362 presents several measures that support these conclusions. Across the 80 Terms since the Court acquired practical control over its docket, the trend is unmistakable: With each passing Court, the Justices have averaged more opinions per constitutional case, more pages per case in the United States Reports, and—perhaps most alarmingly—more cases decided by plurality opinions. It is likely, of course, that some of the nearly four-fold increase in the average number of pages taken to dispose of a single
constitutional case is explained by the increasing complexity of legal questions litigated in a mature, industrially-developed nation that recognizes a larger number of individual rights than was true in Taft’s day. A society whose parts have become more and more interdependent, one that has recognized more and more freedoms, and therefore one where considerable fine-tuning is required to harmonize conflicting legal interests would logically require judicial opinions that explain more. But however true this may be, the simultaneous increase in all the measures presented in the table above more clearly suggests that the Justices, influenced by sharply different values, have become much more outspoken. As with political elites in America, they have become more and more polarized. The tenor of constitutional disputes—like the rhetoric of political disputes in the country generally—has gotten sharper. It is a sobering observation, for example, that on average today more than four constitutional cases each Term will be resolved without an Opinion of the Court, that is to say by a plurality opinion. A plurality opinion is one written by a Justice in the majority that announces the judgment of the Court but whose reasoning is shared by only some, not all, of them. Because a majority of Justices can’t agree on the reasoning, a plurality opinion cannot bind the Court. Such a thing was unheard of in Taft’s day. But during the 1970, 1975, and 1988 Terms, the number of plurality opinions climbed into double digits—accounting at high tide for nearly 30% of all the Court’s nonunanimous constitutional decisions.

In sum, the trends revealed in the table above present the unsettling prospect of the Justices reverting to something like the delivery of seriatim opinions. It was this practice of each Justice speaking individually that led Marshall to create the Opinion of the Court in the first place. As he well understood, the wagging of many tongues weakens the Court politically and sows confusion about what in fact it has decided. If what has gone before is any guide as to what is yet to come, betting that these trends will be arrested, now that a new Chief Justice has taken the helm, is a longshot.

The Court and Political Accountability

This brief tour through the eras of American political history returns us to the central problem that is said to plague constitutional interpretation: the undemocratic nature of the
Supreme Court’s role as the ultimate interpreter of the Constitution. But in this there may be less than first meets the eye. In fact, the dilemma posed at the beginning of this chapter is an embarrassment only when it comes to the justification of judicial review. However, when it comes to explaining the Court’s role in the political system, it is essentially a false dilemma. The real issue is not whether the Supreme Court is undemocratic, but for how long it is undemocratic (if indeed it is undemocratic at all, since that depends on what is meant by democratic).

To be sure, as this historical overview of the Court has shown, there have been critical points in American history where the time lag that inheres in the Court has put it politically at odds with the elected branches. But given the many weapons in Congress’s arsenal to bring the Court to heel, the fact that no one—not even Supreme Court Justices—can live forever, and the inevitability that both the President and the Senate will take into account the political attitudes of any judicial nominee, it is only a matter of time before the Court will fall in line with the popularly elected institutions of the government. Given these limitations on the duration of any disagreement between the Court and Congress, the reality would appear to be a far cry from depicting the Court as a loose cannon, laying down barrage after constitutional barrage, forever staving off the enactment of policies the American public favors. However much constitutional absolutists—such as Justice Black—may have decried it, the political reality is that the rights enunciated by the Supreme Court in the long run can never be other than what the rest of the political system will permit. Checks and balances see to that. The long and short of it, therefore, is that constitutional rights can never have an existence that is independent of politics. At worst, the exercise of judicial review postpones the inevitable.

As Gerald Rosenberg has argued, “U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts.” To sum it up, “A court’s contribution is akin to officially recognizing the evolving state of affairs, more like the cutting of a ribbon on a new project than its construction.”

This book is organized around the concepts and doctrines of American constitutional law instead of a chronological narrative because that is what makes the study of law different from the study of history. That the chapters do not continually repeat the central truth that the Court’s work product is largely determined by the political values and attitudes of its members, does not diminish the message that a change in the composition of the Court is usually the best clue to why judicial doctrines change. An understanding of constitutional law more often requires awareness of political facts than it does knowledge of abstractions. Nearly a century and a quarter ago, then-to-be Supreme Court Justice Oliver Wendell Holmes, Jr., wrote:

31. Political science research has not been able to demonstrate much of a relationship in general between how judges decide cases and the method (election vs. appointment) by which judges are selected. See Craig Ducat, Mikel Wyckoff, and Victor Flango, “State Judges and Federal Constitutional Rights,” 4 Research in Law and Policy Studies 155 (1995); Victor Eugene Flango and Craig R. Ducat, “What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort,” 5 The Justice System Journal 25 (1979); Philip L. Dubois, From Bench to Ballot: Judicial Elections and the Quest for Accountability (1980). But there is evidence that having to face the voters in the near future does affect a judge’s willingness to uphold imposition of the death penalty. See Melinda G. Hall, “Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study,” 49 Journal of Politics 1117 (1987). Judicial independence is less likely to provide an across-the-board guarantee of constitutional rights than it is to usefully deflect the impact of the public’s emotional reaction in the decision of individual cases.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. In order to show what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. Although he was writing about the evolution of common law doctrines, Holmes could just as easily have been writing about American constitutional law.

APPENDIX A

TIME CHART OF THE
U.S. SUPREME COURT

The following table is designed to aid the user in identifying the composition of the Court at any given time in American history. Each listing is headed by the Chief Justice, whose name is italicized. Associate Justices are listed following the Chief Justice in order of seniority. In addition to dates of appointment, the table provides information on political party affiliation. Following each Justice is a symbol representing his party affiliation at the time of appointment:

- F = Federalist
- DR = Democratic-Republican
- D = Democrat
- W = Whig
- R = Republican
- I = Independent

This chart will aid you in accounting for all of the votes cast in any of the major decisions included in this casebook. In order to identify how each Justice voted in a given case, find the listing of the Court’s membership for the year in which the case was decided. The process of identifying the votes then proceeds by elimination: Since all dissenting votes have been noted as well as any nonparticipations, all of the remaining members of the Court can be counted as voting to join the judgment of the Court, although since all concurring opinions have not been included or noted throughout the casebook, all of the remaining Justices may not necessarily have also joined the Opinion of the Court.

<table>
<thead>
<tr>
<th>Year</th>
<th>Chief Justice</th>
<th>Justice 1</th>
<th>Justice 2</th>
<th>Justice 3</th>
<th>Justice 4</th>
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<td>J. Rutledge (F)</td>
<td>Cushing (F)</td>
<td>Wilson (F)</td>
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<td>1790-91</td>
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<td>Wilson (F)</td>
<td>Blair (F)</td>
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1. Rutledge was a recess appointment; his nomination was rejected by the Senate after the 1795 Term.
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<th>Third Justice (F)</th>
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<td>Story (DR)</td>
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<td>Story (DR)</td>
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</tr>
</tbody>
</table>

2. After 1853–54, Justice McLean identified with the Republican party. Although doubtless it was the case that he came to find far greater ideological compatibility with the Republican party, especially given his pronounced antislavery views, it was equally true that he possessed an overwhelming ambition to be President. Although appointed to the Court when he was a Democrat, his four presidential candidacies demonstrated a remarkable freedom from the encumbrance of party loyalty. In his announced tries for a presidential nomination, McLean was respectively an Anti-Mason (1832), an Independent (1836), a Whig and Free Soiler (1852), and a Republican (1856).
<table>
<thead>
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3. Upon the deaths of Catron in 1865 and Wayne in 1867, their positions were abolished according to a congressional act of 1866. The Court's membership was reduced to eight until a new position was created by Congress in 1869. The new seat has generally been regarded as a re-creation of Wayne's seat.
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**APPENDIX A**  
A Time Chart of the U.S. Supreme Court
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### Appendix B

**Biographical Chart of Supreme Court Justices Since 1900**

The following chart summarizes in easy-to-read form certain basic biographical information about past and present members of the Supreme Court. Chief Justices are identified by an asterisk. Attendance at law school is noted only for those Justices who graduated from a program of formal study. The numbers in parentheses following each entry regarding prior experience show the approximate number of years spent. Membership in the U.S. House of Representatives or Senate is indicated by “House” or “Senate”; membership in the upper and/or lower house of a state legislature is denoted simply by “state legis.” Although several Justices, including John Jay, James Byrnes, and Arthur Goldberg, continued their careers of public service after resigning, information on this chart is restricted to that occurring before appointment to the Court. Four Presidents made no appointments to the Court and are, therefore, not included on this chart: William Henry Harrison (March–April 1841); Zachary Taylor (1849–1850); Andrew Johnson (1865–1869); and Jimmy Carter (1977–1981).

While the entries for each Justice are self-explanatory, in the aggregate the data yield several general observations. First, a significant majority of Justices have had some experience in public life before coming to the Court, which suggests that they have had more than a nodding acquaintance with the political process and belies the icy remoteness we frequently attribute to judges. Second, Presidents overwhelmingly appoint Justices of their own political party, since they want to leave their mark on the political complexion of the Court, and—some notable exceptions to the contrary notwithstanding—they usually succeed. The impact, in fact, is sometimes still felt decades after a President has left office.

Third, the formal study of law—following a prescribed program of study at a law school resulting in the conferral of a law degree—is a comparatively modern route of entry into the legal profession. Before well into the twentieth century, those lawyers who became Justices, like the vast majority of their attorney-colleagues, got into the profession by what was called “reading the law,” that is, by studying law books and clerking for a practicing attorney who supervised their on-the-job training to a point where the young aspiring lawyers could pass the bar exam and were thus entitled to practice on their own. Indeed, of the 58 Supreme

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Court Justices whose appointments preceded those listed in this biographical chart, only Justice George Shiras (1892–1903) had a law degree (Yale). Robert H. Jackson, the last Justice who did not have a law degree, left the Court in 1954. The lack of a law degree did not keep him from becoming one of the most skilled and effective advocates to argue cases before the Court and one of its most gifted and eloquent Justices when he ascended to the Bench. Even more remarkably, Justice Jackson did not have a college education either. All of the Justices, of course, have been lawyers, but the Constitution does not require it.

Fourth and finally, there is absolutely no correlation between prior experience as a judge and “greatness” as a Justice. Oliver Wendell Holmes, Jr. and Benjamin Cardozo together spanned nearly forty years of prior judicial experience; the cumulative total for John Marshall, Joseph Story, Louis Brandeis, Hugo Black, Felix Frankfurter, and William J. Brennan, Jr. was eight and a half years (Brennan served for seven years on the New Jersey Supreme Court and Black was a city judge for a year and a half). All of these men, however, are widely acclaimed as among the very best to have graced the Court.

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<td>1841–1935</td>
<td>Harvard</td>
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<td>William R. Day</td>
<td>1903–1922</td>
<td>1849–1923</td>
<td>Ohio</td>
<td></td>
<td>Local judge (4); Asst. Sec’y of State (1); Sec’y of State (1/2); Fed. judge (4)</td>
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<td>1906–1910</td>
<td>1853–1917</td>
<td>Mass.</td>
<td></td>
<td>City atty. (2); Dist. atty. (5); House (7); Sec’y of the Navy (2); U.S. Att’y Gen. (1 1/2)</td>
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<td>Horace H. Lurton</td>
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<td>*Earl Warren</td>
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APPENDIX C

BIOGRAPHIES OF THE CURRENT JUSTICES

Following are brief biographical sketches of the current Justices of the U.S. Supreme Court. For more biographical information about them, see the following websites: http://www.oyez.org/courts/roberts/robt2 and http://www.supremecourtus.gov. In the following biographies, Left describes a judicial voting record generally favoring government over business in economic regulation cases and the individual over government in civil rights and liberties cases; Right describes a judicial voting record generally favoring business over government in economic regulation cases and government over the individual in civil rights and liberties cases.

CHIEF JUSTICE

John G. Roberts, Jr.


ASSOCIATE JUSTICES

John Paul Stevens

Antonin Scalia


Anthony M. Kennedy


David H. Souter


Clarence Thomas


Ruth Bader Ginsburg

Stephen G. Breyer

Samuel A. Alito, Jr.
APPENDIX D

THE CONSTITUTION OF THE UNITED STATES

PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof; for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the Second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concur rence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace,
be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and Post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
[13] To provide and maintain a Navy;
[14] To make Rules for the Government and Regulation of the land and naval Forces;
[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.
[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
[3] No Bill of Attainder or ex post facto Law shall be passed.
[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.
[5] No Tax or Duty shall be laid on Articles exported from any State.
[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.
[7] No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.
[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congrесс, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
[2] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.
ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in chusing the President, the Votes shall be taken by States the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at Stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the
militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

3. 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; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. 1. Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort.
No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. [2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

**ARTICLE VII**

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

**ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.**

**AMENDMENT I**—[1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT II**—[1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**AMENDMENT III**—[1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**AMENDMENT IV**—[1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V**—[1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI**—[1791]

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**AMENDMENT VII**—[1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States.
States, than according to the rules of the common law.

AMENDMENT VIII—[1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX—[1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X—[1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI—[1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII—[1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate:—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted:—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII—[1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.
AMENDMENT XIV—[1868]

Section 1. 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 the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

AMENDMENT XV—[1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI—[1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII—[1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall
issue writs of election to fill such vacancies: 
Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

**AMENDMENT XVIII—[1919]**

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**AMENDMENT XIX—[1920]**

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XX—[1933]**

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If the President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

**AMENDMENT XXI—[1933]**

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**Amendment XXII—[1951]**

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

**Amendment XXIII—[1961]**

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

**Amendment XXIV—[1964]**

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States, or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

**Amendment XXV—[1967]**

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of
such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.

Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI—[1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII—[1992] *

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

*Authored by James Madison, this was the second of 12 proposed constitutional amendments approved by Congress and sent to the states for ratification on September 25, 1789. Ten of those were approved by the required three-fourths of the states by 1791 and became the Bill of Rights. Nearly 203 years elapsed between the date this amendment was proposed and Michigan's approval of it on May 7, 1992, making it the 38th state to ratify. New Jersey followed suit later that day. Unlike the customary practice with amendments proposed in the twentieth century, this amendment contained no deadline for ratification. Six states ratified the amendment in the eighteenth century, one in the nineteenth, and the remaining states did so between 1978 and May 1992.

Constitutionally speaking, it is an open question whether ratification so long delayed is still valid. Nonetheless, the Archivist of the United States has certified the amendment as adopted. Although anyone whose salary was affected by the amendment would have the right to challenge its constitutionality, the Supreme Court in Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972 (1939), held that the question of timeliness in the ratification of proposed amendments to the Constitution presented a political question and was thus a matter for Congress to decide. Coleman involved a challenge to action taken by the Kansas legislature in 1937 approving the proposed Child Labor Amendment. The disputed close vote by the Kansas Senate, followed by the concurrence of the Kansas House, came 12 years after the state's legislature had initially rejected the amendment. The proposed Child Labor Amendment likewise contained no ratification deadline.
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According to an old saying, a lawyer is not necessarily someone who knows the law, but someone who knows where to find it. Although lawyers have been meticulous and thorough in indexing and cross-referencing the law so that information can be retrieved efficiently—even before the advent of the computer age—to someone unfamiliar with these resources, finding the law can be “a puzzlement.” The aim of this essay is to introduce you to the sorts of legal resources you are most likely to need, short of a legal research course in law school. This brief introduction to legal resources is divided, logically and for the sake of clarity, into six parts: law reports, statutes, index and search books, citation books, miscellaneous, and electronic materials.

Abbreviations used in the citation of various sources appear in parentheses below; typically, in citing a source the abbreviated series title is preceded by the volume number and followed by the page number on which the item begins: for example, The War Powers Resolution, 87 Stat. 555; Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 288 (2000); Coalition for Economic Equity v. Wilson, 946 F.Supp. 1480 (N.D.Cal. 1996), order vacated, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963, 118 S.Ct. 397 (1997); Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). Sometimes, opinions in cases have not yet been published in a printed volume of court reports and are indicated by a citation to an electronic source, such as WESTLAW; for example: In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 2002 WL 1949263 (F.I.S.Ct.). Citations to federal appellate and district court decisions, and to state court decisions as well, also identify the jurisdiction of the court deciding the case.

Law Reports

Law reports contain the text of judicial opinions in cases, and such opinions are published roughly in the order they are delivered, which is to say chronologically. Since the United States has a federal system of government, cases decided by federal courts and those decided by state courts are reported separately.

As noted in the footnote in Chapter 1 at pp. 4–5, cases decided by the U.S. Supreme Court are reported in three different series of reports, although the text of the opinions is

### Exhibit E.1 The National Reporter System

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<th>REGIONAL REPORTERS</th>
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<td>Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, and District of Columbia Court of Appeals</td>
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<td>California Reporter</td>
<td>1960</td>
<td>All reported California opinions</td>
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<td>New York Supplement</td>
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<td>Federal Supplement</td>
<td>1932</td>
<td>U.S. Court of Claims from 1912 to 1960; U.S. District Courts since 1912; U.S. Customs Court from 1956 to 1980; Court of International Trade from 1980; Judicial Panel on Multidistrict Litigation from 1982; Special Court, Regional Railroad Reorganization Act from 1973</td>
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<td>Supreme Court Reporter</td>
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<td>U.S. Supreme Court beginning with the October term of 1882</td>
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<td>Military Justice Reporter</td>
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<td>U.S. Court of Military Appeals and Courts of Military Review for the Army, Navy, Air Force, and Coast Guard</td>
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<tr>
<td>United States Claims Court Reporter</td>
<td>1982</td>
<td>U.S. Claims Court decisions beginning October 1982</td>
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Although some states publish official reports of the decisions of their state supreme courts, many do not, and even fewer officially report the text of decisions by intermediate state appellate and trial courts. For that reason, the most complete and universally available source for cases decided by state courts is the particular unit of the National Reporter System that covers decisions of the state in which you are interested. The apportionment of the country into various regional reporters, containing the decisions of state courts of last resort, intermediate courts, and some trial courts, is also presented in the chart and on the map in Exhibit E.2. All units of the National Reporter System, federal and state, are kept current with the paperback publication of “advance sheets” every week or two containing the latest decisions. After a few months, the cases in accumulated advance sheets join the pertinent unit of the National Reporter System as hardback volumes.

The most current and up-to-date reporting of judicial decisions is available through several loose-leaf systems. Decisions of the U.S. Supreme Court are most quickly available in United States Law Week, usually within a couple days of delivery of an opinion. Use of Law Week is invaluable when time is of the essence and you do not want to wait the several weeks it takes for the opinions in a case to be published in the advance sheets. Besides publishing the text of the most recent Supreme Court opinions, Law Week also lists and describes all of the cases on the Court’s current docket and monitors their status, and other sections summarize the latest noteworthy lower federal court and state court decisions. Other loose-leaf systems, such as the Criminal Law Reporter and the Environmental Law Reporter, focus on the announcement of decisions—federal and state—in specialized areas of law.
STATUTES

Law reports contain only judge-made law. To find law made by a legislative body, one must look elsewhere. Legislation passed by Congress in the chronological order of its enactment is published in United States Statutes at Large (Stat.). Between the time that Congress enacts a law and the time that the text of the law appears in the Statutes, the law is available in loose form, known as slip laws. Because organizing statutory law by subject is a much more helpful and efficient way to facilitate its retrieval, the text of the statutes passed by Congress has been reorganized into the United States Code (U.S.C.), which arranges statutory provisions by subject matter and then alphabetizes the subjects into various numbered titles and sections. More helpful still is the United States Code Annotated (U.S.C.A.), which maintains the organization of the U.S.C. and adds to it paragraph-long summaries of judicial decisions (annotations) interpreting every provision of the Code. Each annotation concludes with a complete citation to the case interpreting a given statutory provision so such cases can easily be found. The U.S.C.A. is kept up to date by a cumulative supplement or pocket-part inserted in the back of each volume every year. Several volumes at the end of the U.S.C.A. are devoted to a very thorough index of topics. Citations to the U.S.C.A. contain the title number preceding U.S.C.A. and a section number (§) following it. If you want to know not just what Congress has enacted, but also how courts have construed what Congress has legislated, you should use the U.S.C.A. Statutory materials for each state are available in similar formats.

INDEX AND SEARCH BOOKS

Several general reference works, not limited to the law of a particular jurisdiction, are also helpful when what is needed is an understanding of some legal concept or the law on some general topic. Two major legal encyclopedias are available, Corpus Juris Secundum (C.J.S.) and American Jurisprudence 2d. These provide complete, integrated summaries of law on subjects arranged alphabetically and footnoted with extensive case citations. Subjects are indexed in the end volumes. This material does not cover statutes. Summaries of law in particular jurisdictions are provided in other encyclopedic works, such as Federal Practice, Illinois Law and Practice, and so on. Legal encyclopedias are places to begin the search for what the law is; they are not usually cited as authoritative legal sources.

The points of law identified in the headnotes to cases published in the units of the National Reporter System are accumulated and published in various digests. There is a Supreme Court Digest, and there are regional, federal, state, and decennial digests. The Decennial Digest (1658–1896, 1897–1916, 1917–1926, 1927–1936 * * * up to the eleventh edition, which covers 1997 to date) divides law into 420 broad topics and then into thousands of subtopics and summarizes points of law under each.

The meaning of legal terms is detailed extensively in the multivolume Words and Phrases, which also provides numerous citations to cases as authorities for the definitions. A handier source for regular use is Black's Law Dictionary.

Law review articles, analyses and discussions of cases and doctrines in legal journals, and reviews of books on legal topics can be found in the Index to Legal Periodicals. The Index functions rather like a legal Readers' Guide to Periodical Literature and consists of annual bound volumes and paperback supplements to keep coverage current.

CITATION BOOKS

Because judicial decisions are generally governed by the principle of stare decisis, it is essential that we know when and where a case has been cited in later decisions, whether a
case has been followed or distinguished, and—most important of all—whether it has been questioned or overruled. Unless we could find all of the subsequent citations and discussions of a case, we could never know whether the law announced in a given case is still good law. The standard resource for finding all the occasions on which a case has been cited by any court is Shepard’s Citations. There are separate editions of Shepard’s Citations for Supreme Court decisions, federal cases, the regional reporters, the Constitution and federal statutes, and so on. Shepard’s is used only when you have the principal case and you want to find all the subsequent cases that cite it. Various alphabetical cues appear in the Shepard’s listings to indicate how a subsequent case treated the case you are researching: “f” indicates it was followed, “e” means it was explained, “d” signifies it was distinguished, “q” denotes it was questioned, “o” shows it was overruled, and so forth. When using Shepard’s remember to consult all of the recent paperback citation books in addition to all of the relevant hardback volumes. Practically the same thing can be accomplished with a few strokes of the finger using KeyCite on WESTLAW (see “Electronic Sources” at p. E-6).

**MISCELLANEOUS MATERIALS**

Some other materials are also worth mentioning. In addition to finding the text of legislation passed by Congress, you may want to unearth the legislative history of a statute or resolution. A quick and relatively convenient resource for obtaining an overview of a law’s enactment is Congressional Quarterly. The current session of Congress is followed in CQ’s Weekly Report, and developments occurring in past sessions are detailed in annual single-volume editions of Congressional Quarterly Almanac. House and Senate reports on various pieces of legislation, and committee hearings as well, are published by the government. The text of legislation and the relevant committee reports are also available in U.S. Code Congressional & Administrative News in both bound volumes for past sessions of Congress and paperback advance sheets for the current session. The Congressional Record, published daily by the Government Printing Office, carries a verbatim account of debate on the floors of the House and Senate.

The Federal Register, also published daily, contains the text of executive orders signed by the President and all administrative regulations issued by departments, agencies, and commissions of the U.S. government. The body of current administrative regulations is codified and published in the Code of Federal Regulations (C.F.R.) under titles similar to those appearing in the U.S.C.A. Various independent regulatory agencies, such as the ICC, the FTC, and the SEC, also publish their decisions and opinions in separate official reports. Interpretations of law rendered by the U.S. Attorney General at the request of the President or the various department heads are available in the Official Opinions of the Attorneys General (Ops. Att’y Gen.).

Briefs and oral arguments in major cases argued before the U.S. Supreme Court are available in Landmark Briefs & Arguments of the Supreme Court of the United States: Constitutional Cases, edited by Philip Kurland and Gerhard Casper and published by University Publications of America. A brief (one- or two-page) summary of oral argument in some of the more important cases just argued appears in the third section of Law Week, which covers proceedings of the Court. Coverage varies according to the importance of the case and space available. For additional description of accessibility to materials presenting the arguments in cases currently pending before the Supreme Court, see the next section.

A wonderful collection of oral arguments in nearly two dozen landmark Supreme Court cases is readily available in May It Please the Court (1993), edited by Peter Irons and Stephanie Guitton. Edited oral argument in cases from Brown v. Board of Education to
Bowers v. Hardwick may be listened to on six audiotapes or read from printed transcripts. Narrative comments throughout provide guidance in following the argument and identify individual Justices as they ask questions.

**Electronic Sources**

There are two particularly prominent electronic sources to statutes, court decisions, and other legal documents that you should be aware of: WESTLAW and Lexis/Nexis. Citations in this book to legal materials not yet available in hardcopy or not obtainable at all in printed form may take the form of a WESTLAW citation, such as that illustrated in the first paragraph of this appendix. In a WESTLAW citation, the year of the document is followed by WL and the document number. An electronic legal search system, such as WESTLAW or Lexis/Nexis, which operates on a pay-for-use basis, may not be accessible except through a law school or college library. But such systems are indispensable to retrieve very recent decisions or to conduct searches for opinions when you do not know the title of the case.

Electronic search systems can retrieve cases based on use of certain key words, the date on which the decision was rendered, the judge writing the court’s opinion, a concurrence, a dissent, or the statutory or constitutional provision at issue. Electronic search systems, like their hardcopy counterparts, put the same legislative enactments, court decisions, administrative rules, and executive orders at your fingertips, but permit you to search through them in ways that are customized to your needs and would otherwise not be possible by thumbing through printed books. Guides are available that identify the various databases and help you plan and execute searches. Lexis/Nexis provides research capability similar to WESTLAW.

An invaluable source for information about the U.S. Supreme Court is its official website, [http://www.supremecourtus.gov](http://www.supremecourtus.gov). You can access descriptions of the Court’s history and traditions, biographies of the Justices, and information concerning its procedures, rules, and docket. There is information on visiting the Court and much of the building’s interior is shown. It posts the schedule of oral argument in cases being heard by the Court. Most important of all, the Court’s website provides access to the Court’s decisions immediately after their announcement in the form of slip opinions (opinions in newly released cases, before the decisions are consecutively arranged and bound in volumes). The Court also makes available a complete transcript of oral argument on its website shortly after a case has been heard. Another website that provides access to Supreme Court decisions, information about the cases to be argued before the Court, and the briefs filed in those cases, is [http://supreme.lp.findlaw.com/supreme_court](http://supreme.lp.findlaw.com/supreme_court).

The contents of petitions for certiorari, reply petitions, briefs for the opposing parties, and amicus briefs in cases currently pending before the Supreme Court are also frequently available on WESTLAW. The relevant WESTLAW document numbers for those materials are available by searching on WESTLAW or by looking in the “United States Supreme Court Actions” section in the front of current paperback advance sheets for the Supreme Court Reporter. The paperback advance sheets for all units of the National Reporter System also contain an invaluable “Judicial Highlights” section that flags recent noteworthy or unusual decisions of federal and state courts.
GLOSSARY

a fortiori with stronger reason; a form of argument to the effect that because one fact exists, another fact that is included within it or analogous to it, that is less improbable, also exists

absolutism reading the Constitution as a set of rules; strict construction; also known as interpretivism

abstention a doctrine that holds that federal courts should refrain from deciding federal constitutional issues involving a matter of state law until the state court has had a chance to render an authoritative decision as to the law’s meaning

acquittal a finding of not guilty

action a lawsuit

actual malice a term associated with libel law requiring proof that material was published with knowledge it was false or with reckless disregard as to its falsity

admiralty a type of law or court relating to maritime cases and arising out of acts on the high seas

adverse possession a method by which title to property is acquired simply by possessing it for a certain period of time

advisory opinion a statement of legal rights and obligations by a court without deciding a real case and controversy

affidavit a written statement made under oath attesting to a certain set of facts

affirm to confirm or ratify a previous judgment

affirmative action taking into account race, ethnicity, or gender in employment or admissions decisions so as to increase the number of minorities and women

amicus curiae a friend of the court; a party who has interests to protect, but who has no right to appear in the instant suit and who, by leave of the court, is permitted to introduce argument or evidence bearing on the policy question before the court

appeal the removal of a case from a lower court to a court of superior jurisdiction for the purpose of reviewing the judgment

appellant the party who lost in the lower court and who seeks review of that court’s judgment by a higher court

appellate jurisdiction the authority of a higher court to review the judgments of a lower court

appellee the party who won the judgment in the lower court

arguendo for the sake of argument

arrangement the occasion on which the charges against the accused are read and the accused is asked how he or she pleads

attempt a crime for which liability is established by the risk created when the accused has gone sufficiently far toward the commission of a target offense that, unless he or she is apprehended, the criminal goal will be achieved—for example, attempted murder, attempted robbery, attempted rape, and so on

balancing of interests an approach to adjudication that sees the role of the judge as attempting to harmonize competing social interests in a case

bench memorandum a memorandum to a judge from a law clerk

bench trial a trial in which the judge decides all questions of fact, including the guilt of the defendant, because the defense has waived the right to trial by jury

bill of attainder a legislative act that imposes punishment on a particular individual without a hearing or trial

Brandeis brief a presentation of legal arguments buttressed by scientific or social science facts rather than by citation of legal authorities such as previous court decisions

brief a written statement of legal arguments submitted by an attorney

capital offense a crime punishable by death

capital punishment the death penalty

case and controversy a dispute properly before a court in which the party bringing the suit asserts the injury or likely injury of real and personal interests and requests the court to take some binding action that redresses or prevents such damage

cause of action the facts that entitle someone to judicial relief

censorship preventing something from being expressed, whether in speech, writing, or pictorially

cert. pool a panel of law clerks (one from each of the chambers of participating Justices) who prepare a memorandum for each case in which Supreme Court review is being sought summarizing the facts of the case and appraising its “certworthiness,” i.e., whether it presents a sufficiently substantial federal question to warrant oral argument and decision by the Supreme Court

certification a method of exercising appellate jurisdiction in which a lower court presents a higher court with
certain novel questions of law to which it needs answers in order to decide the case
certiorari a discretionary method of exercising appellate jurisdiction in which a higher court directs a lower court to send up the record in a particular case
chilling effect deterring even the constitutional expression of one's views out of fear that sanctions might be imposed because the speaker or writer has guessed inaccurately about whether his or her expression is protected by the First Amendment
circuit courts federal appellate courts whose jurisdiction includes the geographic area of several states; at the state level, courts whose jurisdiction may extend over several counties
civil case any case that is not a criminal case
class action a suit that is brought not only in the interest of the plaintiff, but also in behalf of all persons in similar circumstances
collateral attack a strategy of attacking the judgment in a case by bringing suit in another tribunal other than on direct appeal; for example, by seeking a writ of habeas corpus to reopen a constitutional challenge to certain criminal procedures that led to the defendant's conviction once he or she has exhausted the process of direct appeal and has gone to prison
comity the due regard and respect one sovereign gives the legal actions of another, as between states or between the federal government and a state
commercial speech advertising; the constitutional doctrine by which advertising is protected by the First Amendment
common law the system of law that began in medieval England in which judges reported what they had done in the cases they decided and these accumulated decisions became precedents for the decision of future cases; judge-made law, as distinguished from law made by a legislative body and stated in a code
complainant the party to a suit who alleges that he or she has been or is likely to be injured; the plaintiff
concurrent powers powers exercised by both the national and the state governments; for example, the power to tax
concurring opinion an opinion written by a judge who votes for the same result in a case as does the majority, but who gives additional reasons or different reasons for doing so
consent decree a court order in which the affected party agrees to refrain from engaging in certain conduct
conspiracy an agreement by two or more people to do an unlawful thing or to do a lawful thing in an unlawful manner; an association for criminal purposes
constitutional courts federal courts that derive their authority from the judicial article (Article III) of the Constitution and whose judges are, therefore, protected by the principle of judicial independence
contempt willful disobedience to a court order or a directive of Congress
cooperative federalism a conception of the federal system that, acknowledging the superior leadership and revenue-raising capacities of the national government, strives to integrate programs at different levels of government so that they form a cohesive whole and thus better serve the needs of the people than either could do on its own
creationism the belief that God created the universe and everything in it, including human beings, exactly in the manner described in the Bible
criminal case a case that involves charges brought by the government in the exercise of its monopoly power over penal justice
curtailage the grounds immediately surrounding a dwelling
de facto segregation separation of the races that occurs by private, as distinguished from official, action; for example, segregation in housing patterns that arises from decisions by private individuals about where they want to live
de jure segregation separation of the races that is maintained by law or by administrative action of government officials
de minimis something that is not sufficiently important to warrant adjudication
declaratory judgment a judgment by a court that states one's entitlement to certain legal rights
defamation an injury to one's reputation
defendant the party against whom a charge or complaint is brought
demur a form of response in which the defendant argues that, even if the facts are as the plaintiff alleges, no actionable wrong has occurred
dictum a superfluous statement of law not necessary to the decision of the case at hand
discretionary acts acts by government officials that are entirely a matter of their own political choice and that are outside the reaches of a court order; for example, the President's veto power or Congress's appropriations power
discuss list a list of cases prepared by the Chief Justice that identifies cases deemed to be "certworthy" and which functions as the agenda of cases to be discussed by the Justices at conference prior to a vote on granting certiorari
dissenting opinion an opinion written by a judge who votes for the losing party in a lawsuit
distributive justice the notion that the role of judges is limited to applying the law to parties in suits before them (and does not extend to reviewing the lawmakers' authority of legislative bodies)
diversity jurisdiction the authority of federal courts to hear suits between citizens of different states
docket the list of cases to be heard by a court during a given term
double jeopardy being tried twice for the same offense
dual federalism that conception of the federal system that views the powers of the national and state governments as mutually exclusive and set in a state of constant tension against one another to prevent the dangerous accumulation of excessive political power; in such a scheme, the two levels of government are seen as dual sovereigns, each supreme in its different area of jurisdiction
a privilege that an owner of a parcel of land has in land owned by another, as in a right-of-way across a neighbor’s property
eavesdropping overhearing a conversation
eminent domain the legal doctrine that private property may be taken for public use; the Fifth Amendment requires that, when this is done, just compensation must be paid
en banc the practice of a court, in which cases are normally tried before panels of judges, to collectively sit and hear a case with the full complement of judges present
enjoin to command or require; to require a person by an injunction to do something or refrain from doing something
enumerated powers those powers specifically given to the national government in Article I, section 8 of the Constitution
equity that branch of the common law in which the specifics of relief in a given case could not be found in existing procedures and remedies, but instead called for the exercise of justice and fairness by the judge
error (writ of) the method by which cases reached the Supreme Court before 1925 as a matter of its appellate jurisdiction and over which the Court had no control
evolution the theory that human beings did not originally appear in their present form, but are descended from earlier animal life-forms and gradually developed their present characteristics over a long period of time
ex parte on the side of, or on the application of
ex post facto law a law that makes something a crime that was not illegal at the time the act was done or that increases the penalty after a crime was committed
exclusionary rule a doctrine that forbids the admissibility at trial of illegally obtained evidence
federal question a dispute over the interpretation of a provision of the U.S. Constitution or a statute passed by Congress
fee simple estate property owned by a person that he or she has unconditional power to dispose of during his or her lifetime and that descends to his or her heirs upon death according to the terms of a will
felony a serious criminal offense for which the penalty is usually more than a year’s confinement in a state or federal prison
fiat decree or say-so
fiduciary one who handles the property of others in a position of trust or confidence; for example, a trustee, a banker, a stockbroker
franchise the right to vote
fruit of the poisonous tree a doctrine that bars the admissibility of evidence in a criminal trial that was obtained from leads disclosed through illegal police behavior, as when information contained in a coerced confession leads police to the location where certain physical evidence has been buried; the evidence that police indirectly acquire is said to be the fruit of the poisonous tree because it is tainted by the previous illegal police behavior
general election at the state and national level, an election held in November at which voters fill elected governmental offices by choosing from various political party nominees and independent candidates; some contests, such as those to fill judgeships, may be nonpartisan, for example, where candidates run without party designation
gerrymander to draw the boundaries of legislative districts in such a way as to maximize partisan advantage
grand jury a body empowered to bring formal charges against individuals whom it has probable cause to believe have committed criminal acts
habeas corpus (writ of) a court order directing the release of someone who is judged to have been confined illegally
harmless error a term used by an appellate court to characterize an error committed by a trial court that did not prejudice the rights of the party alleging the error, so that there is insufficient basis for reversing the judgment below
impeachment the bringing of formal charges of wrongdoing in office against a government official for the purpose of initiating his or her removal from office, as when the U.S. House of Representatives impeaches a federal official and the Senate then sits in judgment to see if there is sufficient evidence to warrant his or her removal; the practice of presenting evidence at trial to cast doubt upon the credibility or veracity of a witness
implied powers that authority under the Necessary and Proper Clause (Art. I, § 8, cl. 18) of the Constitution that empowers Congress to select any means appropriate for realizing the enumerated powers
in camera in chambers; when a judge considers a matter in camera, he or she examines materials in the privacy and secrecy of his or her chambers
in forma pauperis in the manner of a pauper; a way of proceeding in which someone—often a prisoner—is exempted from the usual requirements of filing paper work (such as a petition for certiorari and briefs) with the Supreme Court because he or she is too poor to pay the costs
in hac verba in these words
in re in the matter of
in terrorem by way of threat or warning
incorporation theory the process of including provisions of the Bill of Rights as aspects of “liberty” protected by the Due Process Clause of the Fourteenth Amendment and thus restricting the legislative power of the states
indictment a statement of formal criminal charges against a named individual voted by a grand jury
inferior courts lower courts; depending upon the context of the reference, it may mean only trial courts or trial courts and intermediate appellate courts
information a statement of formal criminal charges filed by the prosecuting attorney against a named individual in a jurisdiction that does not employ a grand jury
infra below
inherent powers powers possessed by an official or a government that are implicit in the concept of sovereignty and that do not depend for their existence upon designation in a constitution
injunction or injunctive relief a court order requiring someone to do something or to refrain from doing something
inter alia among other things
interest balancing see balancing of interests
interpretivism see absolutism
intervenor an affected party who, with the court's permission, participates in a lawsuit after its inception by either joining with the plaintiff or uniting with the defendant
intrapersonal within the boundaries of a state, as distinguished from across state boundaries, which would make something interstate
ipse dixit something that is asserted, but not proved
judgment the official decision of a court
judicial federalism state court reliance upon state constitutional grounds as an independent basis to provide greater protection for civil rights and liberties than is required by the U.S. Supreme Court's interpretation of the U.S. Constitution; a state court interpreting a provision of its own state's constitution may provide more, but not less, constitutional rights than the U.S. Constitution requires.
judicial power the power to decide cases and controversies
judicial review the power of a court to pass upon the constitutionality of acts of a coordinate branch of government
jurisdiction the authority of a court to hear a case
jurisprudence the philosophy of law; the collection of law on a given topic, such as the Court's First Amendment jurisprudence
justiciability the character of a dispute being in the proper form to be considered by a court
lacunae gaps in writing
lame duck an official who serves out his term of office without the prospect of serving another term
legislative courts federal courts that derive their authority from the legislative article (Article I) of the Constitution and whose judges are not protected by the principle of judicial independence
legislative veto legislative action by the Congress invalidating a policymaking decision made by the President or an agency of the executive branch
libel an injury to reputation caused by circulating written untruths about someone
litigant a party to a lawsuit
magistrate judge a kind of junior federal trial judge who serves for a fixed period of time and whose duties vary widely by federal district, but which may include conducting many types of pretrial proceedings and, with the consent of the parties, trying and deciding civil cases and criminal misdemeanor cases
malapportionment the combined effect of legislative districts whose boundaries are improperly drawn
malice unlawful intent
mandamus (writ of) a court order directing an officer of the government to perform some nondiscretionary act associated with his or her office
mandate a command or order of a court that its judgment be executed
martial law the state of affairs that exists when military authorities exercise authority over civilians and otherwise govern domestic territory
material important or relevant, as in a material issue, material fact, or material witness
mechanical jurisprudence a conception of a judge's role that holds that he or she merely applies rules to facts in order to render a decision; merely applying the law according to the canons of deductive logic, as distinguished from making law or creating legal doctrines
memorandum opinion an opinion written by a judge for the record, as distinguished from one deciding a case; an example is Justice Rehnquist's memorandum opinion in Laird v. Tatum, 409 U.S. 824, 93 S.Ct. 7 (1972), in which he explained why he denied a motion to recuse himself
merits the substantive issues that divide the parties in a legal dispute, as distinguished from arguments about procedural or jurisdictional issues
ministerial act an action by a government official, which is dictated by law and about which he or she has no power to exercise discretion or to make a policy judgment
misdemeanor a lesser type of criminal offense for which punishment can be confinement for up to a year in the county jail
moot no longer a live controversy
motion a request or application for a decision
next friend a person acting for the legal benefit of someone not legally competent to act for himself or herself
non sequitur a conclusion that does not follow logically from the premises
obiter dictum see dictum
obscenity pornographic expression that is not protected by the First Amendment
original intent the intent of the Framers either of the original Constitution or of an amendment
original jurisdiction the authority of a court to hear a case in the first instance or for the first time; the authority to hear a case possessed by a trial court
overbreadth or overbroad regulation of a fundamental right that reaches beyond the legitimate and demonstrated interest of the government; violation of the third element of strict scrutiny
overrule the action taken by a court when the policy announced in an opinion in a current case explicitly annuls or supersedes a statement of law in a previous opinion, so that the preceding statement of law is no longer authoritative
packing the Court appointing sufficient new members to the Court with the aim of changing policy
parole to release from confinement on certain conditions...
paternity  fatherhood
penumbra  a term borrowed from astronomy, which denotes the area of shade between full sunlight and complete darkness caused in an eclipse; a gray area of implicit rights existing somewhere between explicit statement in a constitutional provision and total silence
per curiam opinion  an unsigned opinion for the Court; often used when the conclusion in a case is so straightforward that no extended discussion seems necessary or, in the opposite extreme, when a collegial court is so fragmented there is agreement only on the result announced
per se  by itself or inherently
peremptory challenge  the removal of a prospective juror during jury selection, which is at the complete discretion of one of the parties to the case and for which the party removing the juror need give no reason, as distinguished from removal for cause where the party must show bias, conflict of interest, or some other impediment to a juror’s impartial consideration of the case; each side in a case is allotted a certain number of peremptory challenges, whereas the number of challenges for cause is unlimited
petit jury  a trial jury
petitioner  one who seeks a writ or court order
plain meaning rule  the principle that, in the interpretation of a constitutional or statutory provision, words should be given their ordinary and accepted meaning
plaintiff  the party bringing the suit
plea bargain  the result of negotiation between the prosecution and the defense that led the defendant to plead guilty to a reduced charge or for a lesser sentence than would be the case had the government insisted on the maximum permitted under the law
plenary  complete or exclusive; as in saying that the regulation of interstate commerce is a plenary power of the national government
plurality opinion  an opinion written for several, but not a majority, of the justices on the winning side in a case; their votes are crucial to the decision of the case, but their reasons do not state policy that is binding on the Court in future cases
police power  those broad regulatory powers reserved to the states that entitle them to legislate to protect the public health, safety, welfare, and morals
political question doctrine  a doctrine that excuses federal courts from considering matters that, even though they may constitute a case and controversy, are not the sorts of things that are proper for a court to decide
pornography  material that depicts erotic behavior and is intended to cause sexual excitement
post  after
precedent  a previous court decision thought to be analogous in some important respect to a current case
preemption  the effect of federal law superseding state law in a particular field
preliminary injunction  a court order directed at preserving the existing state of affairs until argument can be heard on the matter in dispute; in order to obtain such a temporary restraining order, the party seeking preservation of the status quo must show that irreparable injury would otherwise occur
presumptive privilege  exemption from an ordinary legal obligation that exists unless the party opposing the possessor of the privilege can state a claim of need in the case at hand sufficient to override the claim of privilege; for example, executive privilege and, in some jurisdictions, a journalist’s privilege in the confidentiality of sources
prima facie  sufficient evidence to make a case until it is contradicted or overcome by opposing evidence
primary or primary election  an election in which party candidates are chosen to run in the general election
probable cause  such evidence as would lead a reasonable person to believe that it is likely a particular individual committed a crime or that certain evidence will be found in a particular place
probation  allowing someone convicted of a minor criminal offense to remain at large during good behavior and under supervision
procedural due process  the principle of fairness that governs the means by which government deprives a person of some life, liberty, or property interest
prohibition (writ of)  an order issued by a superior to an inferior court directing it to cease consideration of some matter so as to prevent it from usurping jurisdiction it does not have
pure speech  expression by means of the spoken or written word
quash  to vacate or annul
quorum  the minimum number required to be present by law in order to permit business to be done
reapportionment  the redrawing of the boundaries of legislative districts
reasoning by analogy  the method of legal reasoning in which the facts in the current case are thought to be sufficiently like the facts in a previous case, so that the holding in the previous case should also be the holding in the instant case
rebuttable presumption  a presumption that the law makes, but that may be refuted by a certain amount of evidence, as distinguished from a conclusive or an irrebuttable presumption, which cannot be overcome by any amount of evidence
recuse  to disqualify oneself from participating in a case because of some real or apparent bias or conflict of interest that might reasonably lead someone to question a judge’s impartiality and detachment
remand  to send back to a lower court for further proceedings
res judicata  a matter adjudged; the legal principle that prevents interminable relitigation of the merits of a case by foreclosing other than the pertinent appellate tribunals from deciding the merits of a case once a court of competent jurisdiction has rendered judgment
reserved powers  the police powers possessed by the states, the existence of which is acknowledged by the Tenth Amendment
respondent  the party that opposes a petitioner’s request for a court order
restraining order  an injunction
restrictive covenant  a provision in a deed that bars transfer of the property to one or more classes of people, usually minorities, identified therein; enforcement of such discrimination has been held to constitute state action in violation of the Fourteenth Amendment.

reverse  the action of an appellate court concluding that the trial court should have rendered judgment for the other side in a case.

riding circuit  the traveling of a judge to various localities within a court's jurisdiction so that sessions of court are made more accessible.

ripeness  a principle that precludes courts from hearing cases prematurely; for example, until the facts in the dispute have crystallized sufficiently so that judges do not have to guess about pertinent facts.

scienter  awareness of such facts as permit a finding of criminal guilt; to act knowingly.

self-fulfilling prophecy  the phenomenon by which something eventually happens simply because it was expected or predicted to occur; for example, advocates of judicial self-restraint, by continually pointing out that courts are politically weak institutions, contribute to the political vulnerability of courts simply by saying this over and over, or—to use the famous example associated with Justice Harlan's warning in Plyler v. Ferguson—racial segregation that was justified as a way of dealing with hostility between the races actually creates racial hostility where none or much less hostility existed beforehand.

self-incrimination  giving testimony that implicates one's self in a crime.

separation of powers  the doctrine according to which the powers of government are divided among several branches: legislative, executive, and judicial.

seriatim  individually or one after another; in the days when U.S. Supreme Court Justices delivered seriatim opinions in cases, each wrote his own opinion, and they were delivered one after another.

shield law  legislation that relieves certain individuals of the obligation of giving testimony under particular circumstances; for example, a rape-shield law limits inquiry by the defense into the past sexual relations of the complaining witness; a media shield law limits or precludes inquiry about a reporter's confidential news sources.

slander  an injury to reputation caused by speaking untruths about someone.

sovereign immunity  the doctrine that government cannot be sued without its consent.

special master  a kind of hearing officer appointed by the court to receive evidence, hear testimony, and formulate conclusions that are then presented to the court; one or both of the parties to the case may then take issue with the special master's findings, and argument on the matter is then heard by the court, which thereafter renders its judgment; the procedure by which the Supreme Court usually functions when it hears cases within its original jurisdiction.

specific intent  a form of criminal intent where the accused in committing a crime acts with a subjective desire for the achievement of certain criminal consequences; acting purposely.

speech plus  that variety of behavior in which speech and action elements are intertwined; for example, picketing, flag burning, marching, nude dancing.

standing  the element of justiciability that measures whether the plaintiff has alleged direct, personal, and sufficiently substantial injury to entitle him or her to have the suit heard by a court; the element of justiciability that connects the party bringing the suit to the alleged injury, so that it can be said the plaintiff has a personal stake in the outcome.

state deced  the practice of adhering to settled law, as contained in previous court decisions; reliance upon precedent.

state action  actions or developments for which the state shares responsibility, whether by causing, sanctioning, or supporting them.

stay  a court order halting the execution of a judgment.

strict construction  a literal reading of the Constitution; see absolutism.

sua sponte  on its own initiative without prompting, request, or suggestion.

sub nom. (sub nomine)  under the name.

sub silentio  covertly; without explicitly saying so.

subpoena  a court order directing an individual to appear and give testimony.

subpoena duces tecum  a court order directing that certain documents be turned over.

substantive due process  the conception of due process that interprets liberty in the Due Process Clause of the Fourteenth Amendment as a shorthand reference for certain fundamental rights, which government may not infringe without overcoming a presumption of unconstitutionality.

summary judgment  a judgment rendered by the court without hearing oral argument.

supra  above.

surrogate  a person or thing acting in place of another; a substitute.

suspect classification  a disfavored basis for creating categories in law; usually a distinction drawn on the basis of race, alienage, or some other characteristic beyond the control of the affected individuals that reflects societal prejudice and that usually operates to impose disabilities on the affected class.

symbolic speech  expression through symbolic acts rather than using the spoken or written word, such as burning a draft card, desecrating the flag, or wearing an armband.

tort  an act causing injury for which remedies exist in law.

ultra vires  beyond the scope of its powers.

vacate  to set aside or annul.

vagrancy  at common law, the crime of going about from place to place without any visible means of support and of being idle although able-bodied and capable of working.

vagueness  a statute or regulation that is void for vagueness is one that imposes penalties without giving a reasonable person a clear idea of the sort of conduct that is prohibited; such a statute or regulation essentially.
punishes a person for guessing wrong about what the law means to prohibit rather than for failing to live up to a legal obligation and violates the entitlement to notice beforehand that is implicit in the concept of due process.

**vel non** or not

**venue** the location of a trial

**vested rights** property rights

**voire dire** the process by which a jury is selected or empaneled

**warrant** a writ directed to a competent legal authority ordering that an act be done

**writ** a court order; see the names of particular writs

**writ of habeas corpus** an order to bring a prisoner or person appearing to be a prisoner into court to show cause why he should not be released

**writ of certiorari** an order that certain papers that have been made a part of the record in a case in a lower court be brought up for review

**writ of mandamus** a court order directing a public official to perform or refrain from performing a particular act

**writ of prohibition** an order prohibiting the lower court from issuing a particular writ

**writ of quo warranto** an order that a public officer give account of the manner and cause of his obtaining his position or office

**writ of scire facias** an order requiring a person to appear in court and answer a summons
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