

Civil Rights and Liberties

CIVIL RIGHTS AND LIBERTIES

Excerpts of Landmark Cases

Oregon State University
Corvallis, OR



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Introduction

There are several good constitutional law and civil rights and liberties textbooks on the market, so why create another? There was a confluence of factors that led to the creation of this volume. First, and most importantly, after many years of teaching a constitutional law series at a large public institution, it became apparent that the costs of the texts were a barrier to many students. Second, as texts were updated, the authors had to make choices about inclusion or exclusion of cases due to printing and publishing constraints. As such, some material that was pedagogically useful had to be jettisoned to include recent cases as the Court has changed doctrines in multiple areas recently. These two factors were the main motivations. Trailing behind them is the wonderful support and staff at Oregon State University's Open Educational Resources unit. With their help, I knew that the volume would be useful and accessible to students.

To complete this volume, I worked with several excellent students that had completed the constitutional law series. We examined several other textbooks, and discussed which cases were critical and which were most helpful to them as they tried to understand the substantive material from the course. Together we built a plan for each chapter to include cases that are landmarks, and other cases that help build the profile of the doctrine so that there are guideposts as the doctrine shifts or changes. We read the full case and then selected the key components that related to the constitutional issue, focusing on the key facts, the constitutional questions, and the resolution of the case. We included dissents and concurring opinions where we agreed they were historically important, useful or provided a significantly different approach to the question. We have also included appendices that may help students place the cases in historical context. First, each case is hyperlinked by year to a table that indicates who was on the Court at the time of the decision, their appointing president, and that president's political affiliation. When available, the table also includes the justices' Martin Quinn scores for that year so that the ideological balance of the Court can be easily assessed. For these years, there is also a figure that provides these data in a visual format. Finally, there is a table and graph of the scores of the median justice for the years available, again using the Martin Quinn scores as our source.

To use this volume, I would approach it as any other constitutional law textbook; however, there is a significant difference. This volume, again, only contains excerpts. Unless the justices provide an introduction or make a strong connection to previous doctrine in the excerpt, these handholds between major cases are left to the instructor to elucidate. I have used this type of text before in a "rights of the criminally accused course" and it has been highly successful and pushes the students to make the connections as they read through the cases and discuss them in class.

We hope to update this text every other year. I plan to assign my students a group project to excerpt a recent important case that warrants inclusion in the volume. The best versions of these excerpts, with additional editing by me, will then be included in a new version.

A huge thank you to Petar Jeknic, Kimberly Clairmont, Sarah Mason and Alex Metzdorf for their hard work and dedication to this project. Petar was instrumental in the initial planning of the volume and Kimberly, Sarah, and Alex made sure I met my deadlines and did so with fabulous excerpts.

Rorie Solberg, Editor
Oregon State University



Case List

A copy of the following case list, with embedded links for each chapter and case, is available to [download as a document](https://beav.es/5Q7) (https://beav.es/5Q7) for editing and distribution. The list is also available to [download as a sheet](https://beav.es/5Q8) (https://beav.es/5Q8) for easier reorganization and filtering.

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32 U.S. 243 (1833)

Vote: 6-0

Opinion: Marshall, joined by Johnson, Duvall, Story, Thompson, McLean and Baldwin

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

... The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government ...

...

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

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

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to-guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government-not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by, the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

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

Excerpted by Kimberly Clairmont



Second Attempt under the P&I Clause

Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.

111 U.S. 746 (1873)

Vote: 5-4

Decision: Reversed

Majority: J. Miller, joined by J. Clifford, J. Strong, J. Hunt, J. Davis

Dissent: J. Field, joined by J. Chase, J. Swayne, J. Bradley

Notes of Reporter before the Court:

(see <https://www.law.cornell.edu/supremecourt/text/83/36> for full disposition.)

Mr. John A. Campbell, and also Mr. J. Q. A. Fellows, argued the case at much length and on the authorities, in behalf of the plaintiffs in error. The reporter cannot pretend to give more than such an abstract of the argument as may show to what the opinion of the court was meant to be responsive.

The learned counsel quoting Thiers, contended that ‘the right to one’s self, to one’s own faculties, physical and intellectual, one’s own brain, eyes, hands, feet, in a word to his soul and body, was an incontestable right; one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away. More than this, the obligation to labor was a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family.’

...

Now, the act of the Louisiana legislature was in the face of all these principles; it made it unlawful for men to use their own land for their own purposes; made it unlawful to any except the seventeen of this company to exercise a lawful and necessary business for which others were as competent as they, for which at least one thousand persons in the three parishes named had qualified themselves, had framed their arrangements in life, had invested their property, and had founded all their hopes of success on earth. The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law.

...

But if this monopoly were not thus void at common law, would be so under both the thirteenth and the fourteenth amendments.

...

Lest some competitor may present more tempting or convenient arrangements, the act directs that all of these shall be closed on a particular day, and prohibits any one from having, keeping, or establishing any other; and a peremptory command is given that all animals shall be sheltered, preserved, and protected by this corporation, and by none other, under heavy penalties.

Is not this ‘a servitude?’ Might it not be so considered in a strict sense? It is like the ‘thirlage’ of the old Scotch law and the *banalites* of seignioral France; which were servitudes undoubtedly. But, if not strictly a servitude, it is certainly a servitude in a more popular sense, and, being an enforced one, it is an involuntary servitude.

...

The act is even more plainly in the face of the fourteenth amendment. That amendment was a development of the thirteenth, and is a more comprehensive exposition of the principles which lie at the foundation of the thirteenth.

...

But the fourteenth amendment does define citizenship and the relations of citizens to the State and Federal government. It ordains that ‘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 where they reside.’ Citizenship in a State is made by residence and without reference to the consent of the State. Yet, by the same amendment, when it exists, no State can abridge its privileges or immunities.

...

The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified. The amendment embodies all that the statesmanship of the country has conceived for accommodating the Constitution and the institutions of the country to the vast additions of territory, increase of the population, multiplication of States and Territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development. It is an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government—that they might mutually sustain, support, and co-operate for the promotion of peace, security, and the assurance of property and liberty.

...

From whatever cause originating, or with whatever special and present or pressing purpose passed, the fourteenth amendment is not confined to the population that had been servile, or to that which had any of the disabilities or disqualifications arising from race or from contract ...

The only question then is this: ‘When a State passes a law depriving a thousand people, who have acquired valuable property, and who, through its instrumentality, are engaged in an honest and necessary business, which they understand, of their right to use such their own property, and to labor in such their honest and necessary business, and gives a monopoly, embracing the whole subject, including the right to labor in such business, to seventeen other persons—whether the State has abridged any of the privileges or immunities of these thousand persons?’

...

MR. JUSTICE MILLER delivered the opinion of the court.

...

The appellee brought a suit in the Circuit Court to obtain an injunction against the appellant forbidding the latter from exercising the business of butchering, or receiving and landing livestock intended for butchering, within certain limits in the parishes of Orleans, Jefferson, and St. Bernard, and obtained such injunction by a final decree in that court ...

The ground on which this suit was brought and sustained is that the plaintiffs had the exclusive right to have all such stock landed at their stock-landing place, and butchered at their slaughter-house, by virtue of an act of the General Assembly of Louisiana, approved March 8th, 1869, entitled, “An act to protect the health of the city of New Orleans, to locate the stock landing and slaughter-houses, and to incorporate the Crescent City Live-Stock Landung and Slaughter-House Company.” ...

The fact that it did so, and that this was conceded, was the basis of the contest in this court in the Slaughter-House Cases, 16 Wall. 36, in which the law was assailed as a monopoly forbidden by the thirteenth and fourteenth amendments to the Constitution of the United States, and these amendments as well as the fifteenth, came for the first time before this court for construction. The constitutional power of the State to enact the statute was upheld by this court. This power was placed by the court in that case expressly on the ground that it was the exercise of the police power which had remained with the States in the formation of the original Constitution of the United States, and had not been taken away by the amendments adopted since ...

...

The appellant, however, insists that, so far as the act of 1869 partakes of the nature of an irrevocable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case ...

While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limited exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure.

This principle has been asserted and repeated in this court in the last few years in no ambiguous terms ...

But the case of the *Fertilizing Company v. Hyde Park* (1879), is, perhaps, more directly in point as regard the facts of the case, while asserting the same principle. ... The opinion cites the language of the court in *Beer Company v. Massachusetts*, already copied here, and numerous other cases of the exercise of the police power in protecting health and property, and holds that the charter conferred no irrevocable right for the fifty years of its duration to continue a practice injurious to the public health.

These cases are all cited and their views adopted in the opinion of the Supreme Court of Louisiana in a suit between the same parties in regard to the same matter as the present case, and which was brought to this court by writ of error and dismissed before a hearing by the present appellee.

The result of these considerations is that the constitution of 1879 and the ordinances of the city of New Orleans, which are complained of, are not void as impairing the obligation of complainant's contract, and that

The decree of the Circuit Court must be reversed, and the case remanded to that court with directions to dismiss the bill.

Excerpted by Kimberly Clairmont



The Door Opens under the Due Process Clause

Chicago, Burlington & Quincy Railroad Co. v. City of Chicago 166 U.S. 226 (1897)

Vote: 7-1

Opinion: J. Harlan

Decision: Affirmed

Majority: J. Harlan, joined by J. Field, J. Gray, J. Brown, J. Shiras, J. White, J. Peckham

Dissent: J. Brewer

MR. JUSTICE HARLAN delivered the opinion of the court.

...

The constitution of Illinois provides that “no person shall be deprived of life, liberty or property, without due process of law.” Art. 2, § 2. It also provides: “Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.” ...

By the fifth article of the general statute, of Illinois, approved April 10, 1872, and relating to the incorporation of cities and villages, it was provided that “the city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness.” ...

The ninth article of the same statute declared that when the corporate authorities of a city or village provided by ordinance for the making of any local improvement authorized to be made, the making of which would require that private property be taken or damaged for public use, the city or village should file in its name a petition in some court of record of the county praying “that the just compensation to be made for private property to be taken or damaged” for the improvement or purpose specified in the ordinance be ascertained by a jury ...

By an ordinance of the city council of Chicago approved October 9, 1880, it was ordained that Rockwell Street in that city be opened and widened from West 18th Street to West 19th Street by condemning therefor, in accor-

dance with the above act of April 10, 1872, certain parcels of land owned by individuals, and also certain parts of the right of way in that city of the Chicago, Burlington and Quincy Railroad Company, a corporation of Illinois ...

In execution of that ordinance a petition was filed by the city, November 12, 1890, in the Circuit Court of Cook County, Illinois, for the condemnation of the lots, pieces or parcels of land and property proposed to be taken or damaged for the proposed improvement, and praying that the just compensation required for private property taken or damaged be ascertained by a jury ...

The parties interested in the property described in the petition, including the Chicago, Burlington and Quincy Railroad Company, were admitted as defendants in the proceeding. In their verdict the jury fixed the just compensation to be paid to the respective individual owners of the lots, pieces and parcels of land and property sought to be taken or damaged by the proposed improvements, and fixed one dollar as just compensation to the railroad company in respect of those parts of its right of way described in the city's petition as necessary to be used for the purposes of the proposed street ...

It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, "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, as we have often said, the constitutional prohibition has no meaning, and "the State has clothed one of its agents with power to annul or evade it." ...

When the government, through its' established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs ...

In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid.” ...

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument ...

It is further contended that the railroad company was denied the equal protection of the laws in that by the final judgment individual property owners were awarded, as compensation for contiguous property appropriated to the public use by the same proceeding, the value of their land taken, while only nominal compensation was given to the company—the value of its land, simply as land, across which the street was opened, not being taken into account. This contention is without merit. Compensation was awarded to individual owners upon the basis of the value of the property actually taken, having regard to the uses for which it was best adapted and the purposes for which it was held and used and was likely always to be used. Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public ... In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws ...

We have examined all the questions of law arising on the record of which this court may take cognizance, and which, in our opinion, are of sufficient importance to require notice at our hands, and finding no error, the judgment is Affirmed.

Excerpted by Kimberly Clairmont



Two Track Incorporation

Hurtado v. California

110 U.S. 516 (1884)

Vote: 7-1

Opinion: J. Matthews

Decision: Affirmed

Majority: J. Matthews, joined by J. Waite, J. Miller, J. Bradley, J. Woods, J. Gray, J. Blatchford

Dissent: J. Harlan

MR. Justice Matthews delivered the opinion of the court.

...

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.'

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.

The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States ...

...

On the other hand, 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 29th chapter of Magna Charta; that, by immemorial usage, 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, venerable by time and custom, 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 fundamental 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, brought into being by that instrument, it has now been added as an additional security to the

individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

... it may be said that Lord Coke himself explains his own meaning by saying ‘the law of the land,’ as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men.

It is quite apparent from these extracts that the interpretation usually put upon Lord Coke’s statement is too large, because if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offences, and the conclusion would be inevitable that information as a substitute for indictments would be illegal in all cases ...

...

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our “ancient liberties.” It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government ...

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of 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. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*summum cuique tribuere*. There is nothing in Magna Charta, rightly construed 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 ...

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial ...

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the 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. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and 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 indictment ...

For these reasons, finding no error therein, the judgment of the Supreme Court of California is

Affirmed.

Excerpted by Kimberly Clairmont



Maxwell v. Dow

176 U.S. 581 (1900)

Vote: 8-1

Opinion: J. Peckham

Decision: Affirmed

Majority: Peckham, joined by Fuller, Gray, Brewer, Brown, Shiras, White, McKenna

Dissent: J. Harlan

MR. JUSTICE PECKHAM delivered the opinion of the court.

...

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the State of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the Supreme Court of the State for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful, because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under article 5 of the amendments to the Constitution of the United States, and also violated section 1 of article 14 of those amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under article 6, and also violated section 1 of article 14 of such amendments; (3) that a trial by such a jury and his sub-

sequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, -in violation of section 1 of article 14, which provides that no State shall deprive any person of life, liberty or, property, without due process of law ...

The questions to be determined in this court are, (1) as to the validity, with reference to the Federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors ...

In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the Fifth Amendment. Yet this amendment was held in the *Hurtado* case not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the States themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the Federal Government. By holding that the conviction ‘upon an information was valid, the court necessarily held that an indictment was not necessary ... To the other objection, that a conviction upon an information deprives a person of his liberty without due process of law, the *Hurtado* case is, as we have said, a complete and conclusive answer.

...

It would seem to be quite plain that the provision in the Utah constitution for a jury of eight jurors in all state criminal trials, for other than capital offences, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the- United States in state courts ...

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the States. In order to limit the powers which it was feared might be claimed or exercised by the Federal Government, under the’ provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several States by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the General Government, and were not intended to and did not have any effect upon the powers of the respective States. This has been many times decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. *Spies v. Illinois* (1887) [other citations omitted].

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the States cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments ...

That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to every one, white or black, that comes within its

provisions. But, as said in the *Slaughter-house Cases*, the protection of the citizen in his rights as a citizen of the State still remains with the State ... But if all these rights are included in the phrase “privileges and immunities”⁶ of citizens of the United States, which the States by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the State in regard to them has been entirely destroyed, and the *Slaughter-house Cases*, and *United States v. Cruikshank* are all wrong, and should be overruled ...

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah constitution and legislation.

The remaining question is, whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the State deprives him of life, liberty or property, without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado* case, *supra*. The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. *Hodgson v. Vermont* (1897) [other citations omitted].

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado* case is a trial by jury mentioned as a necessary part of such process ...

Judged by the various cases in this court we think there is no error in this record, and the judgment of the Supreme Court of Utah must, therefore, be Affirmed.

MR. JUSTICE HARLAN, dissenting.

...

What are the privileges and immunities of “citizens of the United States”? Without attempting to enumerate them, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair ...

It seems to me that the privileges and immunities enumerated in these amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to themselves and their posterity, the political community known as the People of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified -the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty could never be impaired or destroyed by the National Government ...

I am also of opinion that the trial of the accused for the crime charged against him by a jury of eight persons was not consistent with the “due process of law” prescribed by the Fourteenth Amendment. Referring to the words in the Fifth Amendment, that “no person shall be deprived of life, liberty or property without due process of law,” this court said in *Murray’s Lessee v. Hoboken*: “The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It was manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process ‘due process of law’ by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement ‘of this country.’” ...

The right to be tried when charged with crime by a jury of twelve person is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments originally limited only the powers of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the States ...

If some of the guarantees of life, liberty and property which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present

decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freemen.

I dissent from the opinion and judgment of the court.

Excerpted by Kimberly Clairmont



Gitlow v. NY

268 U.S. 652 (1925)

Vote: 7-2

Opinion: J. Sanford

Decision: Affirmed

Majority: J. Sanford, joined by J. Taft, J. Van Devanter, J. McReynolds, J. Sutherland, J. Butler, J. Stone

Dissent: J. Holmes, joined by J. Brandeis

MR. JUSTICE SANFORD delivered the opinion of the Court.

...

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted ...

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. Its material provisions are:

“§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony ...

The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of “moderate Socialism.” Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a “Manifesto.” This was published in

The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen-thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation." ...

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

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 ...

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, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom ...

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question ...

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties ...

It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State ...

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 ...

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

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

Affirmed.

Excerpted by Kimberly Clairmont



Palko v. Connecticut

302 U.S. 319 (1947)

Vote: 7-1

Opinion: J. Cardozo

Decision: Affirmed

Majority: J. Cardozo, joined by J. McReynolds, J. Brandeis, J. Sutherland, J. Stone, J. Roberts, J. Black

Dissent: J. Butler

MR. JUSTICE CARDOZO delivered the opinion of the Court.

...

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of a plea to the Supreme Court of Errors ...

Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State v. Palko*, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder ...

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States ...

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 jeop-

ardy 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 ...

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

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer ... 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* (1937) [other citations omitted], or the like freedom of the press, *Grosjean v. American Press Co.* (1936) [other citations omitted], or the free exercise of religion, *Hamilton v. Regents* (1934) [other citations omitted] ... In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states ...

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts* (1934) [other citations omitted] ... Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey* (1908). This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether! No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by -a study and appreciation of the meaning, the essential implications, of liberty itself ...

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amend-

ment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed ...

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unflinching throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”? The answer surely must be “no.” What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch* (1918). This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v. Carabetta* (1927), has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before ...

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

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

The judgment is

Affirmed.

Excerpted by Kimberly Clairmont



Wolf v. Colorado

338 U.S. 25 (1949)

Vote: 6-3

Opinion: J. Frankfurter

Decision: Affirmed

Majority: J. Frankfurter, joined by J. Vinson, J. Reed, J. Jackson, J. Burton

Concurring: J. Black

Dissent: J. Murphy, joined by J. Rutledge, and J. Douglas

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: Does a conviction by a State court for a State offense deny the “due process of law” required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States* (1914)?...

The notion that the “due process of law” guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration ...

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko v. Connecticut*, supra, 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead in rejecting the suggestion that that the Due Process Clause incorporated the original Bill of Rights ...

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights ...

The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in “the concept of ordered liberty” and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a pre-

lude 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 ...

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective ... 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.

We hold, therefore, 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. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under § 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.

Affirmed.

Excerpted by Kimberly Clairmont



One Path Forward

Gideon v. Wainwright

372 U.S. 335 (1963)

Opinion: J. Black

Decision: unanimous reversed

Majority: J. Black, joined by J. Warren, J. Brennan, J. Stewart, J. White

Concurring: J. Clark, J. Harlan, J. Douglas

MR. JUSTICE BLACK delivered the opinion of the Court.

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

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

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

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument “emphasizing his innocence to the charge contained in the Information filed in this case.” The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court’s refusal to appoint counsel for him denied him rights “guaranteed by the Constitution and the Bill of Rights by the United States Government.” ...

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State’s witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison ...

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision ...

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

On the basis of this historical data the Court concluded that “appointment of counsel is not a fundamental right, essential to a fair trial.” ... It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment’s guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, “made obligatory upon the States by the Fourteenth Amendment.” Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was “a fundamental right, essential to a fair trial,” it would have held that the Fourteenth Amendment requires appointment of counsel in’ a state court, just as the Sixth Amendment requires in a federal court ...

In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this “fundamental nature” and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment’s freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court had made obligatory on the States the Fifth Amendment’s command that private property shall not be taken for public use without just compensation, the Fourth Amendment’s prohibition of unreasonable searches and seizures,’ and the Eighth’s ban on cruel and unusual punishment ...

We accept Betts v. Brady’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that “the right to the aid of counsel is of this fundamental character.” *Powell v. Alabama* (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 ...

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.

Reversed.

MR. JUSTICE DOUGLAS, concurring in judgement.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil v. Vermont* ... as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson v. California* ... That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases* ... and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker v. Sauvinet* ... Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. ... And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government.’ Mr. Justice Jackson shared that view. But that view has not prevailed ‘ and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

...

Excerpted by Kimberly Clairmont



Duncan v. Louisiana

391 U.S. 145 (1968)

Vote: 7-2

Opinion: White

Decision: Reversed

Majority: White, joined by Warren, Black, Douglas, Brennan, Fortas, Marshall

Concurring: Black, Douglas, Fortas

Dissent: Harlan and Stewart

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years’ imprisonment and a \$300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of \$150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution ... appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed ...

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant

encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

...

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Powell v Alabama* (1932). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which-were they to be tried in a federal court-would come within the Sixth Amendment’s guarantee ... Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant’s demand for jury trial was refused ...

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objective of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689 ...

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court ...

Jury trial 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. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime ...

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluc-

tance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States ...

We would not assert, however, that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely ...

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision's and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff v. Schnackenberg* (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v. Clawans* (1937). In the case before us, the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not ... Of course, the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled b ... chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a \$500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail." ... We need not, however, settle in this case the exact location of

the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.” Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Excerpted by Kimberly Clairmont



McDonald v. Chicago

561 U.S. 742 (2010)

Vote: 5-4

Opinion: J. Alito

Decision: Reversed

Majority: J. Alito, joined by J. Roberts, J. Scalia, J. Kennedy, J. Thomas (Parts I, II-A, II-B, II-D, III-A, and III-B); J. Roberts, J. Scalia, J. Kennedy (Parts II-C, IV, and V)

Concurring: J. Scalia, J. Thomas

Dissent: J. Stevens, J. Breyer, J. Ginsburg, J. Sotomayor

Justice Alito announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, and III, in which The Chief Justice, Justice Scalia, Justice Kennedy, and Justice Thomas join, and an opinion with respect to Parts II-C, IV, and V, in which The Chief Justice, Justice Scalia, and Justice Kennedy join.

...

Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson (Chicago petitioners) are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago’s firearms laws. A City ordinance provides that “[n]o person shall ... possess ... any firearm unless such person is the holder of a valid registration certificate for such firearm.” Chicago, Ill., Municipal Code § 8-20-040(a) (2009). The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City. § 8-20-050(c). Like Chicago, Oak Park makes it “unlawful for any person to possess ... any firearm,” a term that includes “pistols, revolvers, guns and small arms ... commonly known as handguns.” ...

Chicago enacted its handgun ban to protect its residents “from the loss of property and injury or death from firearms.” See Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982). The Chicago petitioners and their amici, however, argue that the handgun ban has left them vulnerable to criminals. Chicago

Police Department statistics, we are told, reveal that the City's handgun murder rate has actually increased since the ban was enacted and that Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities.

Several of the Chicago petitioners have been the targets of threats and violence. For instance, Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers ... Colleen Lawson is a Chicago resident whose home has been targeted by burglars ... Lawson, and the other Chicago petitioners own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection ...

After our decision in *Heller*, the Chicago petitioners and two groups filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances. All three cases were assigned to the same District Judge ...

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases*, supra, should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right ...

As previously noted, the Seventh Circuit concluded that *Cruikshank*, *Presser*, and *Miller* doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others ... but petitioners are unable to identify the Clause's full scope ... Nor is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed ...

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding ...

In *Cruikshank*, the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the States ... Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] ... safeguarded by the due process clause of the Fourteenth Amendment." *DeJonge v. Oregon* (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause ...

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty ... or as we have said in a related context, whether this right is “deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg* (1997).

Our decision in *Heller* points unmistakably to the answer. Thus, we concluded, citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.”

Heller makes it clear that this right is “deeply rooted in this Nation’s history and tradition.” ... *Heller* explored the right’s origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense ... Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen,” ...

By the 1850’s, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense ...

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks ...

Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Wilson told his colleagues: “In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country.” 39th Cong. Globe 40 (1865) ...

Union Army commanders took steps to secure the right of all citizens to keep and bear arms, but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.

The most explicit evidence of Congress’ aim appears in §14 of the Freedmen’s Bureau Act of 1866, which provided that “the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery.” 14 Stat. 176–177 (emphasis added).

...

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.

...

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

...

Municipal respondents' remaining arguments are at war with our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the Due Process Clause protects only those rights " 'recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.' " ...

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases ... And the present day implications of municipal respondents' argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country. If our understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of any civilized country, it would follow that the United States is the only civilized Nation in the world ...

... In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States ... We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Excerpted by Kimberly Clairmont



Timbs v. IN

586 U.S. ____ (2019)

Opinion: Ginsburg, joined by Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh

Decision: unanimous, reversed

Concurring: Gorsuch

Concurring: Thomas

JUSTICE GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling \$1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$42,000, more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause.

The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions ...

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." ... The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment. ..." ...

Today, acknowledgment of the right’s fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality ... Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment ...

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies ... Even absent a political motive, fines may be employed “in a measure out of accord with the penal goals of retribution and deterrence,” for “fines are a source of revenue,” while other forms of punishment “cost a State money.” ...

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” ...

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil in rem forfeitures because, the State says, the Clause’s specific application to such forfeitures is neither fundamental nor deeply rooted ...

...

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil in rem forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana’s suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated ... regardless of whether application of the Excessive Fines Clause to civil in rem forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Ramos v. Louisiana

590 U.S. ____ (2020)

Vote: 6-3

Opinion: Gorsuch

Decision: Reversed

Majority: Gorsuch joined by Ginsburg, Breyer, Sotomayor, Kavanaugh, Thomas

[Note the majority on this opinion was split differently for different sections of the opinion]

Concurring: Sotomayor

Concurring: Kavanaugh

Concurring: Thomas

Dissent: Alito, joined by Roberts, Kagan (to all but Part III-D)

JUSTICE GORSUCH delivered the opinion of the Court.

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos’s guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror’s vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow nonunanimous convictions? Though it’s hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to “establish the supremacy of the white race,” and the resulting document included many of the trappings of the Jim Crow era ...

Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U. S. Senate passed a resolution calling for an investigation into whether Louisiana was systematically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a “facially race-neutral” rule permitting 10-to-2 verdicts in order “to ensure that African-American juror service would be meaningless.”

Adopted in the 1930s, Oregon’s rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute “the influence of racial, ethnic, and religious minorities on Oregon juries.” In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States’ respective nonunanimity rules.

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. Louisiana insists that this Court has never definitively passed on the question and urges us to find its practice consistent with the Sixth Amendment. By contrast, the dissent doesn’t try to defend Louisiana’s law on Sixth or Fourteenth Amendment grounds; tacitly, it seems to admit that the Constitution forbids States from using nonunanimous juries. Yet, unprompted by Louisiana, the dissent suggests our precedent requires us to rule for the State anyway. What explains all this? To answer the puzzle, it’s necessary to say a bit more about the merits of the question presented, the relevant precedent, and, at last, the consequences that follow from saying what we know to be true.

The Sixth Amendment promises that “[i]n 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.” The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a “trial by an impartial jury” entails.

Still, the promise of a jury trial surely meant something— otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a “jury trial” to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district “previously ascertained by law.” And if that’s not enough, imagine a constitution that included the same hollow guarantee twice—not only in the Sixth Amendment, but also in Article III. No: The text and structure of the Constitution clearly suggest that the term “trial by an impartial jury” carried with it some meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term “trial by an impartial jury trial” meant at the time of the Sixth Amendment’s adoption—whether it’s the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law ...

Influential, postadoption treatises confirm this understanding ... Justice Story explained in his *Commentaries on the Constitution* that “in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable.” Similar statements can be found in American legal treatises throughout the 19th century.

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.” A few decades later, the Court elaborated that the Sixth Amendment affords a right to “a trial by jury as understood and applied at common law, ... includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.” And, the Court observed, this includes a requirement “that the verdict should be unanimous.” In all, this Court has commented on the Sixth Amendment’s unanimity requirement no fewer than 13 times over more than 120 years.

There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is “fundamental to the American scheme of justice” and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

If Louisiana’s path to an affirmance is a difficult one, the dissent’s is trickier still. The dissent doesn’t dispute that the Sixth Amendment protects the right to a unanimous jury verdict, or that the Fourteenth Amendment extends this right to state-court trials. But, it insists, we must affirm Mr. Ramos’s conviction anyway. Why? Because the doctrine of *stare decisis* supposedly commands it. There are two independent reasons why that answer falls short.

In the first place and as we’ve seen, not even Louisiana tries to suggest that *Apodaca* supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today. Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject). And to accept that reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.

This is not the rule, and for good reason—it would do more to destabilize than honor precedent. To see how, consider a hypothetical. Suppose we face a question of first impression under the Fourth Amendment: whether a State must obtain a warrant before reading a citizen’s email in the hands of an Internet provider and using that email as evidence in a criminal trial. Imagine this question splits the Court, with four Justices finding the Fourth Amendment requires a warrant and four Justices finding no such requirement. The ninth Justice agrees that the Fourth Amendment requires a warrant, but takes an idiosyncratic view of the consequences of violating that right. In her view, the exclusionary rule has gone too far, and should only apply when the defendant is prosecuted for a felony. Because the case before her happens to involve only a misdemeanor, she provides the ninth vote to affirm a conviction based on evidence secured by a warrantless search. Of course, this Court has long-standing precedent requiring the suppression of all evidence obtained in unconstitutional searches and seizures.

But like Justice Powell, our hypothetical ninth Justice sticks to her view and expressly rejects this Court's precedent. Like Justice Powell, this Justice's vote would be essential to the judgment. So if, as the dissent suggests, that is enough to displace precedent, would Mapp's exclusionary rule now be limited to felony prosecutions? ...

In the final accounting, the dissent's stare decisis arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. In arguing otherwise, the dissent must elide the reliance the American people place in their constitutionally protected liberties, overplay the competing interests of two States, count some of those interests twice, and make no small amount of new precedent all its own.

On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmation. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.

The judgment of the Court of Appeals is

Reversed.

Excerpted by Kimberly Clairmont



Privileges and Immunities Redux

Saenz v. Roe

526 U.S. 489 (1999)

Vote: 7-2

Opinion: Stevens

Decision: Affirmed

Majority: Stevens, joined by O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer

Dissent: Rehnquist, joined by Thomas

JUSTICE STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence. The questions presented by this case are whether the 1992 statute was constitutional when it was enacted and, if not, whether an amendment to the Social Security Act enacted by Congress in 1996 affects that determination.

...

On December 21, 1992, three California residents who were eligible for AFDC benefits filed an action in the Eastern District of California challenging the constitutionality of the durational residency requirement in § 11450.03. Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances. One returned to California after living in Louisiana for seven years, the second had been living in Oklahoma for six weeks and the third came from Colorado. Each alleged that her monthly AFDC grant for the ensuing 12 months would be substantially lower under § 11450.03 than if the statute were not in effect. Thus, the former residents of Louisiana and Oklahoma would receive \$190 and \$341 respectively for a family of three even though the full California grant was \$641; the former resident of Colorado, who had just one child, was limited to \$280 a month as opposed to the full California grant of \$504 for a family of two.

The District Court issued a temporary restraining order and, after a hearing, preliminarily enjoined implementation of the statute. District Judge Levi found that the statute "produces substantial disparities in benefit levels and makes no accommodation for the different costs of living that exist in different states." ... In his view, if the purpose of the measure was to deter migration by poor people into the State, it would be unconstitutional for that reason. And even if the purpose was only to conserve limited funds, the State had failed to explain why the entire burden of the saving should be imposed on new residents ...

The word “travel” is not found in the text of the Constitution. Yet the “constitutional right to travel from one State to another” is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, (1969), the right is so important that it is “assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.” ...

In *Shapiro*, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long “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 squarely held that it was “constitutionally impermissible” for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State. We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause “unless shown to be necessary to promote a compelling governmental interest,” ... and that no such showing had been made.

... California submits that, instead of being subjected to the strictest scrutiny, the statute should be upheld if it is supported by a rational basis and that the State’s legitimate interest in saving over \$10 million a year satisfies that test. Although the United States did not elect to participate in the proceedings in the District Court or the Court of Appeals, it has participated as *amicus curiae* in this Court. It has advanced the novel argument that the enactment of PRWORA allows the States to adopt a “specialized choice-of-law-type provision” that “should be subject to an intermediate level of constitutional review,” merely requiring that durational residency requirements be “substantially related to an important governmental objective.” The debate about the appropriate standard of review, together with the potential relevance of the federal statute, persuades us that it will be useful to focus on the source of the constitutional right on which respondents rely.

The “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State ...

...

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides:

“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

Thus, by virtue of a person’s state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the “Privileges and Immunities of Citizens in the several States” that he visits. This provision removes “from the citizens of each State the disabilities of alienage in the other States.” *Paul v. Virginia* (1869). Permissible justifications for discrimination between residents and non-

residents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State. It provides important protections for nonresidents who enter a State ... Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." ... Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment ...

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, (1873), it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "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." ...

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro* ... but it is surely no less strict.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. *Dunn v. Blumstein* (1972).

It is undisputed that respondents and the members of the class that they represent are citizens of California and that their need for welfare benefits is unrelated to the length of time that they have resided in California. We thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned. Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile ...

... First, although it is reasonable to assume that some persons may be motivated to move for the purpose of obtaining higher benefits, the empirical evidence reviewed by the District Judge, which takes into account the high cost of living in California, indicates that the number of such persons is quite small—surely not large enough

to justify a burden on those who had no such motive. Second, California has represented to the Court that the legislation was not enacted for any such reason. Third, even if it were, as we squarely held in *Shapiro v. Thompson*, (1969), such a purpose would be unequivocally impermissible ...

The question that remains is whether congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act somehow resuscitates the constitutionality of § 11450.03. That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.

Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination." *Williams v. Rhodes*, (1968). Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation ...

Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." ... The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, (1935).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

...

In my view, the majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.

...

Unlike the majority, I would look to history to ascertain the original meaning of the Clause. At least in American law, the phrase (or its close approximation) appears to stem from the 1606 Charter of Virginia, which provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies ... shall HAVE and enjoy all Liberties, Franchises, and Immunities ... as if they had been abiding and born, within this our Realm of England." ... Other colonial charters contained similar guarantees. Years later, as tensions between England and the American Colonies increased, the colonists adopted resolutions reasserting their entitlement to the privileges or immunities of English citizenship ...

The colonists' repeated assertions that they maintained the rights, privileges, and immunities of persons "born within the realm of England" and "natural born" persons suggests that, at the time of the founding, the terms "privileges" and "immunities" (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons. Presumably members of the Second Continental Congress so understood these terms when they employed them in the Articles of Confederation, which guaranteed that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." ...

Accordingly, the majority's conclusion-that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits-appears contrary to the original understanding and is dubious at best.

As THE CHIEF JUSTICE points out ... it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case ... Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court." ...

I respectfully dissent.

Excerpted by Kimberly Clairmont



Table of Incorporation

Table of Incorporation, 1925 – 2020

Amendment	Right	Year	Case
I	Speech	1925	<i>Gitlow v. NY</i>
	Press	1931	<i>Near v. MN</i>
	Assembly	1937	<i>DeJonge v. OR</i>
	Religion	1940	<i>Cantwell v. CT</i>
II	Bear arms	2010	<i>McDonald v. Chicago</i>
III	Quartering soldiers		Not incorporated
IV	No unreasonable searches and seizures	1949	<i>Wolf v. CO</i>
	Exclusionary rule	1961	<i>Mapp v. OH</i>
	Just compensation	1987	<i>Chicago, B&O RR v. Chicago</i>
V	Self-incrimination	1964	<i>Malloy v. Hogan</i>
	Double jeopardy	1969	<i>Benton v. MD</i>
	Grand jury		Not incorporated
	Right to counsel	1963	<i>Gideon v. Wainwright</i>
VI	Public trial	1948	<i>In re Oliver</i>
	Right to confront	1965	<i>Pointer v. TX</i>
	Impartial trial	1966	<i>Parker v. Gladden</i>
	Speedy trial	1967	<i>Klopfer v. NC</i>
	Compulsory trial	1967	<i>Washington v. TX</i>
	Criminal trial	1968	<i>Duncan v. LA</i>
	Unanimous jury	2020	<i>Ramos v. LA</i>
	Civil trial		Not incorporated
VIII	No cruel and unusual punishment	1962	<i>Robinson v. CA</i>
	No excessive fines	2019	<i>Timbs v. IN</i>
	No excessive bail		Not incorporated

Press Freedoms

Case List

Basics of the Freedom

[*Near v. Minnesota*](#) (1931)

[*New York Times v. United States*](#) (1971)

Libel and Defamation

[*New York Times Co. v. Sullivan*](#) (1964)

[*Gertz v. Robert-Welch Inc.*](#) (1974)

[*Hustler Magazine v. Falwell*](#) (1998)

Protection of the Press

[*Branzburg v. Hayes*](#) (1972)

[*Zurcher v. Stanford Daily*](#) (1978)

Press Access to Criminal Justice Process

[*Sheppard v. Maxwell*](#) (1966)

[*Nebraska Press Assn. v. Stuart*](#) (1976)

[*Richmond Newspapers v. Virginia*](#) (1980)

[*Houchins v. KQED*](#) (1978)

Right to Publish

[*Seattle Times v. Rhinehart*](#) (1984)

[*Smith v. Daily Mail Publishing Co*](#) (1979)

Print versus Cable, Broadcast and Internet

Miami Herald Publishing Co. v. Tornillo (1974)

Red Lion Broadcasting Co. v. FCC (1969)

FCC v. Pacifica Foundation (1978)

Turner Broadcasting System, Inc v. FCC (1994)

United States et. al v. Playboy Entertainment Group, Inc. (2000)

Reno v. American Civil Liberties Union (1997)

Basics of the Freedom

Near v. Minnesota

283 U.S. 697 (1931)

Vote: 5-4

Decision: Reversed

Majority: Hughes, joined by Holmes, Brandeis, Stone, Roberts

Dissent: Butler, joined by Van Devanter, McReynolds, Sutherland

CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

...

[In this case] the county attorney of Hennepin county brought this action to enjoin the publication of what was described as a 'malicious, scandalous and defamatory newspaper, magazine or other periodical,' known as "The Saturday Press" published by the defendants in the city of Minneapolis. * * * Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles 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. Most of the charges were directed against the chief of police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The county attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters ... There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them ...

[A state district court found against the defendant, Jay Near, the publisher of "The Saturday Press"] and found that the defendants through these publications "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title." * * * [Near appealed to the Minnesota Supreme Court which affirmed. 179 Minn. 40, 228 N.W. 326.].

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. * * * Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

* * * It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. * * *

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 periodical 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. * * *

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be “malicious, scandalous and defamatory,” and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. * * *

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

The 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 licenser, 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. See Story on the Constitution, 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship

under our constitutional system and that enjoyed in England. Here, as Madison said, ‘the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.’ Report on the Virginia Resolutions, Madison’s Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado* (1907): “In the first place, the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, *Respublica v. Oswald*. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *Respublica v. Oswald*.”

*** 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. “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.” *Schenck v. United States* (1919). 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. The constitutional guaranty of free speech does not “protect a man from an injunction against uttering words that may have all the effect of force.” *Gompers v. Buck Stove & Range Co.* (1911). *Schenck v. U.S.*, *supra*. These limitations are not applicable here. ***

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. *** The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions. ***

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. ***

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent ...

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice.

...

Defendant Near again appealed to the supreme court ...

Defendant concedes that the editions of the newspaper complained of are "defamatory *per se*." And he says: "It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. ... The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance*, though he is subject to responsibility therefor *afterwards*."

The record, when the substance of the articles is regarded, requires that concession here. And this Court is required to pass on the validity of the state law on that basis ...

The Act was passed in the exertion of the State's power of police, and this court is by well established rule required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. *Lindsley v. Natural Carbonic Gas Co* (1911), *Gitlow v. New York* (1925), *Corporation Commission v. Lowe* (1930), *O'Gorman & Young v. Hartford Ins. Co* (1931) ...

...

It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press ...

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. The controlling words are "All persons guilty of such nuisance may be enjoined, as hereinafter provided. ... Whenever any such nuisance is committed ... an action in the name of the State" may be brought "to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, *from further committing, conducting or maintaining any such nuisance.* ... The court may make its order and judgment permanently enjoining ... defendants found guilty ... from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. ..." 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.

The judgment should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

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New York Times v. United States

403 U.S. 713 (1971)

Vote: Per Curiam
 Decision: Affirmed
 Concurrence: Black, joined by Douglas
 Concurrence: Brennan
 Concurrence: Stewart, joined by White
 Concurrence: Marshall
 Dissent: Harlan, joined by Burger
 Dissent: Blackmun

PER CURIAM.

...

We granted certiorari in 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.” Post, pp. 942, 943.

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan* (1963); see also *Near v. Minnesota* (1931). The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.” *Organization for a Better Austin v. Keefe* (1971). The District Court for the Southern District of New York in the New York Times case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the Washington Post case held that the Government had not met that burden. We agree.

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.

The judgments shall issue forthwith. So ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

...

I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. 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 seeking injunctions against these newspapers, and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge ...

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 ...

In other words, 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. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." 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. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists ...

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. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. 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. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States* (1919), during which times "[n]o 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." *Near v. Minnesota* (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature." [T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota, supra*. Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient, for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And, therefore, every restraint issued in this case, whatever its form, has violated the First Amendment — and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

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. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that 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.

The Government's position is simply stated: the responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information. At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press ...

It is not easy to reject the proposition urged by the United States, and to deny relief on its good faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun, and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful, at best.

What is more, 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 ...

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether, in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" Brief for the United States. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases, there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. *See, e.g.*, 18 U.S.C. § 798; 50 U.S.C. § 783. Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether, in these particular cases, the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. *See In re Debs*, (1895). The Government argues that, in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines v. Waterman S.S. Corp* (1948); *Hirabayashi v. United States* (1943); *United States v. Curtiss Wright Corp* (1936). And, in some situations, it may be that, under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if, when the Executive Branch has adequate authority granted by Congress to protect "national security," it can choose, instead, to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co. v. Sawyer* (1952). 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 ...

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case, this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official, nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

Excerpted by Kimberly Clairmont

The New York Times.

NEW YORK, TUESDAY, MARCH 29, 1960

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard."

—New York Times editorial
Saturday, March 19, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas trilled the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as

protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it is this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. 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"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions

of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to belaud this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs. . . . We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious reaffirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Stella Adler
Harwood Peace Alexander
Sully Aspinion
Henry Van Andele
Harry Baldwin
Julie Baldwin
Omer Davis
Sammy Davis, Jr.
Mae Blount
William Evans
William Branch
Marian Brande
Miss Ralph Burdick
Daphne Carroll
Dr. Alan Knight Chalmers

Joseph Cohen
Richard Cox
Nat King Cole
Cheryl Crawford
Dorothy Dandridge
Omer Davis
Sammy Davis, Jr.
Ruby Dee
Harry Duffly
Society Edford
Dr. Philip Elliott
Dr. Harry Emerson Fosdick

Anthony Francisco
Melrose Gussion
Lorraine Hanbury
Rev. Donald Huntington
Nat Henzell
James Hicks
Mary Hinton
Van Heflin
Langston Hughes
Marilyn Isakovich
Mahala Jackson
Floyd Johnson
Houston Johnson
John Kilian

Estlin Kitt
Rabbi Edward Klein
Hope Lange
John Lewis
Vivian Lindbergh
David Livingston
William Michelson
Cal Murphy
Don Murray
John Murray
A. J. Murks
Frederick O'Hair
Peter Oshry
L. Joseph Overton

Albert P. Palmer
Clarence Pickett
Shed Piker
Sidney Piker
Michael Posner
A. Philip Randolph
John Ralls
Eliot Rice
Cleveland Robinson
Jackie Robinson
Mr. Ebaner Roosevelt
Robert Rubin
Robert Ryan
Mervyn Stuppin

Frank Stone
Louis Simon
Hugo Stevens
David Sullivan
Julius Sun
George Tabak
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynes
Charles White
Shelley Winans
Max Youngstein

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph D. Abernathy
(Montgomery, Ala.)
Rev. Fred L. Shuttlesworth
(Birmingham, Ala.)
Rev. Rabby Mike Smith
(Nashville, Tenn.)
Rev. W. A. Dennis
(Chattanooga, Tenn.)
Rev. C. K. Steele
(Tallahassee, Fla.)

Rev. Matthew D. McCallie
(Orangeburg, S. C.)
Rev. William Holmes
Sifton
(Atlanta, Ga.)
Rev. Douglas Moore
(Durham, N. C.)
Rev. Wyatt Tee Walker
(Petersburg, Va.)

Rev. Wilbur L. Hamilton
(Norfolk, Va.)
I. S. Levy
(Columbia, S. C.)
Rev. Martin Luther King, Sr.
(Atlanta, Ga.)
Rev. Henry C. Boston
(Memphis, Tenn.)
Rev. S. S. Sear, Sr.
(Montgomery, Ala.)
Rev. Samuel W. Williams
(Atlanta, Ga.)

Rev. A. L. Davis
(New Orleans, La.)
Mrs. Katie S. Whiskam
(New Orleans, La.)
Rev. W. H. Hall
(Hattiesburg, Miss.)
Rev. J. E. Levey
(Mobile, Ala.)
Rev. T. J. Jernigan
(Baton Rouge, La.)

Please mail this coupon TODAY!

Committee To Defend Martin Luther King and The Struggle For Freedom In The South
312 West 125th Street, New York 27, N. Y. UNIVERSITY 6-1700

I am enclosing my contribution of \$ _____
for the work of the Committee.

NAME (PLEASE PRINT): _____
ADDRESS: _____
CITY: _____ STATE: _____

I want to help Please send further information

Please make checks payable to:
Committee To Defend Martin Luther King

NY Times Ad
3/29/1960

Libel and Defamation

New York Times Co. v. Sullivan

376 U.S. 254 (1964)

Vote: 9-0

Decision: Reversed

Majority: Brennan, joined by Warren, Clark, Harlan, Stewart, White

Concurrence: Black, joined by Douglas

Concurrence: Goldberg, joined by Douglas

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.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. ..." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are

struggling daily for dignity and freedom warmly endorse this appeal,” appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South,” and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent’s claim of libel. They read as follows:

Third paragraph:

“In Montgomery, Alabama, after students sang ‘My Country, ‘Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.”

Sixth paragraph:

“Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. 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’ – a felony under which they could imprison him for ten years. ...”

Although neither of these statements mentions respondent by name, he contended that the word “police” in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of “ringing” the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement “They have arrested [Dr. King] seven times” would be read as referring to him; he further contended that the “They” who did the arresting would be equated with the “They” who committed the other described acts and with the “Southern violators.” Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King’s protests with “intimidation and violence,” bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not “My Country, ‘Tis of Thee.” Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time “ring” the campus,

and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. * * * The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous per se, "the law ... implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages – as distinguished from "general" damages, which are compensatory in nature – apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

[The jury found for the plaintiff and the Supreme Court of Alabama affirmed]. Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

[The Court first held that there was state action and that the publication was not a "commercial" advertisement unprotected by the First Amendment because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."]

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 to “bring [him] into public contempt.” *** 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. *Alabama Ride Co. v. Vance* (1938); *Johnson Publishing Co. v. Davis* (1960). ***

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. *** In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. *NAACP v. Button* (1963). Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression 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.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. ***

Thus we 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. See *Terminiello v. Chicago* (1949); *De Jonge v. Oregon* (1937). The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon “the truth, popularity, or social utility of the ideas and beliefs which are offered.” *NAACP v. Button* (1963). As Madison said, “Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.” ***

[E]rroneous statement is inevitable in free debate, and *** must be protected if the freedoms of expression are to have the “breathing space” that they “need ... to survive,” *NAACP v. Button* (1963) ...

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California* (1941). This is true even though the utterance contains “half-truths” and “misinformation.” *Pennekamp v. Florida* (1946). Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as “men of fortitude, able to thrive in a hardy cli-

mate,” *Craig v. Harney* (1947), surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798 which first crystallized a national awareness of the central meaning of the First Amendment. *See* Levy, *Legacy of Suppression* (1960), at 258 *et seq.*; Smith, *Freedom’s Fetters* (1956), at 426, 431, and *passim*. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, “if any person shall write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress ..., or the President ..., with intent to defame ... or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.”

The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. * * *

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. * * * [There is] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment. * * * There is no force in respondent’s argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. * * * [T]his distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment’s restrictions.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. * * * The judgment awarded in this case – without the need for any proof of actual pecuniary loss – was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is “a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.” *Bantam Books, Inc. v. Sullivan* (1963).

The state rule of law is not saved by its allowance of the defense of truth. * * *

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. They tend to make only statements which “steer far wider of the unlawful zone.” *Speiser v. Randall* (1958). 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. * * * 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. * * * 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 ...

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

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds 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.” I base my vote to reverse on the belief that the First and Fourteenth Amendments 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 criticisms of the Montgomery agencies and officials. * * *

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as “obscenity,” *Roth v. United States* (1957) and “fighting words,” *Chaplinsky v. New Hampshire* (1942) are not expression within the protection of the First Amendment, freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. “For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.” An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring.

The Court today announces a constitutional standard which 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.” The Court thus rules that the Constitution gives citizens and newspapers a “conditional privilege” immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court’s standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. * * *

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Gertz v. Robert-Welch Inc.

418 U.S. 323 (1974)

Vote: 5-4

Decision: Reversed

Majority: Powell joined by Stewart, Marshall, Blackmun, and Rehnquist

Concurrence: Blackmun

Dissent: Burger, Douglas, Brennan and White

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.

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes *American Opinion*, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of *American Opinion* commissioned an article on the murder trial of Officer Nuccio. For this purpose, he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio and The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police ...

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of *American Opinion* made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harasses Nuccio." Respondent placed the issue of *American Opinion* containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. * * * After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan* (1964). Under this rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood “with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine’s managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author’s reputation and on his prior experience with the accuracy and authenticity of the author’s contributions to *American Opinion* ...

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. * * *

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues. *New York Times v. Sullivan* (1964). They belong to that category of utterances which “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.” *Chaplinsky v. New Hampshire* (1942) ...

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate ... [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability [liability that does not depend on actual negligence or intent to harm] that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan*: “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.” The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation ... Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation ...

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. * * *

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 administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. 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 ...

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. 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 than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An 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. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties ...

Even if the foregoing generalities do not obtain in every instance, 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." *Curtis Publishing Co. v. Butts* (1967). 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 “public or general interest” test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

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 ...

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 recognize 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. We decline to follow it.

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 perva-

sive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure ... 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.

It is so ordered.

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Hustler Magazine v. Falwell

485 U.S. 46 (1998)

Vote: 8-0

Decision: Reversed

Majority: Rehnquist, joined by Brennan, Marshall, Blackmun, Stevens, O'Connor, Scalia

Concurrence: White

Not participating: Kennedy

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various

celebrities about their “first times.” Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of “first times.” Copying the form and layout of these Campari ads, Hustler’s editors chose respondent as the featured celebrity and drafted an alleged “interview” with him in which he states that his “first time” was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, “ad parody – not to be taken seriously.” The magazine’s table of contents also lists the ad as “Fiction; Ad and Personality Parody.”

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not “reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.” The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded \$100,000 in compensatory damages, as well as \$50,000 each in punitive damages from petitioners. Petitioners’ motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. The court rejected petitioners’ argument that the “actual malice” standard of *New York Times Co. v. Sullivan* (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are “entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent’s] claim for libel.” But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. * * * The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was “irrelevant,” as the issue is “whether [the ad’s] publication was sufficiently outrageous to constitute intentional infliction of emotional distress.” Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari.

This case presents us with a novel question involving First Amendment limitations upon a State’s authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”[T]he freedom to speak one’s mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.” *Base Corp v. Consumers Union of United States, Inc.* (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a “false” idea. *Gertz v. Robert Welch, Inc.* (1974). As Justice Holmes wrote, “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 ...” *Abrams v. United States* (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” * * *

Of course, this does not mean that any speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan* (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counter speech, however persuasive or effective. But even though falsehoods have little value in and of themselves, they are “nevertheless inevitable in free debate,” and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted “chilling” effect on speech relating to public figures that does have constitutional value. “Freedoms of expression require ‘breathing space.’” This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. In respondent’s view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State’s interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking, the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently “outrageous.” But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. * * * Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events – an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

"The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, *The Political Cartoon: Journalism's Strongest Weapon*, *The Quill* 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, *The Art and Politics of Thomas Nast 177* (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, *The Political Cartoon* 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them.

;Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. * * *

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. * * * But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice,” i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a “blind application” of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate “breathing space” to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a “public figure” for purposes of First Amendment law. The jury found against respondent on his libel claim when it decided that the *Hustler* ad parody could not “reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.” The Court of Appeals interpreted the jury’s finding to be that the ad parody “was not reasonably believable,” and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by “outrageous” conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

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Protection of the Press

Branzburg v. Hayes

480 U.S. 665 (1972)

Vote: 5-4

Decision: Affirmed

Majority: White, joined by Burger, Blackmun, Powell, Rehnquist

Concurrence: Powell

Dissent: Stewart, Marshall, Brennan, Douglas

OPINION OF THE COURT BY JUSTICE WHITE, ANNOUNCED BY THE CHIEF JUSTICE.

...

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.

[There were three consolidated cases: Branzburg was a reporter for the Louisville, Kentucky newspaper the Courier-Journal, who published articles including his observations of people “synthesizing hashish from marijuana” and the “drug scene” in Kentucky; Pappas was a television reporter-photographer in Providence, Rhode Island who gained entrance to a Black Panther headquarters waiting for a police raid that did not occur and did not write about the incident; and Caldwell was a “reporter for the New York Times assigned to cover the Black Panther Party” in Northern California. All three were subpoenaed by grand juries].

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: 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 the newsmen in these cases 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. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is “compelling” or “paramount,” and those precedents

establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association. The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

*** The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, 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. ***

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. ***

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. ***

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. * * *

MR. JUSTICE POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice Stewart's dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media – properly free and untrammelled in the fullest sense of these terms – were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.¹

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

MR. JUSTICE DOUGLAS, dissenting.

* * * The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are

1. It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court - when called upon to protect a newsman from improper or prejudicial questioning - would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

to be balanced against other needs or conveniences of government. My belief is that all of the “balancing” was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case. * * *

I see no way of making mandatory the disclosure of a reporter’s confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions. * * *

* * * A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter’s main function in American society will be to pass on to the public the press releases which the various departments of government issue. * * *

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. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While Mr. Justice Powell’s enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman 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.

*** [W]hen 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 that 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.

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Zurcher v. Stanford Daily

436 U.S. 547 (1978)

Vote: 5-3

Decision: Reversed

Majority: White, joined by Burger, Blackmun, Powell, Rehnquist

Dissent: Stevens, joined by Brennan, Marshall

MR. JUSTICE WHITE DELIVERED THE OPINION OF THE COURT.

...

On Sunday, April 11, a special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police. The photographs carried the byline of a Daily staff member and indicated that he had been at the east end of the hospital hallway where he could have photographed the assault on the nine officers. The next day, the Santa Clara County District Attorney's Office secured a warrant from the Municipal Court for an immediate search of the Daily's offices for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9. The warrant issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily]." App. 31-32. The warrant affidavit contained no allegation or indication that members of the Daily staff were in any way involved in unlawful acts at the hospital.

The search pursuant to the warrant was conducted later that day by four police officers and took place in the presence of some members of the Daily staff. The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. The officers apparently had opportunity to read notes and correspondence during the search; but, contrary to claims of the staff, the officers

denied that they had exceeded the limits of the warrant. They had not been advised by the staff that the areas they were searching contained confidential materials. The search revealed only the photographs that had already been published on April 11, and no materials were removed from the Daily's office.

A month later the Daily and various members of its staff, respondents here, brought a civil action in the United States District Court for the Northern District of California seeking declaratory and injunctive relief under 42 U. S. C. § 1983 against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search of the Daily's office had deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments of the United States Constitution ...

The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring ...

Because the State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not, the premise of the District Court's holding appears to be that state entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the State's right to arrest him. The cases are to the contrary ... the central purpose of the Fourth Amendment was seen to be the protection of the individual against official searches for evidence to convict him of a crime. Entries upon property for civil purposes, where the occupant was suspected of no criminal conduct whatsoever, involved a more peripheral concern and the less intense "right to be secure from intrusion into personal privacy." *Frank v. Maryland* (1959). Such searches could proceed without warrant, as long as the State's interest was sufficiently substantial. Under this view, the Fourth Amendment was more protective where the place to be searched was occupied by one suspected of crime and the search was for evidence to use against him ... held that a warrant is required where entry is sought for civil purposes, as well as when criminal law enforcement is involved. Neither case, however, suggested that to secure a search warrant the owner or occupant of the place to be inspected or searched must be suspected of criminal involvement. Indeed, both cases held that a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor ...

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought ...

Against this background, it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest ... As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises. The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search war-

rant in the circumstances present here and by insisting that the investigation proceed by *subpoena duces tecum* [a writ ordering a person to attend court and bring relevant documents], whether on the theory that the latter is a less intrusive alternative or otherwise.

This is not to question that “reasonableness” is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized. We do hold, however, that the courts may not, in the name of Fourth Amendment reasonableness, prohibit the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement ...

In any event, the reasons presented by the District Court and adopted by the Court of Appeals for arriving at its remarkable conclusion do not withstand analysis. First, as we have said, it is apparent that whether the third-party occupant is suspect or not, the State’s interest in enforcing the criminal law and recovering the evidence remains the same; and it is the seeming innocence of the property owner that the District Court relied on to foreclose the warrant to search. But, as respondents themselves now concede, if the third party knows that contraband or other illegal materials are on his property, he is sufficiently culpable to justify the issuance of a search warrant. Similarly, if his ethical stance is the determining factor, it seems to us that whether or not he knows that the sought after articles are secreted on his property and whether or not he knows that the articles are in fact the fruits, instrumentalities, or evidence of crime, he will be so informed when the search warrant is served, and it is doubtful that he should then be permitted to object to the search, to withhold, if it is there, the evidence of crime reasonably believed to be possessed by him or secreted on his property, and to forbid the search and insist that the officers serve him with a subpoena *duces tecum*.

Second, we are unpersuaded that the District Court’s new rule denying search warrants against third parties and insisting on subpoenas would substantially further privacy interests without seriously undermining law enforcement efforts. Because of the fundamental public interest in implementing the criminal law, the search warrant, a heretofore effective and constitutionally acceptable enforcement tool, should not be suppressed on the basis of surmise and without solid evidence supporting the change ... [S]earch 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.

Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime, involves hazards to criminal investigation much more serious than the District Court believed ... At the very least, the burden of justifying a major revision of the Fourth Amendment has not been carried.

We are also not convinced that the net gain to privacy interests by the District Court's new rule would be worth the candle. In the normal course of events, search warrants are more difficult to obtain than subpoenas, since the latter do not involve the judiciary and do not require proof of probable cause. Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when choice is available under local law and the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course. His choice is more likely to be based on the solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case, that the warranted search is necessary to secure and to avoid the destruction of evidence ...

Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings 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. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices ...

We note finally that if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash. Further, Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment. Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non constitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants ...

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here persuaded us that the Amendments forbade this search.

It follows that the judgment of the Court of Appeals is reversed.

So ordered.

Excerpted by Kimberly Clairmont



Press Access to Criminal Justice Process

Sheppard v. Maxwell

384 U.S. 333 (1966)

Vote: 8-1

Decision: Reversed

Majority: Clark, joined by Brennan, Harlan, Stewart, White, Douglas, Fortas, Warren

Dissent: Black

[JUSTICE BLACK DISSENTED WITHOUT OPINION.]

JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution ...

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore home in Bay Village, Ohio, a suburb of Cleveland ... [on July 4, 1954] ...

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 the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy, together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence, and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was “infallible,” and “you might as well tell us all about it now.” At the end of the interrogation, Shotke told Sheppard: “I think you killed your wife.” Still later in the same afternoon, a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon — later the chief prosecutor of Sheppard — sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline “Testify Now In Death, Bay Doctor Is Ordered,” one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Shep-

pard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. 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. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: "Loved My Wife, She Loved Me," Sheppard Tells News Reporter." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

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 Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. 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. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence. During the inquest on July 26, a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed

Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled “Why Don’t Police Quiz Top Suspect” demanded that Sheppard be taken to police headquarters. It described him in the following language:

“Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases. ...”

A front-page editorial on July 30 asked: “Why Isn’t Sam Sheppard in Jail?” It was later titled “Quit Stalling – Bring Him In.” After calling Sheppard “the most unusual murder suspect ever seen around these parts” the article said that “[e]xcept for some superficial questioning during Coroner Sam Gerber’s inquest he has been scot-free of any official grilling. ...” It asserted that he was “surrounded by an iron curtain of protection [and] concealment.”

That night at 10 o’clock Sheppard was arrested at his father’s home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned – having been denied a temporary delay to secure the presence of counsel – and bound over to the grand jury ... the Court has also pointed out that “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” And the Court has insisted that no one be punished for a crime without “a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.” “Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.” But it must not be allowed to divert the trial from the “very purpose of a court system ... to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.” Among these “legal procedures” is the requirement that the jury’s verdict be based on evidence received in open court, not from outside sources ...

Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered ... Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge’s “admonitions” at the beginning of the trial are representative ...

At intervals during the trial, the judge simply repeated his “suggestions” and “requests” that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge’s failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors’ privacy ...

Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial ... The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judge-ships.

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." *Estes v. Texas* (1965). The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

There can be no question about the nature of the publicity which surrounded Sheppard's trial ... Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury ...

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution ...

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further

report that there was “a ‘bombshell witness’ on tap” who would testify as to Sheppard’s “fiery temper” could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge’s failure to take any action. Effective control of these sources – concededly within the court’s power – might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard’s indictment.

...

Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel’s complaint about the WHK broadcast on the second day of trial. In this manner, Sheppard’s right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements.

From the cases coming here we note that unfair 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. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. 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.

Excerpted by Kimberly Clairmont



Nebraska Press Assn. v. Stuart

427 U.S. 539 (1976)

Vote: 9-0

Decision: Reversed

Majority: Burger, joined by White, Blackmun, Powell, Rehnquist

Concurrence: Brennan, joined by Stewart, Marshall

Concurrence: White

Concurrence: Powell

Concurrence: Stevens

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

...

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations ... [A broad initial order prohibiting reporting was later amended by the Nebraska Supreme Court and] prohibited reporting of only 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 Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public ...

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot ... [We] conclude that this case is not moot, and proceed to the merits.

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press ...

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community for the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession – including other judges – pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court.

The excesses of press and radio and lack of responsibility of those in authority in the *Hauptmann* case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. The effort was renewed in 1965 when the American Bar Association embarked on a project to develop standards for all aspects of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. See Powell, *The Right to a Fair Trial*, 51 A. B. A. J. 534 (1965) [Lewis Powell was then president of the ABA; he joined the Court as an Associate Justice in 1972]. The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968). Other groups have undertaken similar studies ...

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines ...

The First Amendment provides that “Congress shall make no law ... abridging the freedom ... of the press,” and 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.” *Near v. Minnesota ex rel. Olson* (1931). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a “previous” or “prior” restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant’s right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case ...

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law’s sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time.

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct ...

... The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly – a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue – like the order requested in *New York Times* – does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter ...

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. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is

nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see *Ex parte Milligan* (1867), cautions against suspending explicit guarantees ...

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable ... [The final order] enjoined reporting of (1) “[c]onfessions or admissions against interest 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 “[o]ther 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: “[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.” *Sheppard v. Maxwell* (1966). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once 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. As part of a final order, entered after plenary review, this prohibition regarding “implicative” information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. The third phase of the order entered falls outside permissible limits.

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.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. However difficult it may be, we need not rule out the possibility of show-

ing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

Reversed.

Excerpted by Kimberly Clairmont



Richmond Newspapers v. Virginia

448 U.S. 555 (1980)

Vote: 7-1

Decision: Reversed

Majority: Burger, joined by Blackmun, Stewart, White, Marshall, Blackmun, Stevens

Dissent: Rehnquist

Not participating: Powell

(Closing off a trial to the public and the press violates the First Amendment).

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.

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va.

The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence ... Stevenson was retried in the same court. This second trial ended in a mistrial ... A third trial, which began in the same court on June 6, 1978, also ended in a mistrial ...

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public ... The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection and would leave it to the discretion of the court.

Presumably referring to Va. Code § 19.2-266 (Supp. 1980), the trial judge then announced, “[T]he statute gives me that power specifically and the defendant has made the motion.” He then ordered “that the Courtroom be kept clear of all parties except the witnesses when they testify” Tr., supra, at 4-5.2 The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day’s proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial, accordingly, he again ordered the reporters to leave the courtroom, and they complied.

At the closed hearing, counsel for appellants observed that no evidentiary findings had been made by the court prior to the entry of its closure order and pointed out that the court had failed to consider any other, less drastic measures within its power to ensure a fair trial ...

What transpired when the closed trial resumed the next day was disclosed in the following manner by an order of the court entered September 12, 1978. “[I]n the absence of the jury, the defendant by counsel made a Motion that a mistrial be declared, which motion was taken under advisement” ...

“At the conclusion of the Commonwealth’s evidence, the attorney for the defendant moved the Court to strike the Commonwealth’s evidence on grounds stated to the record, which Motion was sustained by the Court.”

“And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart.”

On September 27, 1978, the trial court granted appellants’ motion to intervene *nunc pro tunc* [changing back to an earlier date of an order] in the Stevenson case. Appellants then petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the trial court’s closure order. On July 9, 1979, the Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal.

Appellants then sought review in this Court, invoking both our appellate and certiorari jurisdiction ... We conclude that jurisdiction by appeal does not lie; however, treating the filed papers as a petition for a writ of certiorari ... we grant the petition.

The criminal trial which appellants sought to attend has long since ended, and there is thus some suggestion that the case is moot. This Court has frequently recognized, however, that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature ... If the underlying dispute is “capable of petition, yet evading review,” it is not moot. *Southern Pacific Terminal Co. v. ICC* (1911).

Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order “will evade review, or at least considered plenary review in this Court.” *Nebraska Press Assn v. Stuart* (1976). Accordingly, we turn to the merits.

...

In prior cases the Court has treated questions involving conflicts between publicity and a defendant’s right to a fair trial, as we observed in *Nebraska Press Assn. v Stuart* ... But 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 ...

As we have shown, and was shown in both the Court’s opinion and the dissent in *Gannett Co., Inc. v. DePasquale* (1979), 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. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial, it 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 serve an important prophylactic purpose, providing 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 ...

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done-or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner ...”

It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” 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," *Offutt v. United States* (1954) ...

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 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. This conclusion is hardly novel, without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years ...

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment, without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg v. Hayes* (1972).

... 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 ... [T]here exist 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.

Excerpted by Kimberly Clairmont



Houchins v. KQED

438 U.S. 1 (1978)

Vote: 4-3

Decision: Reversed

Majority: Burger, joined by Stewart, White, Rehnquist

Dissent: Stevens, joined by Brennan, Powell

Not participating: Marshall, Blackmun

CHIEF JUSTICE BURGER ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED AN OPINION, IN WHICH WHITE AND REHNQUIST, JJ., 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.

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a statement from petitioner denying that prison conditions were responsible for the prisoners' illnesses.

KQED requested permission to inspect and take pictures within the Greystone facility. After permission was refused, KQED and the Alameda and Oakland branches of the National Association for the Advancement of Colored People (NAACP) filed suit under 42 U.S.C. 1983. They alleged that petitioner had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances. Public access to such information was essential, they asserted, in order for NAACP members to participate in the public debate on jail conditions in Alameda County. They further asserted that television coverage of the conditions in the cells and facilities was the most effective way of informing the public of prison conditions.

The complaint requested a preliminary and permanent injunction to prevent petitioner from "excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing therein." On June 17, 1975, when the complaint was filed, there appears to have been no formal policy regarding public access to the Santa Rita jail. However, according to petitioner, he had been in the process of planning a program of regular monthly tours since he took office six months earlier. On July 8, 1975, he announced the program and invited all interested persons to make arrangements for the regular public tours. News media were given notice in advance of the public and presumably could have made early reservations ...

On interlocutory appeal from the District Court's order, petitioner invoked *Pell v. Procunier* (1974), where this Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." He contended that the District Court had departed from *Pell* and abused its discretion because it had ordered that he give the media greater access to the jail than he gave to the general public. The Court of Appeals rejected petitioner's argument that *Pell* and *Saxbe v. Washington Post Co.* (1974), were controlling. It concluded, albeit in three separate opinions, that the public and the media had a First and Fourteenth Amendment right of access to prisons and jails, and sustained the District Court's order ...

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; each has special, crucial functions, each complementing – and sometimes conflicting with – the other ...

The respondents' argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but 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 on 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. We must not confuse what is "good," "desirable," or "expedient" with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.

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

Getting Away With Murder

AN EDITORIAL

What's the matter with the law enforcement authorities of Cuyahoga County?

Have they lost their sense of reason—or at least incessantly set aside the realization of what they are hired to do, and for whom they work?

If ever a murder case was studied with fumbling, halting, stupid, uncooperative bungling—politeness to people whose place in this situation completely justified vigorous searching, prompt and effective police work—the Sheppard case has them all.

Was the murder of Mrs. Sheppard a polite matter? Did the killer make a dutiful bow to the authorities and then proceed brutally to destroy the young child-bearing wife?

Why all of this sham, hypocrisy, politeness, crisscrossing of pomp and protocol in this case? Who is trying to deceive whom?

From the very beginning of this case—from the first hour that the murder became known to the authori-

ties by a telephone call from the husband to the town mayor—from that moment on and including this, the case has been one of the worst in local crime history.

Of course the trail is cold. Of course the clues have been virtually erased by the killer. Of course the whole thing is botched up so badly that head or tail cannot be made of it.

In the background of this case are 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, and a whole string of special and bewildering extra-privileged courtesies that should never be extended by authorities investigating a murder—the most serious, and sickening crime of all.

The spectacle of a whole community watching a batch of law enforcement officials fumbling around, stumbling over one another, bowing and scraping in the presence of people they ought to be dealing with just as firmly as any other persons in any other crime—that spectacle is not only becoming a stench but a

serious threat to the dignity of law enforcement itself.

•
Carter Sam Gerber was never more right than when yesterday he said that the killer must be laughing secretly at the whole spectacle—the spectacle of a community of a million and a half people brought to indignant frustration by Mrs. Sheppard's killer in that white house out in Bay Village.

Why shouldn't he chuckle? Why shouldn't he cover up, shut up, conceal himself behind the circle of protecting people?

What's the matter with us in Cuyahoga County? Who are we afraid of? Why do we have to kow-tow to a set of circumstances and people where a murder has been committed?

•
It's time that somebody smashed into this situation and tore aside this restraining curtain of sham, politeness and hypocrisy and went at the business of solving a murder—and quit this nonsense of artificial politeness that has not been extended to any other murder case in generations.

Cleveland Press editorial



Cleveland Press sketch



Right to Publish

Seattle Times v. Rhinehart

476 U.S. 20 (1984)

Vote: 9-0

Decision: Affirmed

Majority: Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O' Connor

JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between \$35,000 and \$50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang. ..." The two articles that appeared in 1979 referred to a purported connection between Rhinehart and Lou Ferrigno, star of the popular television program, "The Incredible Hulk."

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs. The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants – petitioners here – knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." With respect to the Foundation, the complaint also states: "[T]he articles have, or may have

had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes.” The complaint alleges that the articles misrepresented the role of the Foundation’s “choir” and falsely implied that female members of the Foundation had “stripped off all their clothes and wantonly danced naked. ...” The complaint requests \$14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses. Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart’s income tax returns. Respondents refused, however, to disclose certain financial information, the identity of the Foundation’s donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion [under state law] requesting an order compelling discovery. In their supporting memorandum, petitioners recognized that the principal issue as to discovery was respondents’ “refusa[1] to permit any effective inquiry into their financial affairs, such as the source of their donations, their financial transactions, uses of their wealth and assets, and their financial condition in general.” Record 350. Respondents opposed the motion, arguing in particular that compelled production of the identities of the Foundation’s donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association. Respondents also moved for a protective order preventing petitioners from disseminating any information gained through discovery. Respondents noted that petitioners had stated their intention to continue publishing articles about respondents and this litigation, and their intent to use information gained through discovery in future articles.

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated ... Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request ... In general, the affidavits averred that public release of the donor lists would adversely affect Foundation membership and income and would subject its members to additional harassment and reprisals.

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to “the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.” App. 65a. The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process. In an accompanying opinion, the trial court recognized that the protective order would restrict petitioners’ right to publish information obtained by discovery, but the court reasoned that the restriction was necessary to avoid the “chilling effect” that dissemination would have on “a party’s willingness to bring his case to court.” Record 63.

Respondents appealed from the trial court’s production order, and petitioners appealed from the protective order. The Supreme Court of Washington affirmed both. * * * The Supreme Court of Washington recognized that its holding conflicts with the holdings of the United States Court of Appeals for the District of Columbia Circuit * * * and applies a different standard from that of the Court of Appeals for the First Circuit * * *. We granted certiorari to resolve the conflict. We affirm.

Most States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. Rule 26(b)(1) provides that a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” It further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.” Wash.Super.Ct.Civ.Rule 26(b)(1); *Trust Fund Services v. Aro Glass Co.* (1978); cf. 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2008 (1970).

The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties. If a litigant fails to comply with a request for discovery, the court may issue an order directing compliance that is enforceable by the court’s contempt powers. Wash.Super.Ct.Civ.Rule 37(b).

Petitioners argue that the First Amendment imposes strict limits on the availability of any judicial order that has the effect of restricting expression. They contend that civil discovery is not different from other sources of information, and that therefore the information is “protected speech” for First Amendment purposes. Petitioners assert the right in this case to disseminate any information gained through discovery. They do recognize that in limited circumstances, not thought to be present here, some information may be restrained. They submit, however: “When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression.” Brief for Petitioners 10.

We think the rule urged by petitioners would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process.

It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. This interest may well include most – and possibly all – of what has been discovered as a result of the court’s order under Rule 26(b)(1). It does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery. For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that “[f]reedom of speech ... does not comprehend the right to speak on any subject at any time.” *American Communications Assn. v. Dods* (1950).

The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procurner v. Martinez* (1974) ...

At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order, such as the one at issue here, may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. *Zemel v. Rusk* (1965). Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, *Gannett Co. v. DePasquale* (1979), and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.

Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. *Procurner, supra*. The Washington Civil Rules enable parties to litigation to obtain information "relevant to the subject matter involved" that they believe will be helpful in the preparation and trial of the case. Rule 26, however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy

interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. * * * The prevention of the abuse that can attend the coerced production of information under a State’s discovery rule is sufficient justification for the authorization of protective orders.

...

The facts in this case illustrate the concerns that justifiably may prompt a court to issue a protective order. As we have noted, the trial court’s order allowing discovery was extremely broad. It compelled respondents – among other things – to identify all persons who had made donations over a 5-year period to Rhinehart and the Aquarian Foundation, together with the amounts donated. In effect the order would compel disclosure of membership as well as sources of financial support. The Supreme Court of Washington found that dissemination of this information would “result in annoyance, embarrassment and even oppression.” 98 Wash. 2d at 257, 654 P.2d at 690. It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court’s decision to issue a protective order pursuant to a constitutional state law. We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

The judgment accordingly is

Affirmed.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Rorie Solberg. Licensed under [CC BY-NC-SA](#).



Smith v. Daily Mail Publishing Co

443 U.S. 97 (1979)

Vote: 8-0

Decision: Affirmed

Majority: Burger, joined by Blackmun, Rehnquist, White, Stewart, Marshall, Stevens, Brennan

Not participating: Powell

MR. CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

...

On February 9, 1978, a 15-year-old student was shot and killed at Hayes Junior High School in St. Albans, W. Va., a small community located about 13 miles outside of Charleston, W. Va. The alleged assailant, a 14-year-old classmate, was identified by seven different eyewitnesses and was arrested by police soon after the incident.

The Charleston Daily Mail and the Charleston Gazette, respondents here, learned of the shooting by monitoring routinely the police band radio frequency; they immediately dispatched reporters and photographers to the junior high school. The reporters for both papers obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney who were at the school.

The staffs of both newspapers prepared articles for publication about the incident. The Daily Mail's first article appeared in its February 9 afternoon edition. The article did not mention the alleged attacker's name. The editorial decision to omit the name was made because of the statutory prohibition against publication without prior court approval.

The Gazette made a contrary editorial decision and published the juvenile's name and picture in an article about the shooting that appeared in the February 10 morning edition of the paper. In addition, the name of the alleged juvenile attacker was broadcast over at least three different radio stations on February 9 and 10. Since the information had become public knowledge, the Daily Mail decided to include the juvenile's name in an article in its afternoon paper on February 10.

On March 1, an indictment against the respondents was returned by a grand jury. The indictment alleged that each knowingly published the name of a youth involved in a juvenile proceeding in violation of W. Va. Code § 49-7-3 (1976). Respondents then filed an original-jurisdiction petition with the West Virginia Supreme Court of Appeals, seeking a writ of prohibition ... alleg[ing] that the indictment was based on a statute that violated the First and Fourteenth Amendments of the United States Constitution ... The West Virginia Supreme Court of Appeals ... held that the statute abridged the freedom of the press ...

We granted certiorari.

Respondents urge this Court to hold that because [the statute] requires court approval prior to publication of the juvenile's name it operates as a "prior restraint" on speech ... Petitioners do not dispute that the statute amounts to a prior restraint on speech. Rather, they take the view that, even if it is a prior restraint, the statute is constitutional because of the significance of the State's interest in protecting the identity of juveniles ...

Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases ...

Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards ...

None of [our previous and related] opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant.

A free press cannot be made to rely solely upon the sufferance of government to supply it with information ... If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here ...

The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense ...

However, we concluded [in a previous case] that the State's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. Therefore, the reasoning ... that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.

The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements. The statute does not restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose. In addition, there is no evidence to demonstrate that the imposition of criminal penalties is necessary to protect the confidentiality of juvenile proceedings ...

Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings ... there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a

state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.

Accordingly, the judgment of the West Virginia Supreme Court of Appeals is

Affirmed.

Excerpted by Kimberly Clairmont



Print versus Cable, Broadcast and Internet

Miami Herald Publishing Co. v. Tornillo

418 U.S. 241 (1974)

Vote: 9-0

Decision: Reversed

Majority: Burger joined by Brennan, Douglas, White, Stewart, Blackmun, Marshall, Powell, Rehnquist

Concurrence: Brennan, joined by Rehnquist

Concurrence: White

CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE [UNANIMOUS] 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.

In the fall of 1972, appellee ... was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials, appellee demanded that appellant print verbatim his replies ... Appellant declined to print the appellee's replies, and appellee brought suit ... seeking declaratory and injunctive relief and actual and punitive damages in excess of \$5,000. The action was premised on Florida Statute §104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor. Appellant sought a declaration that §104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime and held that 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression ...

On direct appeal, the Florida Supreme Court reversed, holding that 104.38 did not violate constitutional guarantees. It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." It also held that the statute is not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." Civil remedies, including damages, were held to be avail-

able under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion. We postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions. 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 which 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 ratified ... 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 specter 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 "interpretive 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's 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 interpretive 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. Proponents of enforced access to the press take comfort from language in several of this Court’s decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. * * *

However much validity may be found in these arguments, at each point 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. * * * We see that * * * the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which “‘reason’ tells them should not be published” is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee’s argument that the Florida statute does not amount to a restriction of appellant’s right to speak because “the statute in question here has not prevented the Miami Herald from saying anything it wished” begs the core question. Compelling editors or publishers to publish that which “‘reason’ tells them should not be published” is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press Co.* (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid con-

trovery. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably “dampens the vigor and limits the variety of public debate,” *New York Times Co. v. Sullivan* (1964). * * *

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo 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 and content of the paper, and treatment of public issues and public officials -whether fair or unfair -constitute 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.

It is so ordered.

BRENNAN, WITH WHOM 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.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Kimberly Clairmont. Licensed under [CC BY-NC-SA](#).



Red Lion Broadcasting Co. v. FCC

395 U.S. 367 ([1969](#))

Vote: 8-0

Decision: Reversed

Majority: White, joined by Warren, Black, Harlan, Brennan, Stewart, Marshal

Not participating: Douglas

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early. In the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has

been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act' that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

The *Red Lion Broadcasting Company* is licensed to operate a Pennsylvania radio station, *WGCB*. On November 27, 1964, *WGCB* carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A hook by Fred J. Cook entitled "Gold-water-Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, *Red Lion*, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that *Red Lion* had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it ...

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of, the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies ... to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 59 App. D.C. 197, 37 F.2d 993, *cert. dismissed*, 281 U.S. 706 (1930) ... After an

extended period during which the licensee was obliged not only to cover and to cover fairly the views of others but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), the latter limitation on the licensee was abandoned, and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F.C.C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source ...

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side ...

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history ... Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act ...

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

"In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as ... whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F.C.C. at 1251-1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station ...

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters ...

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology ...

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect ...

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional." The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



FCC v. Pacifica Foundation

438 U.S. 726 (1978)

Vote: 5-4

Decision: Reversed

Majority: Stevens, joined by Burger, Blackmun, Rehnquist, Powell

Concurrence: Powell

Concurrence: Blackmun (in part)

Dissent: Blackmun (in part), joined by Marshall, Stewart, White

STEVENS, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I-III and IV-C, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Parts IV-A and V-B of which BLACKMUN and POWELL, JJ., joined, and an opinion as to Parts IV-A and V-B, in which BURGER, C. J., and REHNQUIST, J., joined.

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that

he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the “record’s being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control.”

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society’s attitude toward language and that, immediately before its broadcast, listeners had been advised that it included “sensitive language which might be regarded as offensive to some.” Pacifica characterized George Carlin as “a significant social satirist” who “like Twain and Sahl before him, examines the language of ordinary people. ... Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.” Pacifica stated that it was not aware of any other complaints about the broadcast ...

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance, where the “law generally speaks to *channeling* behavior more than actually prohibiting it. ... [T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” 56 F.C.C.2d at 98.

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they “were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon),” and that the prerecorded language, with these offensive words “repeated over and over,” was “deliberately broadcast.” *Id.*, at 99. In summary, the Commission stated: “We therefore hold that the language as broadcast was indecent and prohibited by 18 U. S. C. [§] 1464 ...”

The general statements in the Commission’s memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U. S. C. § 554 (e) (1976 ed.); it did not purport to engage in formal rule-making or in the promulgation of any regulations. The order “was issued in a specific factual context”; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue “as broadcast ...”

The relevant statutory questions are whether the Commission’s action is forbidden “censorship” within the meaning of 47 U. S. C. § 326 and whether speech that concededly is not obscene may be restricted as “indecent” under the authority of 18 U. S. C. § 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin ...

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission’s power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both the anticensorship provision and the Commission’s authority to impose sanctions for the

broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

There is nothing in the legislative history to contradict this conclusion. The provision was discussed only in generalities when it was first enacted ...

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting ...

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" monologue was indecent within the meaning of § 1464.¹³ Even that question is narrowly confined by the arguments of the parties ...

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.⁹ ...

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast ...

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F. C. C. 2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract ...

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise ...

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content." Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth v. United States* (1957). But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's

opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words ‘ ___ First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends ...

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its “social value,” to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. *Cohen v. California*, (1971) ...

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently 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 left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept* (1970). Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children ...

The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a “nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.” *Euclid v. Ambler Realty Co.* (1926). We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Excerpted by Kimberly Clairmont

Note: <https://artsandculture.google.com/entity/seven-dirty-words/m01pxq4?hl=en>

Note: <https://www.theatlantic.com/entertainment/archive/2012/05/the-7-dirty-words-turn-40-but-theyre-still-dirty/257374/>

Note: <https://www.biography.com/news/george-carlin-seven-words-supreme-court>



Turner Broadcasting System, Inc v. FCC

512 U.S. 622 (1994)

Vote: 9-0

Decision: Reversed

Majority: Kennedy, joined by *unanimous* (Part I); Rehnquist, Blackmun, O'Connor, Scalia, Souter, Thomas, Ginsburg (Parts II-A and II-B); Rehnquist, Blackmun, Stevens, Souter (Parts II-C, II-D, and III-A)

Concurrence: Kennedy (Part III-B), joined by Rehnquist, Blackmun, Souter

Concurrence: J. Blackmun

Concurrence: J. Stevens (in part)

Concurrence/ Dissent: O'Connor, joined by Scalia, Ginsburg; Thomas (Parts I and III) and Concurrence/

Dissent: Ginsburg

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court, except as to Part III-B.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment ...

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992 Cable Act or Act). Among other things, the Act subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. At issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§ 4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

Section 4 requires carriage of “local commercial television stations,” defined to include all full power television broadcasters, other than those qualifying as “noncommercial educational” stations under § 5, that operate within the same television market as the cable system ...

Section 5 of the Act imposes similar requirements regarding the carriage of local public broadcast television stations, referred to in the Act as local “noncommercial educational television stations,” ...

Taken together, therefore, §§4 and 5 subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system ...

In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, § 2(a)(3), and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming, § 2(a)(17) ...

In addition, Congress concluded that due to “local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,” the overwhelming majority of cable operators exercise a monopoly over cable service ...

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator’s ability, as owner of the transmission facility, to “terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.” ...

Soon after the Act became law, appellants filed these five consolidated actions in the United States District Court for the District of Columbia against the United States and the Federal Communications Commission (hereinafter referred to collectively as the Government), challenging the constitutionality of the must-carry provisions ...

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment ...

Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions ...

We address first the Government’s contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media. Compare *Red Lion Broadcasting Co. v. FCC* (1969) (television), and *National Broadcasting Co. v. United States*, (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, (1974) (print), and *Riley v. National Federation of Blind of N. c., Inc.*, (1988) (personal solicitation). But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.

...

Although the Government acknowledges the substantial technological differences between broadcast and cable ... It asserts that the foundation of our broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the "market dysfunction" that characterizes the broadcast market. Because the cable market is beset by a similar dysfunction, the Government maintains, the *Red Lion* standard of review should also apply to cable. While we agree that the cable market suffers certain structural impediments, the Government's argument is flawed in two respects. First, as discussed above, the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence ... Second, the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media

...

By a related course of reasoning, the Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court's "precedents governing legislative efforts to correct market failure in a market whose commodity is speech," such as *Associated Press v. United States* (1945) and *Lorain Journal Co. v. United States* (1951). This contention is unavailing ... But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, subject to at least some degree of heightened First Amendment scrutiny ...

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal ...

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals ...

Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content ...

Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech. Although the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers,

regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select. The number of channels a cable operator must set aside depends only on the operator's channel capacity ...

It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment ...

That the must-carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys. *United States v. Eichman*, (1990) ...

Appellants contend, in this regard, that the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content. We do not agree. Our review of the Act and its various findings persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable ...

By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue-or, in the case of noncommercial broadcasters, sufficient viewer contributions, see § 2(a)(8)(B)-to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming ...

This overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers. Indeed, our precedents have held that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems," is not only a permissible governmental justification, but an "important and substantial federal interest." *Capital Cities Cable Inc v. Crisp* (1984) ...

In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable. Appellants' ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry ...

The Government's assertion that the must-carry rules are necessary to protect the viability of broadcast television rests on two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.

As support for the first proposition, the Government relies upon a 1988 FCC study showing, at a time when no must-carry rules were in effect, that approximately 20 percent of cable systems reported dropping or refusing carriage to one or more local broadcast stations on at least one occasion ... The record does not indicate, however, the time frame within which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage. The same FCC study indicates that about 23 percent of the cable operators reported shifting the channel positions of one or more local broadcast stations, and that, in most cases, the repositioning was done for "marketing" rather than "technical" reasons ...

The parties disagree about the significance of these statistics. But even if one accepts them as evidence that a large number of broadcast stations would be dropped or repositioned in the absence of must-carry, the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result. Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants. We think it significant, for instance, that the parties have not presented any evidence that local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of their being dropped from, or otherwise disadvantaged by, cable systems ...

The paucity of evidence indicating that broadcast television is in jeopardy is not the only deficiency in this record. Also lacking are any findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers—i.e., the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters. The answers to these and perhaps other questions are critical to the narrow tailoring step of the O'Brien analysis, for unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress "substantially more speech than ... necessary" to ensure the viability of broadcast television.

In sum, because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government ... Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

The judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



United States et. al v. Playboy Entertainment Group, Inc.

529 U.S. 803 (2000)

Decision: 5-4

Decision: Affirmed

Majority: Kennedy, joined by Stevens, Souter, Thomas, Ginsburg

Concurrence: Stevens, joined by Thomas

Dissent: Breyer, joined by Rehnquist, O'Connor, Scalia

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

This case presents a challenge to § 505 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 136, 47 U. S. C. § 561 (1994 ed., Supp. III). Section 505 requires cable television operators who provide channels “primarily dedicated to sexually-oriented programming” either to “fully scramble or otherwise fully block” those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m. 47 U. S. C. § 561(a) (1994 ed., Supp. III); 47 CFR § 76.227 (1999). Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as “signal bleed.” The purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed.

To comply with the statute, the majority of cable operators adopted the second, or “time channeling,” approach. The effect of the widespread adoption of time channeling was to eliminate altogether the transmission of the targeted programming outside the safe harbor period in affected cable service areas. In other words, for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.

Appellee Playboy Entertainment Group, Inc., challenged the statute as unnecessarily restrictive content-based legislation violative of the First Amendment. After a trial, a three-judge District Court concluded that a regime in which viewers could order signal blocking on a household-by household basis presented an effective, less restrictive alternative to § 505. 30 F. Supp. 2d 702, 719 (Del. 1998). Finding no error in this conclusion, we affirm.

Playboy Entertainment Group owns and prepares programs for adult television networks, including Playboy Television and Spice. Playboy transmits its programming to cable television operators, who retransmit it to their subscribers, either through monthly subscriptions to premium channels or on a so-called “pay-per-view” basis. Cable operators transmit Playboy’s signal, like other premium channel signals, in scrambled form. The operators then provide

paying subscribers with an “addressable converter,” a box placed on the home television set. The converter permits the viewer to see and hear the descrambled signal. It is conceded that almost all of Playboy’s programming consists of sexually explicit material as defined by the statute ...

When the statute became operative, most cable operators had “no practical choice but to curtail [the targeted] programming during the [regulated] sixteen hours or risk the penalties imposed ... if any audio or video signal bleed occur[red] during [those] times.” 30 F. Supp. 2d, at 711. The majority of operators—“in one survey, 69%”—complied with § 505 by time channeling the targeted programmers. *Ibid.* Since “30 to 50% of all adult programming is viewed by households prior to 10 p.m.,” the result was a significant restriction of communication, with a corresponding reduction in Playboy’s revenues ...

Two essential points should be understood concerning the speech at issue here. First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy’s programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.

The speech in question is defined by its content; and the statute which seeks to restrict it is content based. Section 505 applies only to channels primarily dedicated to “sexually explicit adult programming or other programming that is indecent.” The statute is unconcerned with signal bleed from any other channels. See 945 F. Supp., at 785 (“[Section 505] does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel”). The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism* (1989) ...

To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans ...

Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. *Sable Communications of Cal., Inc. v. FCC*, (1989). If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Ibid.* If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative ...

The District Court concluded that a less restrictive alternative is available: §504, with adequate publicity. 30 F. Supp. 2d, at 719-720. No one disputes that § 504, which requires cable operators to block undesired channels at individual households upon request, is narrowly tailored to the Government's goal of supporting parents who want those channels blocked. The question is whether § 504 can be effective.

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical evidence showing that § 504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing § 505, § 504 remained in operation. A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time. The uncomfortable fact is the § 504 was the sole blocking regulation in effect for over a year; and the public greeted it with a collective yawn.

... It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control ...

It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities

or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of non-persuasion operative in all trials-must rest with the Government, not with the citizen ...

The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. Under §505, sanctionable signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this ...

If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles. Here the Government has not met the burden the First Amendment imposes.

The Government has failed to show that § 505 is the least restrictive means for addressing a real problem; and the District Court did not err in holding the statute violative of the First Amendment. In light of our ruling, it is unnecessary to address the second question presented: whether the District Court was divested of jurisdiction to consider the Government's post judgment motions after the Government filed a notice of appeal in this Court. The judgment of the District Court is affirmed.

It is so ordered.

Excerpted by Kimberly Clairmont



Reno v. American Civil Liberties Union

521 U.S. 844 (1997)

Vote: 9-0

Decision: Affirmed

Majority: Stevens, joined by Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer

Concurrence: O'Connor, joined by Rehnquist

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

At issue is the constitutionality of two statutory provisions enacted to protect minors from “indecent” and “patently offensive” communications on the Internet ...

Though such material is widely available, users seldom encounter such content accidentally.” A document’s title or a description of the document will usually appear before the document itself ... and in many cases the user will receive detailed information about a site’s content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.” For that reason, the “odds are slim” that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.” ...

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer’s access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to

block messages containing identifiable objectionable features.” Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images.” Nevertheless, the evidence indicates that “a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.” ...

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there “is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms.” The Government offered no evidence that there was a reliable way to screen recipients and participants in such forums for age. Moreover, even if it were technologically feasible to block minors’ access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit “indecent” or “patently offensive” contributions, it would not be possible to block their access to that material and “still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent ...

An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the “indecent transmission” provision and the “patently offensive display” provision ...

The breadth of these prohibitions is qualified by two affirmative defenses. See § 223(e)(5). One covers those who take “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to the prohibited communications. § 223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code ...

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs filed suit against the Attorney General of the United States and the Department of Justice challenging the constitutionality of §§223(a)(1) and 223(d). A week later, based on his conclusion that the term “indecent” was too vague to provide the basis for a criminal prosecution, District Judge Buckwalter entered a temporary restraining order against enforcement of § 223(a)(1)(B)(ii) insofar as it applies to indecent communications. A second suit was then filed by 27 additional plaintiffs, the two cases were consolidated, and a three-judge District Court was convened pursuant to § 561 of the CDA. After an evidentiary hearing, that court entered a preliminary injunction against enforcement of both of the challenged provisions. Each of the three judges wrote a separate opinion, but their judgment was unanimous ...

The judgement of the District Court enjoins the Government from enforcing the prohibitions ... The Government appealed. ... we noted probable jurisdiction. In its appeal, the Government argues that the District Court erred in holding that the CDA violated the First Amendment because it is overbroad and the Fifth Amendment because it is vague ...

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York*, (1968); (2) *FCC v. Pacifica Foundation*, (1978); and (3) *Renton v. Playtime Theatres, Inc.*, (1986). A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA ...

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions ...

In *Southeastern Promotions, Ltd. V. Conrad*, (1975), we observed the “[e]ach medium of expression ... may present its own problems.” Thus, some of our cases have recognized special justifications for the regulation of broadcast media that are not application to other speakers ... In these cases, the Court relied on the history of extensive government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its “invasive” nature ...

... unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds ... This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through 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. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.” 929 F. Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium ...

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of

the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word “indecent,” 47 U. S. C. § 223(a) (1994 ed., Supp. II), while the second speaks of material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,” § 223(d). Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other³⁶ and just what they mean. 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? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials ...

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech ... Second, the CDA

is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images ...

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively sup-

presses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve ...

In evaluating the free speech rights of adults, we have made it perfectly clear that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.” *Sable*, (1989) Indeed, *Pacifica* itself admonished that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.” ...

The breadth of the CDA’s coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg v. New York* (1968) and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms “indecent” and “patently offensive” cover large amounts of nonpornographic material with serious educational or other value.” Moreover, the “community standards” criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter includes any of the seven “dirty words” used in the *Pacifica* monologue, the use of which the Government’s expert acknowledged could constitute a felony ... It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library ...

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be “tagged” in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all ...

Finally, we find no textual support for the Government’s submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA’s “patently offensive” and “indecent” prohibitions ...

In this Court, though not in the District Court, the Government asserts that—in addition to its interest in protecting children—its “[e]qually significant” interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA ... The Government apparently assumes that the unregulated availability of “indecent” and “patently offensive” material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material. We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the con-

trary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the District Court is affirmed.

It is so ordered.

Excerpted by Kimberly Clairmont



Religious Freedoms

Case List

Establishment Clause

[*Everson v. Board of Education*](#) (1947)

[*Zorach v. Clauson*](#) (1952)

[*Engel v. Vitale*](#) (1962)

[*Epperson v. Arkansas*](#) (1966)

The Lemon Test

[*Lemon v. Kurtzman*](#) (1971)

[*Zelman v. Simmons-Harris*](#) (2002)

Establishment Clause in Schools

[*Stone v. Graham*](#) (1980)

[*Wallace v. Jaffree*](#) (1985)

[*Edwards v. Aguillard*](#) (1987)

[*Santa Fe Independent School District v. Doe*](#) (2000)

Establishment Clause in the Public Square

[*Alleghany County v. Pittsburgh ACLU*](#) (1989)

[*McCreary County v. ACLU of Kentucky et al.*](#) (2005)

[*Van Orden v. Perry*](#) (2005)

[*American Legion v. American Humanist Assn.*](#) (2019)

Prayer at Government Meetings

[*Marsh v. Chambers*](#) (1983)

[*Town of Greece v. Galloway*](#) (2014)

Sunday Blue Laws

McGowan v. Maryland (1961)

Free Exercise Clause: Valid Secular Policy

Reynolds v. U.S. (1879)

Cantwell v. Connecticut (1940)

Braunfeld v. Brown (1961)

Free Exercise Clause: Applying Strict Scrutiny

Sherbert v. Verner (1963)

Wisconsin v. Yoder (1972)

Goldman v. Weinberger (1987)

Free Exercise Clause: The Smith Test

Oregon v. Smith (1990)

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)

A New Era?

Burwell v. Hobby Lobby (2013)

Masterpiece Cakeshop v. CO (2018)

Tandon v. Newsom (2021)

Espinoza v. Montana Department of Revenue (2020)

Fulton v. Philadelphia (2021)

Kennedy v. Bremerton School District (2022)

Establishment Clause

Everson v. Board of Education

330 U.S. 1 (1947)

Vote: 5-4

Decision: Affirmed

Majority: Black joined by Douglas, Vinson, Reed, Murphy

Dissent: Jackson joined by Frankfurter

Dissent: Rutledge joined by Frankfurter, Jackson, Burton

MR. JUSTICE BLACK delivered the opinion of the Court.

...

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

The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the state constitution ...

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

First. The due process argument that the state law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of trans-

porting his children to church schools. It is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church or any other non-government individual or group. But the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need ...

...

Second. The New Jersey statute is challenged as a “law respecting an establishment of religion.” The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania* (1943), commands that a state “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. ...” These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression “law respecting an establishment of religion,” probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an “establishment of religion” requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

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

These practices of the old world were transplanted to, and began to thrive in, the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or nonbelievers, would be required to support and attend. An exercise

of this authority was accompanied by a repetition of many of the old-world practices and persecutions ... These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment ...

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

...

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.' The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom." There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. United States, supra*.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power, even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches

the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief ...

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge ...

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

Affirmed.

Excerpted by Kimberly Clairmont



Zorach v. Clauson

343 U.S. 306 (1952)

Vote: 6-3

Decision: Affirmed

Majority: Douglas, joined by Vinson, Reed, Burton, Clark, Minton

Dissent: Black

Dissent: Frankfurter

Dissent: Jackson

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

...

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction ... A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This “released time” program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations ... our problem reduces itself to whether New York by this system has either prohibited the “free exercise” of religion or has made a law “respecting an establishment of religion” within the meaning of the First Amendment ...

It takes obtuse reasoning to inject any issue of the “free exercise” of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any. There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion ...

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other-hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution ...

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic

student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act ...

Here, as we have said, the public schools' do no more than accommodate their schedule- to a program of outside religious instruction. We follow the [precedent]. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed.

Excerpted by Kimberly Clairmont



Engel v. Vitale

370 U.S. 421 (1962)

Vote: 6-1

Decision: Reversed

Majority: Black, joined by Warren, Clark, Harlan, Brennan, Douglas

Concurrence: Douglas

Dissent: Stewart

Not participating: White, Frankfurter

MR. JUSTICE BLACK delivered the opinion of the Court.

...

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

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

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying:

"We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that "Congress shall make no law respecting an establishment of religion"-a command which was "made applicable to the State of New York by the Fourteenth Amendment of the said Constitution ..."

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

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America ... The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say ...

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the stu-

dents is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non observing individuals or not ...

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

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

Reversed and remanded.

Excerpted by Kimberly Clairmont



Epperson v. Arkansas

393 U.S. 97 (1966)

Vote: 9-0

Decision: Reversed

Majority: Fortas joined by Warren, Douglas, Brennan, White, Marshall

Concurrence: Black

Concurrence: Harlan

Concurrence: Stewart

MR. JUSTICE FORTAS delivered the opinion of the Court.

...

This appeal challenges the constitutionality of the “anti-evolution” statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of “fundamentalist” religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee “monkey law” which that State adopted in 1925.’ The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated Scopes case in 1927 ...

The Arkansas law makes it unlawful for a teacher in any state-supported school or university “to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,” or “to adopt or use in any such institution a textbook that teaches” this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position ...

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas’ statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin’s theory, or to forbid any or all of the infinite varieties of communication embraced within the term “teaching.” Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group ...

The antecedents of today’s decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom. Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion ... There is and can be no doubt that the First Amendment does not per-

mit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In *Everson v. Board of Education* (1947), this Court, in upholding a state law to provide free bus service to school children, including those attending parochial schools, said: “Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another ...”

Arkansas’ law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is

Reversed.

Excerpted by Kimberly Clairmont



The Lemon Test

Lemon v. Kurtzman

403 U.S. 602 (1971)

Vote: 8-1

Decision: Reversed

Majority: Burger joined by Stewart, Marshall, Blackmun, Black, Douglas, Harlan

Concurrence: Douglas joined by Black

Concurrence: Brennan

Concurrence: Marshall

Dissent: White

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

...

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment. Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional ...

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission* (1970). Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen* (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 397 U. S. 674.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be "no law respecting an establishment of religion." A law may be one

“respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment ...

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

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause ...

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. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion ...

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. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches ...

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and

churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn ...

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

Excerpted by Kimberly Clairmont



Zelman v. Simmons-Harris

536 U.S. 639 (2002)

Vote: 5-4

Decision: Affirmed

Majority: Rehnquist, joined by Kennedy, Scalia, O'Connor, Thomas

Concurrence: O'Connor

Concurrence: Thomas

Dissent: Souter, joined by Stevens, Ginsburg, Breyer

Dissent: Breyer, joined by Stevens, Souter

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

...

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools.

More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§3313.974-3313.979 (Anderson 1999 and Supp. 2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been “under federal court order requiring supervision and operational management of the district by the state superintendent.” Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent’s choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school. The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Any public school located in a school district adjacent to the covered district may also participate in the program. Adjacent public schools are eligible to receive a \$2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For these lowest-income families, participating private schools may not charge a parental co-payment greater than \$250. For all other families, the program pays 75% of tuition costs, up to \$1,875, with no co-payment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate.

Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. * * *

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998-1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999-2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools ...

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

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. 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. While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges ...

[W]e have never found a program of true private choice to offend the Establishment Clause. 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.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools ... The program here in fact creates financial disincentives for religious schools, with private schools receiving only half the govern-

ment assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates ... financial incentive[s] for parents to choose a sectarian school." Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.

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 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.

Justice Souter [dissenting] speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities ... Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as Amici Curiae 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools. Respondents and Justice Souter claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves par-

ents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools.

...

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.

JUSTICE SOUTER, WITH WHOM JUSTICE STEVENS, JUSTICE GINSBURG, AND JUSTICE BREYER JOIN, DISSENTING.

...

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these.

"[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini v. Felton* (1997) (Souter, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing* (1947), which inaugurated the modern era of establishment doctrine. * * *

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. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic. 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 majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. * * * Viewed with the necessary generality, the 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 private choice in directing it, are shown to be nothing but examples of verbal formalism

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis. 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.

...

... The majority looks not to the provisions for tuition vouchers, but to every provision for educational opportunity. 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 no favor of religion.

The illogic is patent ... "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "all schools": public tutors may receive from the State no more than \$324 per child to support extra tutoring (that is, the State's 90% of a total amount of \$360), whereas the tuition voucher schools (which turn out to be mostly religious) can receive up to \$2,250. Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd.

...

The majority's view that all educational choices are comparable for the purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular 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 now has transformed this 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. * * * It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching. * * * The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999-2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. * * *

...

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. * * * The Cleveland voucher program has cost Ohio taxpayers \$33 million since its implementation in 1996 (\$28 million in voucher payments, \$5 million in administrative costs), and its cost was expected to exceed \$8 million in the 2001-2002 school year. * * *

...

Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate. If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches at the state and national levels. Legislatures not driven to desperation by the

problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it. My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson's* statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. 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.

Excerpted by Kimberly Clairmont



Establishment Clause in Schools

Stone v. Graham

449 U.S. 39 (1980)

Vote: 5-4

Decision: Reversed

Per Curiam Decision

Dissent: Burger, joined by Blackmun

Dissent: Stewart

Dissent: Rehnquist

PER CURIAM.

...

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State. Petitioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment, sought an injunction against its enforcement. The state trial court upheld the statute, finding that its “avowed purpose” was “secular and not religious,” and that the statute would “neither advance nor inhibit any religion or religious group” nor involve the State excessively in religious matters ...

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

“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.’” *Lemon v. Kurtzman* ...

We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional ...

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 ... It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the “official support of the State ... Government” that the Establishment Clause prohibits ...

The petition for a writ of certiorari is granted, and the judgment below is reversed.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

...

The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due ...

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text ..." It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination ... Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import ... The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government ..."

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

Excerpted by Kimberly Clairmont



Wallace v. Jaffree

472 U.S. 38 (1985)

Vote: 6-3

Decision: Affirmed

Majority: Stevens joined by Brennan, Marshall, Blackmun, Powell

Concurrence: Powell

Concurrence: O'Connor

Dissent: Rehnquist

Dissent: Burger

Dissent: White

JUSTICE STEVENS delivered the opinion of the Court.

...

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools “for meditation”; (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence “for meditation or voluntary prayer”; and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead “willing students” in a prescribed prayer to “Almighty God ... the Creator and Supreme Judge of the world.”

... Thus, the narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for “meditation or voluntary prayer,” is a law respecting the establishment of religion within the meaning of the First Amendment. [Note: § 16-1-20 was not challenged and § 16-1-20.2 was deemed unconstitutional.]

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint named members of the Mobile County School Board, various school officials, and the minor plaintiffs’ three teachers as defendants. The complaint alleged that the appellees brought the action “seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution ...”

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment’s restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed

the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again ...

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects-or even intolerance among "religions"-to encompass intolerance of the disbeliever and the uncertain ...

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman* (1971), we wrote:

"Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz v. Tax Comm'n*, (1970)."

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

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

The un rebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16-1-20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text ...

We must, therefore, conclude that the Alabama Legislature intended to change existing law and that it was motivated by the same purpose that the Governor’s answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes’ testimony frankly described. The legislature enacted § 16-1-20.1, despite the existence of § 161-20, for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of “or voluntary prayer” indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is “whether the government intends to convey a message of endorsement or disapproval of religion.” The well-supported concurrent findings of the District Court and the Court of Appeals — that § 16-1-20.1 was intended to convey a message of state approval of prayer activities in the public schools — make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words “or voluntary prayer” to the statute. Keeping in mind, as we must,

“both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,” we conclude that § 16-1-20.1 violates the First Amendment.

It is so ordered.

Excerpted by Kimberly Clairmont



Edwards v. Aguillard

482 U.S. 578 (1987)

Vote: 7-2

Decision: Affirmed

Majority: Brennan, joined by Marshall, Blackmun, Stevens, Powell, O'Connor

Concurrence: Powell, joined by O'Connor

Concurrence: White

Dissent: Scalia, joined by Rehnquist

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), La. Rev. Stat. Ann. §§ 17:286.1-17:286.7 (West 1982), is ... valid as violative of the Establishment Clause of the First Amendment ...

Appellees, who include parents of children attending Louisiana public schools, Louisiana teachers, and religious leaders, challenged the constitutionality of the Act in District Court, seeking an injunction and declaratory relief.⁷ Appellants, Louisiana officials charged with implementing the Act, defended on the ground that the purpose of the Act is to protect a legitimate secular interest, namely, academic freedom. Appellees attacked the Act as facially invalid because it violated the Establishment Clause and made a motion for summary judgment ...

The Establishment Clause forbids the enactment of any law "respecting an establishment of religion. The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, (1971) ...

In this case, the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system. States and local school boards are generally afforded considerable discretion in operating public schools ...

If the law was enacted for the purpose of endorsing religion, "no consideration of the second or third criteria [of *Lemon*] is necessary. ..." In this case, appellants have identified no clear secular purpose for the Louisiana Act ... 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." 2 App. E-621. Such a ban on teaching does not promote-indeed, it undermines-the provision of a comprehensive scientific education ...

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. While requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution ... 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 ... 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 creationism. ...”

Furthermore, it is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the Act’s primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety ...

In a similar way, teaching a variety of scientific theories about the origins of humankind to school children 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 ...

Appellants contend that affidavits made by two scientists, two theologians, and an education administrator raise a genuine issue of material fact and that summary judgment was therefore barred. The affidavits define creation science as “origin through abrupt appearance in complex form” and allege that such a viewpoint constitutes a true scientific theory ... We agree with the lower courts that these affidavits do not raise a genuine issue of material fact. The existence of “uncontroverted affidavits” does not bar summary judgment ...

The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose. The judgment of the Court of Appeals therefore is

Affirmed.

JUSTICE POWELL, with whom JUSTICE O’CONNOR joins, concurring.

...

I write separately to note certain aspects of the legislative history, and to emphasize that nothing in the Court’s opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum ...

This Court consistently has applied the three-pronged test of *Lemon v. Kurtzman*, (1971), to determine whether a particular state action violates the Establishment Clause of the Constitution ...

“Balanced treatment” means “providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom ...”

Although the Act requires the teaching of the scientific evidences of both creation and evolution whenever either is taught, it does not define either term.”A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ...”

A religious purpose alone is not enough to invalidate an act of a state legislature ... The religious purpose must pre-dominate ... But it necessarily is circumscribed by the Establishment Clause. “Academic freedom” does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief ...

My examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana Legislature was to promote a particular religious belief. The legislative history of the Arkansas statute prohibiting the teaching of evolution examined in *Epperson v. Arkansas*, (1968), was strikingly similar to the legislative history of the Balanced Treatment Act ... That the statute is limited to the scientific evidences supporting the theory does not render its purpose secular ...

Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief. The language of the statute and its legislative history convince me that the Louisiana Legislature exercised its discretion for this purpose in this case ...

In sum, I find that the language and the legislative history of the Balanced Treatment Act unquestionably demonstrate that its purpose is to advance a particular religious belief. Although the discretion of state and local authorities over public school curricula is broad, “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma ...” Accordingly, I concur in the opinion of the Court and its judgment that the Balanced Treatment Act violates the Establishment Clause of the Constitution.

Excerpted by Kimberly Clairmont

See also *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995) in the Free Speech chapter



Santa Fe Independent School District v. Doe

530 U.S. 290 (2000)

Vote: 6-3

Decision: Affirmed

Majority: Stevens, joined by O'Connor, Kennedy, Souter, Ginsburg, Breyer

Dissent: Rehnquist, joined by Scalia, Thomas

JUSTICE STEVENS delivered the opinion of the Court.

...

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

...

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. ... In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions ... The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." In a second vote the class elected two seniors to deliver the invocation and benediction ...

The August policy, which was titled "Prayer at Football Games," ... authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them

...

The first Clause in the First Amendment to the Federal Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace v. Jaffree*, (1985). In *Lee v. Weisman*, (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.

As we held in that case:

“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” *Id.*, at 587 (citations omitted) (quoting *Lynch v. Donnelly*, (1984)).

...

These invocations are authorized by a government policy and take place on government property at government sponsored school-related events ... The Santa Fe school officials simply do not “evince either ‘by policy or by practice,’ any intent to open the [pregame ceremony] to ‘indiscriminate use,’ ... by the student body generally.” *Hazelwood School Dist. v. Kuhlmeier*, (1988). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student’s message,

...

The text of the October policy, however, exposes the extent of the school’s entanglement. The elections take place at all only because the school “board *has* chosen to permit students to deliver a brief invocation and/or message.” ... In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is “to solemnize the event.” A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message “promote good sportsmanship” and “establish the appropriate environment for competition” further narrow the types of message deemed appropriate ... In fact, as used in the past at Santa Fe High School, an “invocation” has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy ...

We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment. The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of school officials. It is

fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation ..."

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace v. Jaffree* (1985) (O'CONNOR, J., concurring in judgment).

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." Brief for Petitioner. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet nonreligious. Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games ... Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice ..."

Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace*, for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day ..." Therefore, even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail. This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable ...

The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events. The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

Excerpted by Kimberly Clairmont



Establishment Clause in the Public Square

Allegheny County v. Pittsburgh ACLU

492 U.S. 573 (1989)

Vote: 6-3

Decision: Reversed in part and affirmed in part

Majority: Blackmun joined by Brennan, Marshall, Stevens, O'Connor

Plurality: Blackmun, joined by Stevens, O'Connor

Concurrence: O'Connor, joined by Brennan, Stevens

Concur/Dissent: Stevens joined by Brennan, Marshall

Concur/Dissent: Brennan, joined by Marshall, Stevens

Concur/Dissent: Kennedy, joined by Rehnquist, White, Scalia

JUSTICE BLACKMUN announced the judgment of the Court.

...

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a creche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City County Building, next to a Christmas tree and a sign saluting liberty. The Court of Appeals for the Third Circuit ruled that each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing religion. We agree that the creche display has that unconstitutional effect, but reverse the Court of Appeals' judgment regarding the menorah display.

...

The county courthouse is owned by Allegheny County and is its seat of government. It houses the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court. Civil and criminal trials are held there. The "main," "most beautiful," and "most public" part of the courthouse is its Grand Staircase, set into one arch and surrounded by others, with arched windows serving as a backdrop ... Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a creche in the county courthouse during the Christmas holiday season. Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah. Western churches have celebrated Christmas Day on December 25 since the fourth century. As observed in this Nation, Christmas has a secular, as well as a religious, dimension ...

The creche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims “Gloria in Excelsis Deo!” ... Altogether, the creche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase.

The City-County Building is separate and a block removed from the county courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County. The city’s portion of the building houses the city’s principal offices, including the mayor’s. *Id.* at 17. The city is responsible for the building’s Grant Street entrance, which has three rounded arches supported by columns. *Id.* at 194, 207. For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees, on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. *Id.* at 218-219. A few days later, the city placed at the foot of the tree a sign bearing the mayor’s name and entitled “Salute to Liberty.” Beneath the title, the sign stated:

“During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.”

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, an 8-day Jewish holiday that begins on the 25th day of the Jewish lunar month of Kislev. App. 138. The 25th of Kislev usually occurs in December, and thus Chanukah is the annual Jewish holiday that falls closest to Christmas Day each year

...

Chanukah, like Christmas, is a cultural event as well as a religious holiday. *Id.* at 143. Indeed, the Chanukah story always has had a political or national, as well as a religious, dimension: it tells of national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday; according to some historians, it was associated in ancient times with the winter solstice. Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and “as a cultural or national event, rather than as a specifically religious event.

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent ... Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization,” may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution’s affairs ...

... Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of “endorsing” religion, a concern that has long had a place in our Establishment Clause jurisprudence ...

... Thus, it has been noted that the prohibition against governmental endorsement of religion “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.” ... Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.” *Lynch v. Donnelly*, (O’CONNOR, J., concurring).

... We turn first to the county’s creche display. There is no doubt, of course, that the creche itself is capable of communicating a religious message ... [T]he effect of a creche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche’s religious message.

... The floral decoration surrounding the creche contributes to, rather than detracts from, the endorsement of religion conveyed by the creche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention that the traditional Christmas greens negate the endorsement effect of the creche fares no better ...

Nor does the fact that the creche was the setting for the county’s annual Christmas-carol program diminish its religious meaning. First, the carol program in 1986 lasted only from December 3 to December 23 and occupied at most one hour a day. The effect of the creche on those who viewed it when the choirs were not singing—the vast majority of the time—cannot be negated by the presence of the choir program. Second, because some of the carols performed at the site of the creche were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it ...

No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the “display of the creche in this particular physical setting,” the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche’s religious message ...

For this reason, the claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of non-adherents must fail. Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: “We rejoice in the glory of Christ’s birth!”), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government’s own celebration of Christmas to the holiday’s secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the

holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians. To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the “the logic of secular liberty” it is the purpose of the Establishment Clause to protect ...

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the creche in this context, therefore, must be permanently enjoined.

...

Justice Kennedy’s accusations [“the Court of harboring a “latent hostility” or “callous indifference” toward religion”] 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 affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.

...

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah’s message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah’s display. The necessary result of placing a menorah next to a Christmas tree is to create an “overall holiday setting” that represents both Christmas and Chanukah — two holidays, not one.

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause.

...

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply

recognizes that both Christmas and Chanukah are part of the same winter holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with Lynch.

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas ... Indeed, a 40-foot Christmas tree was one of the objects that validated the creche in Lynch. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position ... the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition ...

The conclusion here that, in this particular context, the menorah's display does not have an effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the "purpose" or "entanglement" prong of the Lemon analysis.

...

Lynch v. Donnelly confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the creche in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City County Building, however, does not have this effect, given its "particular physical setting."

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings.

It is so ordered.

Excerpted by Kimberly Clairmont



McCreary County v. ACLU of Kentucky et al.

545 U.S. 844 (2005)

Vote: 5-4

Decision: Affirmed

Majority: Souter, joined by Stevens, Ginsburg, Breyer, O'Connor

Concurrence: O'Connor

Dissent: Scalia, joined by Rehnquist, Thomas, Kennedy

...

JUSTICE SOUTER delivered the opinion of the Court.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code ..." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose ...

...

Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has "a secular legislative purpose" has been a common, albeit seldom dispositive, element of our cases ... The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion ..." When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides ...

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon *Lemon's* purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing ...

As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one ...

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show ... The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose ..."

The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message. This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable ...

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual ...

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

It is so ordered.

Excerpted by Kimberly Clairmont



Van Orden v. Perry

545 U.S. 677 (2005)

Vote: 5-4

Decision: Affirmed

Plurality: Rehnquist, joined by Scalia, Kennedy, Thomas

Concurring: Scalia

Concurring: Thomas

Concurring: Breyer

Dissent: Souter, joined by Stevens, Ginsburg

...

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. We hold that it does ...

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the “people, ideals, and events that compose Texan identity.” Tex. H. Con. Res. 38, 77th Leg. (2001).¹ The monolith challenged here stands 6-feet high and 3-feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.” App. to Pet. for Cert. 21.

...

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history ...

The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage ...

These two faces are evident in representative cases both upholding and invalidating laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman*, (1971), as providing the governing test in Establishment Clause challenges ...

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history ...

Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause ...

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, the petitioner here, 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*. 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.

It is so ordered.

Excerpted by Kimberly Clairmont



American Legion v. American Humanist Assn.

588 U.S. ____ (2019)

Vote: 7-2

Decision: Reversed

Majority: Alito, joined by Roberts, Breyer, Kagan, Kavanaugh

Plurality: Alito, joined by Roberts, Breyer, Kavanaugh

Concurrence: Breyer, joined by Kagan

Concurrence: Kavanaugh

Concurrence: Kagan

Concurrence: Thomas

Concurrence: Gorsuch, joined by Thomas

Dissent: Ginsburg, joined by Sotomayor

...

ALITO, J., ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT.

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse ...

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions ..."

...

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.

A cross appears as part of many registered trademarks held by businesses and secular organizations ... Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular ...

The familiar symbol of the Red Cross—a red cross on a white background—shows how the meaning of a symbol that was originally religious can be transformed. The International Committee of the Red Cross (ICRC) selected that symbol in 1863 because it was thought to call to mind the flag of Switzerland, a country widely known for its neutrality ... Thus, the ICRC selected this symbol for an essentially secular reason ... But the cross was originally chosen for the Swiss flag for religious reasons. So an image that began as an expression of faith was transformed.

The image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I.” During and immediately after the war, the army marked soldiers’ graves with temporary wooden crosses or Stars of David”—a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. G. Piehler (1995) The vast majority of these grave markers consisted of crosses, and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross “developed into a ‘central symbol’ ” of the conflict.

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road ...

...

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” While the concept of a formally established church is straightforward, pinning down the meaning of a “law respecting an establishment of religion” has proved to be a vexing problem ... After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court’s existing case law a test that would bring order and predictability to Establishment Clause decision making. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail ...

If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it ...

For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult ... *Second*, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply ... *Third*, just as the purpose for maintaining a monument, symbol, or practice may evolve, “[t]he ‘message’ conveyed ... may change over time ...” *Fourth*, when time’s passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality ...

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. Due in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. As long as it is retained in its original place and form, it speaks as well of the community that erected the monument nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community ...

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause ...

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution. * * *

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings.

It is so ordered.

Excerpted by Kimberly Clairmont



Prayer at Government Meetings

Marsh v. Chambers

463 U.S. 783 (1983)

Vote: 6-3

Decision: Reversed

Majority: Burger, joined by White, Blackmun, Powell, Rehnquist, O'Connor

Dissent: Brennan, joined by Marshall

Dissent: Stevens

...

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of \$319.75 per month for each month the legislature is in session.

Ernst Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action ... seeking to enjoin enforcement of this practice.

...

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court ...

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause

applied to the practice authorized by the First Congress — their actions reveal their intent. An Act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning.”

...

Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination-Presbyterian-has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition. Weighed against the historical background, these factors do not serve to invalidate Nebraska’s practice ...

Absent proof that the chaplain’s reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause. Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature’s chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier by the same Congress that drafted the Establishment Clause of the First Amendment ...

The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat “while this Court sits ...”

The judgment of the Court of Appeals is

Reversed.

Excerpted by Kimberly Clairmont



Town of Greece v. Galloway

572 U.S. 565 (2014)

Vote: 5-4

Decision: Reversed

Majority: Kennedy, joined by Roberts, Alito, Scalia, Thomas

Concurrence: Alito, joined by Scalia

Concurrence: Thomas, joined by Scalia

Dissent: Breyer

Dissent: Kagan, joined by Ginsburg, Breyer, Sotomayor

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B.

...

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court’s opinion in *Marsh v. Chambers*, (1983), that no violation of the Constitution has been shown.

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board’s “chaplain for the month” and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month’s meeting. The town eventually compiled a list of willing “board chaplains” who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

...

Marsh is sometimes described as “carving out an exception” to the Court’s Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to “any of the formal ‘tests’ that have traditionally structured” this inquiry. The Court in *Marsh* found those tests unnecessary because history supported

the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time ...

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that “use overtly Christian terms” or “invoke specifics of Christian theology. ...”

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska’s chaplain, the Rev. Robert E. Palmer, modulated the “explicitly Christian” nature of his prayer and “removed all references to Christ” after a Jewish lawmaker complained. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object ...

Respondents point to other invocations that disparaged those who did not accept the town’s prayer practice. One guest minister characterized objectors as a “minority” who are “ignorant of the history of our country ...” while another lamented that other towns did not have “God-fearing” leaders ... Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer ...

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote “a ‘diversity’ of religious views” would require the town “to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each,” a form of government entanglement with religion that is far more troublesome than the current approach ...

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion ...

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.

The judgment of the U. S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice Kagan, with whom Justice Ginsburg, Justice Breyer and Justice Sotomayor join, dissenting.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court’s opinion because I think the Town of Greece’s prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court’s decision in *Marsh v. Chambers* (1983), upholding the Nebraska Legislature’s tradition of beginning each session with a chaplain’s prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece’s town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case’s record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

You are a party in a case going to trial; let’s say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in

attendance and says: “Lord, God of all creation,. ... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side. ... Amen.” App. 88a–89a. The judge then asks your lawyer to begin the trial.

It’s election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: “We pray this [day] for the guidance of the Holy Spirit as [we vote]. ... Let’s just say the Our Father together. ‘Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven. ...’ ” Id., at 56a. And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.

You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: “[F]ather, son, and Holy Spirit—it is with a due sense of reverence and awe that we come before you [today] seeking your blessing. ... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen.” Id., at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion’s beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. And even Greece’s attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh’ma and V’ahavta. (“Hear O Israel! The Lord our God, the Lord is One. ... Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.”) Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. (“God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.”) In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

A glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed ...

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. ...

... When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

In both Greece’s and the majority’s view, everything I have discussed is irrelevant here because this case involves “the tradition of legislative prayer outlined” in *Marsh v. Chambers*. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition ... Relying on that “unbroken” national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature’s practice of opening each day with a chaplain’s prayer as “a tolerable acknowledgment of beliefs widely held among the people of this country.”

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece’s Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board’s meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen. But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town’s citizenry, were more sectarian, and less inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska’s (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case’s record ...

Let’s count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature’s floor sessions—like those of the U. S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors’ gallery ... Greece’s town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board’s policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town’s governance—sharing concerns, airing grievances, and both shaping the community’s policies and seeking their benefits.

(And following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives ... The same is true in the U. S. Congress and, I suspect, in every other state legislature ...

The very opposite is true in Greece: Contrary to the majority’s characterization, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. And he typically addresses those people, as even the majority observes, as though he is “directing [his] congregation.” ...

And third, the prayers themselves differ in their content and character. Marsh characterized the prayers in the Nebraska Legislature as “in the Judeo-Christian tradition,” and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator’s request. And as the majority acknowledges, Marsh hinged on the view that “that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief”; had it been otherwise, the Court would have reached a different decision.

But no one can fairly read the prayers from Greece’s Town meetings as anything other than explicitly Christian—constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha’i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. About two-thirds of the prayers given over this decade or so invoked “Jesus,” “Christ,” “Your Son,” or “the Holy Spirit”; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture ... And the prayers usually close with phrases like “in the name of Jesus Christ” or “in the name of Your son.” See, e.g., *id.*, at 55a, 65a, 73a, 85a.

...

Those three differences, taken together, remove this case from the protective ambit of Marsh and the history on which it relied.

...

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation’s lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of “a deep sense of gratitude” for the new American Government—“a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine.” Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to “bigotry gives no sanction, to persecution no assistance.” But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants “immunities of citizenship” to the Christian and the Jew alike, and makes them “equal parts” of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas’s phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. “It is now no more,” Washington said, “that toleration is spoken of, as if it was by the indulgence of one class of people” to another, lesser one. For “[a]ll possess alike ... immunities of citizenship.” Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America’s promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone “who live[s] under [the Government’s] protection[,] should demean themselves as good citizens.” *Ibid.*

... that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court’s decision.

Excerpted by Kimberly Clairmont



Sunday Blue Laws

[*McGowan* and *Braunfeld v. Brown* – *McGowan* rejects a free exercise challenge because the petitioner did not claim it infringed on his religious beliefs. *Braunfeld* only deals with the free exercise challenge because a separate case, decided along with *McGowan* and *Braunfeld*, also dealt with it. They were decided the same day along with two other cases.]

McGowan v. Maryland

366 U.S. 420 (1961)

Vote: 8-1

Decision: Affirmed

Majority: Warren, joined by Black, Clark, Brennan, Whittaker, Stewart

Concurrence: Frankfurter, joined by Harlan

Dissent: Douglas

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

...

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof ...

Appellants argue that the Maryland statutes violate the “Equal Protection” Clause of the Fourteenth Amendment ...

It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public. The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment ...

The final questions for decision are whether the Maryland Sunday Closing Laws conflict with the Federal Constitution's provisions for religious liberty. First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," we hold that appellants have no standing to raise this contention ...

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century ... But, despite 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 ...

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—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 activities, a day on which people may visit friends and relatives who are not available during working days ...

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision. Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like ... The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion ...

Finally, we should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the “Establishment” Clause if it can be demonstrated that its purpose-evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect-is to use the State’s coercive power to aid religion. Accordingly, the decision is

Affirmed.

Excerpted by Kimberly Clairmont



Free Exercise Clause: Valid Secular Policy

Reynolds v. U.S.

8 U.S. 145 (1879)

Vote: 9-0

Decision: Affirmed

Majority: Waite, joined by Clifford, Swayne, Miller, Strong, Bradley, Hunt, Harlan

Concurrence: Field

MR. CHIEF JUSTICE WAITE DELIVERED THE OPINION OF THE COURT.

...

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practice polygamy ; ... that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practice polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.' He also proved 'that he had received permission from the recognized authorities in said church to enter into polygamous marriage; ... that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church.' ...

Upon this charge ... the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session, the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined, and, after a recital

"that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty,"

It is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

...

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society ... After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals ...

By the statute of 1 James I (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. ... [I]t was at a very early period reenacted ... in all the colonies. In connection with the case we are now considering, it is a significant fact that, on the 8th of December, 1788, after

the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that “all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,” the legislature of that State substantially enacted the statute of James I., death penalty included ... From that day to this, we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy ...

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

...

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

... Congress, in 1862, saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they

had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted: and the effort of the court seems to have been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

Judgment affirmed.

Excerpted by Kimberly Clairmont



Cantwell v. Connecticut

310 U.S. 296 (1940)

Vote: 9-0

Decision: Reversed

Majority: Roberts, joined by Hughes, McReynolds, Stone, Black, Reed, Frankfurter, Douglas, Murphy

...

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County each of them was convicted on the third count, which charged a violation' of § 6294 of the General' Statutes of Connecticut, and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell, on the fifth count, was also affirmed, but the conviction of Newton and Russell on that count was reversed and a new trial ordered as to them.

By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the State Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion ...

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the

contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.

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

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

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise. It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his

affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth ...

It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one, and that, if he violates his duty, his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark, and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt, a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

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

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

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is that, under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question. The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Excerpted by Kimberly Clairmont



Braunfeld v. Brown

66 U.S. 599 (1961)

Vote: 6-3

Decision: Reversed

Plurality: Warren, joined by Black, Clark, Whittaker

Concurrence: Harlan

Concurrence: Frankfurter, joined by Harlan

Dissent: Brennan

Dissent: Douglas

Dissent: Stewart

Mr. Justice Warren announced the judgment of the Court

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities ... Thus, the only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood, and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above.

...

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate, and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry, then, is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot in any way be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. Connecticut*; *Reynolds v. United States*. Thus, in *West Virginia State Board of Education v. Barnette*, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is

not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. Connecticut*. As pointed out in *Reynolds v. United States*, legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.

...

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. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

MR. JUSTICE STEWART, dissenting.

I agree with substantially all that MR. JUSTICE BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me, this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

Excerpted by Kimberly Clairmont

(footnote, decided the same day. Same issue from *McGowan* but from the free exercise clause perspective)



Free Exercise Clause: Applying Strict Scrutiny

Sherbert v. Verner

374 U.S. 398 (1963)

Vote: 7-2

Decision: Reversed

Majority: Brennan, joined by Warren, Black, Douglas, Clark, Goldberg

Concurrence: Douglas

Concurrence: Stewart

Dissent: Harlan, joined by White

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because, from conscientious scruples, she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be “able to work and ... available for work”; and, further, that a claimant is ineligible for 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 appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant’s restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept “suitable work when offered ... by the employment office or the employer ...” The Commission’s finding was sustained by the Court of Common Pleas for Spartanburg County. That court’s judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant’s contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment. The State Supreme Court held specifically that appellant’s ineligibility infringed no constitutional liberties because such a construction of the statute “places no restriction upon the appellant’s freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.” We noted probable jurisdiction of appellant’s appeal. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.” The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

Plainly enough, appellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant’s constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant’s religion may be justified by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate. ...”

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant’s religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State’s general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” Here not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s “right” but merely a “privilege.” It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege ... Likewise, to condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian’s religious liberty. When in times of “national emergency” the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, “no employee shall be required to work on Sunday ... who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious ... objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.” S. C. Code, § 64-4. No question

of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] ... religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—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. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.

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. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the

existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."

In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment.

The judgment of the South Carolina Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE DOUGLAS, CONCURRING.

The case we have for decision seems to me to be of small dimensions, though profoundly important. The question is whether the South Carolina law which denies unemployment compensation to a Seventh-day Adventist who, because of her religion, has declined to work on her Sabbath, is a law "prohibiting the free exercise" of religion as those words are used in the First Amendment.

It seems obvious to me that this law does run afoul of that clause.

Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. Religious scruples of a Quaker compel him to refrain from swearing and to affirm, instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish. The examples could be multiplied, including those of the Seventh-day Adventist, whose Sabbath is Saturday and who is advised not to eat some meats. These suffice, however, to show that many people hold beliefs alien to the majority of our society — beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.

Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function.

That was the essence of the Court’s decision in the Sunday Blue Law Cases, a ruling from which I then dissented and still dissent. That ruling of the Court travels part of the distance that South Carolina asks us to go now. She asks us to hold that, when it comes to a day of rest, a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits.

The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual’s scruples or conscience —an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.

This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Those considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but no more so than does the salary of any public employee. Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization —matters relevant to the Establishment Clause, not in issue here.

Excerpted by Kimberly Clairmont



Wisconsin v. Yoder

406 U.S. 205 (1972)

Vote: 7-0

Decision: Affirmed

Majority: Burger, joined by Brennan, Stewart, White, Marshall, Blackmun

Concurrence: Stewart, joined by Brennan

Concurrence: White, joined by Brennan, Stewart

Dissent (Partial): Douglas

...

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents’ convictions of violating the State’s compulsory school

attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade. The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law, and they are conceded to be subject to the Wisconsin statute ...

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory attendance law in Green County Court, and were fined the sum of \$5 each. Respondents defended on the ground that the application of the compulsory attendance law violated their rights under the First and Fourteenth Amendments.

...

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today ... Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community. 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 they teach 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 from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it 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. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith — and may even be hostile to it — interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

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. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past ...

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system ...

... Thus, a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, “prepare [them] for additional obligations ...”

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 ...

The essence of all that has been said and written on the subject is that only 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.

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin’s compulsory school attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims, we must be careful to determine whether the Amish religious faith and their mode of life are, as they

claim, inseparable and interdependent. 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 claims 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 Clauses.

Giving no weight to such secular considerations, 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 conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

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. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

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 ...

... Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.” Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

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. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the “necessity” of discrete aspects of a State’s program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State’s legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some “progressive” or more enlightened process for rearing children for modern life.

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State’s enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Nothing we hold is intended to undermine the general applicability of the State’s compulsory school attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.

Affirmed.

Excepted by Kimberly Clairmont



Goldman v. Weinberger

475 U.S. 503 (1987)

Vote: 5-4

Decision: Affirmed

Majority: Rehnquist, joined by Burger, White, Powell, Stevens

Concurrence: Stevens, joined by White, Powell

Dissent: Brennan, joined by Marshall

Dissent: Blackmun

Dissent: O'Connor, joined by Marshall

...

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, and now affirm ...

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35-10. This regulation states in pertinent part that "[h]eadgear will not be worn ... [w]hile indoors except by armed security police in the performance of their duties ..."

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps ... The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

...

Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," but the military authorities have been charged by the Executive and Legislative

Branches with carrying out our Nation’s military policy.”[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged ...”

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment’s notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that “[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection ...”

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a “clear danger” of undermining discipline and esprit de corps. He asserts that in general, visible but “unobtrusive” apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force’s assertion to the contrary is mere ipse dixit, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to AFR 35-10 are in fact desirable and will increase morale by making the Air Force a more humane place. But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate ...

The judgment of the Court of Appeals is

Affirmed.

Excerpted by Kimberly Clairmont



Free Exercise Clause: The Smith Test

Oregon v. Smith

494 U.S. 872 (1990)

Vote: 6-3

Decision: Reversed

Majority: Scalia, joined by Rehnquist, White, Stevens, Kennedy

Concurrence: O'Connor, joined by Brennan, Marshall, Blackmun

Dissent: Blackmun, joined by Brennan, Marshall

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.

Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. Ore. Rev. Stat. § 475.992(4) (1987). The law defines “controlled substance” as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U. S. C. §§811-812, as modified by the State Board of Pharmacy. Ore. Rev. Stat. §475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are “guilty of a Class B felony.” §475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see §475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii* Lemaire. Ore. Admin. Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related “misconduct”. The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents’ free exercise rights under the First Amendment.

On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents’ consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents’ peyote use was irrelevant to resolution of their constitutional claim

— since the purpose of the “misconduct” provision under which respondents had been disqualified was not to enforce the State’s criminal laws, but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents’ religious practice. Citing our decisions in *Sherbert v. Verner* (1963), and *Thomas v. Review Board, Indiana Employment Security Div.* (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith v. Employment Div., Dept. of Human Resources* (1986). We granted certiorari.

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents’ peyote consumption was relevant to their constitutional claim. We agreed, concluding that “if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct ...”

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) ...”

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual’s religion was *United States v. Lee*. 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 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* (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* (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick* (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters* (1925), to direct the education of their children, see *Wisconsin v. Yoder* (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school) ...

Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion ... 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. There being no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls.” Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government ...”

... Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws ... we have never applied the test to invalidate one.

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling” -permitting him, by virtue of his beliefs, “to become a law unto himself,” contradicts both constitutional tradition and common sense ...

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race ... or before the government may regulate the content of speech ... is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields – equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here –a private right to ignore generally applicable laws –is a constitutional anomaly ...

If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind ... The First Amendment’s protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore 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.

Excerpted by Kimberly Clairmont



Church of Lukumi Babalu Aye, Inc. v. City of Hialeah

508 U.S. 520 (1993)

Vote: 9-0

Decision: Reversed

Majority: Kennedy, joined by Rehnquist, White, Stevens, Scalia, Souter, Thomas

Concurrence: Kennedy, joined by Stevens

Concurrence: Scalia, joined by Rehnquist

Concurrence: Souter

Concurrence: Blackmun, joined by O'Connor

Justice Kennedy delivered the opinion of the Court, except as to Part II-A-2.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

This case involves practices of the Santeria religion, which originated in the nineteenth century. When hundreds of thousands of members of the Yoruba people were brought as slaves from eastern Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, “the way of the saints.” The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice ...

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion ... In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church’s goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church’s efforts at obtaining the necessary licenses and permits were far from smooth, see 723 F.Supp., at 1477-1478, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting ... In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption,” and prohibited owning or possessing an animal “intending to use such animal for food purposes.” It restricted application of this prohibition, however, to any individual or group that “kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.” The ordinance contained an exemption for slaughtering by “licensed establishment[s]” of animals “specifically raised for food purposes.” Declaring, moreover, that the city council “has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community,” the city council adopted Ordinance 87-71. That ordinance defined sacrifice as had Ordinance 87-52, and then provided that “[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.” The final Ordinance, 87-72, defined “slaughter” as “the killing of animals for food” and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of “small numbers of hogs and/or cattle per week in accordance with an exemption pro-

vided by state law.” All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding \$500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida ... After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners’ rights under the Free Exercise Clause ... The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion.

... Although the practice of animal sacrifice may seem abhorrent to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” ... Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners’ professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners’ First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements ...

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words “sacrifice” and “ritual” does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council’s enactments discloses the improper attempt to target Santeria. Resolution 87-66, adopted June 9, 1987, recited that “residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and “reiterate[d]” the city’s commitment to prohibit “any and all [such] acts of any and all religious groups.” No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances’ operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting ... But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a “religious gerrymander,” an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result ...

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health ... The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing ...

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing.

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability ...

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." This precise evil is what the requirement of general applicability is designed to prevent.

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests ... A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny ...

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause

to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

Excerpted by Kimberly Clairmont



A New Era?

Burwell v. Hobby Lobby

573 U.S. 682 ([2013](#))

Vote: 5-4

Decision: Reversed

Majority: Alito, joined by Roberts, Scalia, Kennedy, Thomas

Concurrence: Kennedy

Dissent: Ginsburg, joined by Sotomayor, Breyer, Kagan

Dissent: Breyer, joined by Kagan

[Disclaimer that the case is not a constitutional issue. The excerpt is included because it provides a key building block to the current religious freedom jurisprudence.]

...

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest ...

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs. Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would. Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS

regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives ...

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. 42 U. S. C. §2000bb– 1(a). We have little trouble concluding that it does.

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs. If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe ...

The least-restrictive-means standard is exceptionally demanding and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases ... The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Masterpiece Cakeshop v. CO

584 U.S. ____ (2018)

Vote: 7-2

Decision: Reversed

Majority: Kennedy, joined by Roberts, Breyer, Alito, Kagan, Gorsuch

Concurrence: Kagan, joined by Breyer

Concurrence: Gorsuch, joined by Alito

Concurrence: Thomas, joined by Gorsuch

Dissent: Ginsburg, joined by Sotomayor

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop’s owner told the couple that he would not create a cake for their wedding because of his religious opposition to same sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop’s actions violated the Act and ruled in the couple’s favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission’s order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment ...

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state’s tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows: “It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” Colo. Rev. Stat. §24–34–601(2)(a) (2017). The Act defines “public accommodation” broadly to include any “place of business engaged in any sales to the public and any place offering services ... to the public,” but excludes “a church, synagogue, mosque, or other place that is principally used for religious purposes ...”

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason, the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and, in some instances, protected forms of expression ...

As this Court observed in *Obergefell v. Hodges* (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law ...

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips’ dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time ... At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor* (2013), or *Obergefell* ...

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers’ creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.

... But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection. That hostility surfaced at the Commission's formal, public hearings, as shown by the record ... [T]hese statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely ...

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. In *Church of Lukumi Babalu Aye*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures ..."

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside ...

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

Excepted by Kimberly Clairmont



Tandon v. Newsom

593 U.S. ____ (2021)

Vote: 6-3

Per Curiam Opinion

Decision: Reversed

Dissent: Kagan, joined by Breyer, Sotomayor

PER CURIAM.

The Ninth Circuit’s failure to grant an injunction pending appeal was erroneous. This Court’s decisions have made the following points clear.

First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue ...

Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people gather ...

Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors “are always present in worship, or always absent from the other secular activities” the government may allow ... Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too ...

Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants “remain under a constant threat” that government officials will use their power to reinstate the challenged restrictions ...

Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights “for even minimal periods of time”; and the State has not shown that “public health would be imperiled” by employing less restrictive measures. Accordingly, applicants are entitled to an injunction pending appeal ...

This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise ...

It is unsurprising that such litigants are entitled to relief. California’s Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further “interests of the highest order” by means “narrowly tailored in pursuit of those interests ...”

...

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

I would deny the application largely for the reasons stated in *South Bay United Pentecostal Church v. Newsom*, (KAGAN, J., dissenting). The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at home gatherings of all kinds, religious and secular alike. California need not, as the per curiam insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. As the per curiam’s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons ...

First, “when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting,” with participants “more likely to be involved in prolonged conversations.” *Tandon v. Newsom* (2021). Second, “private houses are typically smaller and less ventilated than commercial establishments.” *Ibid.* And third, “social distancing and mask-wearing are less likely in private settings and enforcement is more difficult.” *Ibid.* These are not the mere musings of two appellate judges: The district court found each of these facts based on the uncontested testimony of California’s public-health experts ... No doubt this evidence is inconvenient for the per curiam’s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view, see ante, at 2) turns on risk assessments. In ordering California to weaken its restrictions on at home gatherings, the majority yet again “insists on treating unlike cases, not like ones, equivalently ...” And

it once more commands California “to ignore its experts’ scientific findings,” thus impairing “the State’s effort to address a public health emergency.” *Ibid.* Because the majority continues to disregard law and facts alike, I respectfully dissent from this latest per curiam decision ...

Excerpted by Kimberly Clairmont



Espinoza v. Montana Department of Revenue

91 U.S. ____ (2020)

Vote: 5-4

Decision: Reversed

Majority: Roberts, joined by Thomas, Alito, Gorsuch, Kavanaugh

Concurrence: Thomas, joined by Gorsuch

Concurrence: Alito

Concurrence: Gorsuch

Dissent: Ginsburg, joined by Kagan

Dissent: Breyer, joined by Kagan

Dissent: Sotomayor

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

...

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the “no-aid” provision of the State Constitution, which prohibits any aid to a school controlled by a “church, sect, or denomination.” The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision ...

This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. Stillwater is a private Christian school that meets the statutory criteria for “qualified education providers.” It serves students in prekindergarten through 12th grade, and petitioners chose the school in large part because it “teaches the same Christian values that [they] teach at home.” The child of one petitioner has already received scholarships from Big Sky, and the other petitioners’ children are eligible for scholarships and planned to apply. While in effect, however, Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater. To overcome that obstacle, petitioners sued the Department of Revenue in Montana state court. Petitioners claimed that Rule 1 conflicted with the statute that created the scholarship program and could not be justified

on the ground that it was compelled by the Montana Constitution’s no-aid provision. Petitioners further alleged that the Rule discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children ...

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana’s no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court’s interpretation of state law—including its determination that the scholarship program provided impermissible “aid” within the meaning of the Montana Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution ...

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, “protects religious observers against unequal treatment” and against “laws that impose special disabilities on the basis of religious status.” *Trinity Lutheran* ...

Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the “unremarkable” conclusion that disqualifying otherwise eligible recipients from a public benefit “solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny.” In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization “owned or controlled by a church, sect, or other religious entity.” Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri’s policy discriminated against the Church “simply because of what it is—a church,” and so the policy was subject to the “strictest scrutiny,” which it failed. We acknowledged that the State had not “criminalized” the way in which the Church worshipped or “told the Church that it cannot subscribe to a certain view of the Gospel.” But the State’s discriminatory policy was “odious to our Constitution all the same.”

Here too Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school “controlled in whole or in part by any church, sect, or denomination ...” The provision’s title— “Aid prohibited to sectarian schools”—confirms that the provision singles out schools based on their religious character ... And the Montana Supreme Court explained that the provision forbids aid to any school that is “sectarian,” “religiously affiliated,” or “controlled in whole or in part by churches ...”

This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to “schools controlled in whole or in part by churches,” “sectarian schools,” and “religiously-affiliated schools.” Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were “religiously affiliated” and “controlled by churches,” and the Court ultimately concluded that the scholarship program ran afoul of the Montana Consti-

tution by aiding “schools controlled by churches.” The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations “owned or controlled by a church, sect, or other religious entity.”

...

The Montana Supreme Court asserted that the no-aid provision serves Montana’s interest in separating church and State “more fiercely” than the Federal Constitution. But “that interest cannot qualify as compelling” in the face of the infringement of free exercise here. A State’s interest “in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause ...”

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department’s view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State’s alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not “state experimentation in the suppression of free speech,” and the same goes for the free exercise of religion ...

Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school’s liberty is enhanced by eliminating any option to participate in the first place ... A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious ...

The Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit ... The descriptions are not accurate. The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons ... [S]eeing no other “mechanism” to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.

The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court’s error of federal law occurred at the beginning. When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, “one of those cases” in which application of the no-aid provision “would violate the Free Exercise Clause ... the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court’s failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.

The Supremacy Clause provides that “the Judges in every State shall be bound” by the Federal Constitution, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding ...” “[T]his Clause creates a rule of decision” directing state courts that they “must not give effect to state laws that conflict with federal law ... Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have “disregard[ed]” the no-aid provision and decided this case “conformably to the [C]onstitution” of the United States ... That “*supreme* law of the land” condemns discrimination against religious schools and the families whose children attend them. *Id.*, at 180. They are “member[s] of the community too,” and their exclusion from the scholarship program here is “odious to our Constitution” and “cannot stand ...”

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

It is so ordered.

Excerpted by Kimberly Clairmont



Fulton v. Philadelphia

593 U.S. ____ (2021)

Vote: 9-0

Decision: Reversed

Majority: Roberts, joined by Breyer, Sotomayor, Kagan, Kavanaugh and Barrett

Concurrence: Barrett, joined by Kavanaugh and Breyer (except for the first paragraph)

Concurrence: Alito, joined by Thomas and Gorsuch

Concurrence: Gorsuch, joined by Thomas and Gorsuch

Chief Justice Roberts delivered the opinion of the Court.

Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

The Catholic Church has served the needy children of Philadelphia for over two centuries ...

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City’s Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code §3700.61 (2020) ...

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that “marriage is a sacred bond between a man and a woman.” App. 171. Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had “laws in place to protect its people from discrimination that occurs under the guise of religious freedom.” App. to Pet. for Cert. 147a. The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that “things have changed since 100 years ago,” and “it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.” App. 366. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission ... As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment ... The District Court denied preliminary relief ... The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program. *Id.*, at 695–700.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new language forbidding discrimination on

the basis of sexual orientation as a condition of contract renewal. The court concluded that the proposed contractual terms were a neutral and generally applicable policy under *Smith*. The court rejected the agency's free speech claims on the same grounds as the District Court.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under *Smith* and also asked this Court to reconsider that precedent.

We granted certiorari.

As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.* Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so, see *post*, p. 1 (opinion of Alito, J.); *post*, p. 1 (opinion of Gorsuch, J.). But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* ...

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Smith* ... *Smith* later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way ... In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. *Id.*, at 524–528. The City claimed that the ordinances were necessary in part to protect public health, which was "threatened by the disposal of animal carcasses in open public places." But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable ...

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith* ...

Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS ...

... We have never suggested that the government may discriminate against religion when acting in its managerial role. And *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs ...

... The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable ...

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." Applying that "fundamental" rule here, *Shebadi*, 474 Pa., at 236, 378 A. 2d, at 306, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioner's "sole discretion."

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The concurrence protests that the "Court granted certiorari to decide whether to overrule [*Smith*]," and chides the Court for seeking to "sidestep the question." *Post*, at 1 (opinion of Gorsuch, J.). But the Court also granted review to decide whether Philadelphia's actions were permissible under our precedents. See Pet. for Cert. i. CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. *Lukumi*. Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis ... The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City, see 55 Pa. Code §3700.61.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop*, On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

As Philadelphia acknowledges, CSS has “long been a point of light in the City's foster-care system.” Brief for City Respondents 1. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Excerpted by Kimberly Clairmont



Kennedy v. Bremerton School District

597 U.S. ____ (2022)

Vote: 6-3

Decision: Reversed

Majority: Gorsuch, joined by Roberts, Thomas, Alito, Barrett and Kavanaugh (except Part II-B)

Concurrence: Thomas

Concurrence: Alito

Dissent: Sotomayor, joined by Breyer and Kagan

Justice Gorsuch delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy’s religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy’s. Nor does a proper understanding of the Amendment’s Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. App. 167. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give “thanks through prayer on the playing field” at the conclusion of each game. Id., at 168, 171 ... Initially, Mr. Kennedy prayed on his own. See Ibid. But over time, some players asked whether they could pray alongside him. 991 F. 3d 1004, 1010 (CA9 2021); App. 169 ... The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join ... Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. See id., at 170 ... Mr. Kennedy explained that he “never told any student that it was important they participate in any religious activity.” Ibid. In particular, he “never pressured or encouraged any student to join” his postgame midfield prayers. Ibid.

... It seems the District’s superintendent first learned of [the prayers] only in September 2015 ... At that point, the District reacted quickly ... The District explained that it sought to establish “clear parameters” “going forward.” Ibid. It instructed Mr. Kennedy to avoid any motivational “talks with students” that “include[d] religious expression, including prayer,” and to avoid “suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]” any prayers of students, which students remained free to “engage in.” Id., at 44. The District also explained that any religious activity on Mr. Kennedy’s part must be “nondemonstrative (i.e., not outwardly discernible as religious activity)” if “students are also engaged in religious conduct” in order to “avoid the perception of endorsement.” Id., at 45. In offering these directives, the District appealed to what it called a “direct

tension between” the “Establishment Clause” and “a school employee’s [right to] free[ly] exercise” his religion. *Id.*, at 43. To resolve that “tension,” the District explained, an employee’s free exercise rights “must yield so far as necessary to avoid school endorsement of religious activities.” *Ibid.*

... Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. See *id.*, at 172. Driving home after a game, however, Mr. Kennedy felt upset that he had “broken [his] commitment to God” by not offering his own prayer, so he turned his car around and returned to the field. *Ibid.* By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks. See *Ibid.* ...

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his “sincerely-held religious beliefs,” he felt “compelled” to offer a “post-game personal prayer” of thanks at midfield. *Id.*, at 62–63, 172 ... Mr. Kennedy emphasized that he sought only the opportunity to “wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer.” *Id.*, at 69 ...

Yet instead of accommodating Mr. Kennedy’s request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in “any overt actions” that could “appea[r] to a reasonable observer to endorse ... prayer ... while he is on duty as a District-paid coach.” *Id.*, at 81 ...

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. See *id.*, at 90. When he bowed his head at midfield after the game, “most [Bremerton] players were ... engaged in the traditional singing of the school fight song to the audience.” *Ibid.* Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. See *id.*, at 82, 297. This event spurred media coverage of Mr. Kennedy’s dilemma and a public response from the District ... Still, the District explained that a “reasonable observer” could think government endorsement of religion had occurred when a “District employee, on the field only by virtue of his employment with the District, still on duty” engaged in “overtly religious conduct.” *Id.*, at 91, 93. The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a “private location” behind closed doors and “not observable to students or the public.” *Id.*, at 93– 94.

...

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from “participat[ing], in any capacity, in ... football program activities.” *Ibid.* ...

After these events, Mr. Kennedy sued in federal court, alleging that the District’s actions violated the First Amendment’s Free Speech and Free Exercise Clauses ... These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping

protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent ...

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. See, e.g., *Fulton v. Philadelphia*, (2021) ... We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

The Free Exercise Clause ... protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, (1990).

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Id.*, at 879– 881. Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*.

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise ... Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at ... religious practice." *Smith* ... In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character ...

When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, (1969) ... Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages ...

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions [*Pickering v. Board of Ed. of Township High School Dist.* (1968), *Garcetti*] ... suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech.

At the same time and at the other end of the spectrum, when an employee “speaks as a citizen addressing a matter of public concern,” our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in “a delicate balancing of the competing interests surrounding the speech and its consequences.” ...

... [I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech “ordinarily within the scope” of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. See Part I–B, *supra*. Simply put: Mr. Kennedy’s prayers did not “ow[e their] existence” to Mr. Kennedy’s responsibilities as a public employee. *Garcetti* ...

Of course, acknowledging that Mr. Kennedy’s prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the Pickering–Garcetti framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee’s private speech on a matter of public concern.

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District ... Under the Free Exercise Clause, a government entity normally must satisfy at least “strict scrutiny,” showing that its restrictions on the plaintiff’s protected rights serve a compelling interest and are narrowly tailored to that end. See *Lukumi* ... A similar standard generally obtains under the Free Speech Clause ...

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. *Id.*, at 35–42. On its account, Mr. Kennedy’s prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in “direct tension” with the competing demands of the Establishment Clause. *App.* 43. To resolve that clash, the District reasoned, Mr. Kennedy’s rights had to “yield.” *Ibid.* The Ninth Circuit pursued this same line of thinking ...

What the District and the Ninth Circuit overlooked, however, is that the “shortcomings” associated with this “ambitiou[s],” abstract, and ahistorical approach to the Establishment Clause became so “apparent” that this Court long ago abandoned *Lemon* and its endorsement test offshoot ... The Court has explained that these tests “invited chaos” in lower courts, led to “differing results” in materially identical cases, and created a “minefield” for legislators ... This Court has since made plain, too, that the Establishment Clause does not include anything like a “modified heckler’s veto, in which ... religious activity can be proscribed” based on ““perceptions”” or ““discomfort.”” *Good News Club v. Milford Central School*, (2001) ... Nor does the Clause “compel the government to purge from the public sphere” anything an objective observer could reasonably infer endorses or “partakes of the religious.” *Van Orden v. Perry*, (2005) ...

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “reference to historical practices and understandings.” *Town of Greece* (2013) ... An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “exception” within the “Court’s Establishment Clause jurisprudence.” *Town of Greece* (2013) ...

[Gorsuch then covers the District's other reasons and concerns about the Coach's religious prayers and dismisses each argument.]

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should “trum[p]” the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the “mere shadow” of a conflict, a false choice premised on a misconstruction of the Establishment Clause ... And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights ...

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is

Reversed.

Justice Sotomayor, with whom Justice Breyer and Kagan join dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale* (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. See *Carson v. Makin*, (2022) (BREYER, J., dissenting). To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the

Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice. Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman*, (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. Ante, at 22. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

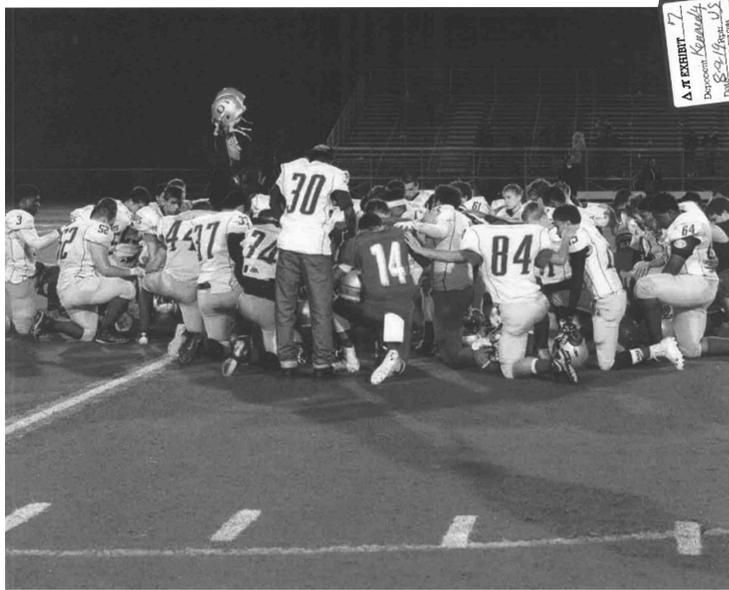
As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "pray[ing] quietly while his students were otherwise occupied." Ante, at 1. The record before us, however, tells a different story.

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated. See Brief for Religious and Denominational Organizations et al. as *Amici Curiae*.

... The District also set requirements for Kennedy's interactions with players, obliging him, like all coaches, to "exhibit sportsmanlike conduct at all times," "utilize positive motivational strategies to encourage athletic performance," and serve as a "mentor and role model for the student athletes." App., at 56. In addition, Kennedy's position made him responsible for interacting with members of the community. In this capacity, the District required Kennedy and other coaches to "maintain positive media relations," "always approach officials with composure" with the expectation that they were "constantly being observed by others," and "communicate effectively" with parents. *Ibid.*

Finally, District coaches had to "[a]dhere to [District] policies and administrative regulations" more generally. *Id.*, at 30–31.

In September 2015, a coach from another school's football team informed BHS' principal that Kennedy had asked him and his team to join Kennedy in prayer ... The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. *Id.*, at 40 ...



J. Kennedy standing in group of kneeling players

While the District’s inquiry was pending, its athletic director attended BHS’ September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player’s helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District’s superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. The District acknowledged that Kennedy had “not actively encouraged, or required, participation” but emphasized that “school staff may not indirectly encourage students to engage in religious activity” or “endors[e]” religious activity; rather, the District explained, staff “must remain neutral” “while performing their job duties.” *Id.*, at 41–43. The District instructed Kennedy that any motivational talks to students must remain secular, “so as to avoid alienation of any team member.” *Id.*, at 44.

The District reiterated that “all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities.” *Id.*, at 45. To avoid endorsing student religious exercise, the District instructed that such activity must be nondemonstrative or conducted separately from students, away from student activities. *Ibid* ...

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was “motivated by his sincerely-held religious beliefs to pray following each football game.” *Id.*, at 63 ... The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.¹ Before the homecoming game, Kennedy made multiple media appearances

to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

... While Kennedy's letter asserted that his prayers "occurr[ed] 'on his own time,' after his duties as a District employee had ceased," the District pointed out that Kennedy "remain[ed] on duty" when his prayers occurred "immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire." *Id.*, at 78 (emphasis deleted).

... The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion ...

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "intended to conduct ceremonies on the field after football games if others were allowed to." *Id.*, at 181. To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.



J. Kennedy in prayer circle
10/16/2015

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements ... Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement ...

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing ...

... After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension ...

Kennedy then filed suit. He contended, as relevant, that the District violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment ... Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so ...

The Establishment Clause protects this freedom by "command[ing] a separation of church and state." *Cutter v. Wilkinson*, (2005) ...

Indeed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, (1987). The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here. First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society ... Accordingly, the Establishment Clause "proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'" or otherwise endorsing religious beliefs. *Lee*, (Blackmun, J., concurring).

Second, schools face a higher risk of unconstitutionally "coerc[ing] ... support or participat[ion] in religion or its exercise" than other government entities. *Id.*, at 587 (opinion of the Court) ... Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." *Lee*... Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school. *Lee*.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent ...

Under these precedents, the Establishment Clause violation at hand is clear ... Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games ... Although the football game itself had ended, the football game events had not; Kennedy himself

acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration." *Santa Fe*.

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence ... The record before the Court bears this out ...

Kennedy does not defend his longstanding practice of leading the team in prayer out loud on the field as they kneeled around him. Instead, he responds, and the Court accepts, that his highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. To the contrary, this Court has repeatedly stated that Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue ... This Court's precedent thus does not permit treating Kennedy's "new" prayer practice as occurring on a blank slate, any more than those in the District's school community would have experienced Kennedy's changed practice (to the degree there was one) as erasing years of prior actions by Kennedy. ...

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved ...

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all ...

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government," while the second erects a "backstop that disables our government from breaking it" and "start[ing] us down the path to the past, when [the right to free exercise] was routinely abridged." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, (2017) (Sotomayor, J., dissenting). Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In

doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.



J. Kennedy in prayer circle
10/26/2015

Excerpted by Kimberly Clairmont



Speech and Expression

Case List

Defining Danger and Speech

- [*Schenck v. U.S.*](#) (1919)
- [*Abrams v. United States*](#) (1919)
- [*Gitlow v. New York*](#) (1925)
- [*Terminiello v. Chicago*](#) (1949)
- [*Dennis v. U.S.*](#) (1951)
- [*Feiner v. People of the State of New York*](#) (1951)
- [*Brandenburg v. Ohio*](#) (1969)
- [*Hess v. Indiana*](#) (1973)

Speech and Expression

- [*Stromberg v. People of the State of California*](#) (1931)
- [*Minersville School Dist. et al. v. Gobitis et al.*](#) (1940)
- [*West Virginia Board of Education v. Barnette*](#) (1943)
- [*Giboney et al. v. Empire Storage & Ice Co.*](#) (1949)
- [*United States v. O'Brien*](#) (1968)
- [*Spence v. Washington*](#) (1974)
- [*Neal R. Wooley etc., et al. v. George Maynard et ux.*](#) (1977)
- [*William P. Clark, Secretary of the Interior, et al. v. Community for Creative Non-Violence et al.*](#) (1984)
- [*Texas v. Johnson*](#) (1989)
- [*United States v. Eichman*](#) (1990)
- [*Donald H. Rumsfeld, Secretary of Defense, et al. v. Forum for Academic and Institutional Rights et al.*](#) (2006)

Types of Speech

- [*Chaplinsky v. New Hampshire*](#) (1942)
- [*Cohen v. California*](#) (1971)
- [*Republican Party of Minnesota v. White*](#) (2002)
- [*United States v. Alvarez*](#) (2012)
- [*Elonis v. United States*](#) (2015)

Hate Speech

[*R.A.V. v. St Paul*](#) (1992)

[*Wisconsin v. Mitchell*](#) (1993)

[*Virginia v. Black*](#) (2003)

Obscenity and Extreme Violence

[*Roth v. United States*](#) (1957)

[*Jacobellis v. Ohio*](#) (1964)

[*Miller v. California*](#) (1973)

[*New York v. Ferber*](#) (1982)

[*Brown v. Entertainment Merchants Association*](#) (2011)

Speech and Association

[*Whitney v. California*](#) (1925)

[*NAACP v. Alabama*](#) (1958)

[*Hurley v. Irish GLB of Boston*](#) (1995)

[*BSA v. Dale*](#) (2000)

Time, Place and Manner

[*City Council v. Taxpayers for Vincent*](#) (1984)

[*Ward v. Rock Against Racism*](#) (1992)

[*Hill v. CO*](#) (2000)

[*Watchtower v. Stratton*](#) (2002)

[*Snyder v. Phelps*](#) (2011)

[*McCullen v. Coakley*](#) (2014)

[*Reed v. Town of Gilbert*](#) (2015)

[*Minnesota Voters Alliance v. Mansky*](#) (2018)

Government Speech

[*National Endowment for the Arts v. Finley*](#) (1998)

[*Pleasant Grove City v. Summum*](#) (2009)

[*Walker v. Texas Division, Sons of Confederate Veterans*](#) (2015)

[*Matal v. Tam*](#) (2017)

[*Iancu v. Brunetti*](#) (2019)

Student Speech

Tinker v. Des Moines Independent Community School District (1969)

Island Trees School District v. Pico (1982)

Bethel School District No. 403 v. Fraser (1986)

Hazelwood School District v. Kuhlmeier (1988)

Morse v. Frederick (2007)

Mahanoy Area School District v. B.L. (2021)

Speech in College

Healy v. James (1972)

Papish v. Board of Curators (1973)

Rosenberger v. Rector and Visitors of the University of Virginia (1995)

Board of Regents of the University of Wisconsin System v. Southworth (2000)

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez (2010)

Campaign Finance and Speech

Buckley v. Valeo (1976)

First Nat'l Bank of Boston v. Bellotti (1978)

Citizens Against Rent Control v. Berkeley (1981)

FEC v. Beaumont (2003)

Citizens United v. FEC (2010)

McCutcheon v. FEC (2010)

Defining Danger and Speech

Schenck v. U.S.

249 U.S. 47 (1919)

Vote: 9-0

Majority: Holmes, joined by White, McKenna, Day, Van Devanter, Pitney, McReynolds, Brandeis and Clarke

Mr. Justice HOLMES delivered the opinion of the Court.

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

...

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

"If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."

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

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. *Patterson v Colorado*, (1907). 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 (Comp. St. 1918, § 10212d) 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.

Excerpted by Sarah Mason

Podcast Link (Spotify): https://open.spotify.com/episode/34OotU0AbneH0Devk9aUmt?si=hrMR-wrw1Qhm2JJUhAu9iNg&dl_branch=1

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "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."

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of military rule, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.

Remember, "eternal vigilance is the price of liberty."

Down with autocracy!

Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

Leaflet (obverse)

ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the supreme law of the Land."

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether knowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. You are a citizen, not a subject! You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Maloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism? No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

Leaflet (reverse)

Abrams v. United States

250 U.S. 216 (1919)

Vote: 7-2

Decision: for the United States

Majority: Clarke, joined by White, McKenna, Day, Van Devanter, Pitney, and McReynolds

Dissent: Holmes, joined by Brandeis

Mr. Justice Clarke delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress.

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: in the first count, “disloyal, scurrilous and abusive language about the form of Government of the United States;” in the second count, language “intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendants conspired,

“when the United States was at war with the Imperial German Government, unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to-wit, ordnance and ammunition, necessary and essential to the prosecution of the war.”

The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and, at the time they were arrested, they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and, of these, three frankly avowed that they were “rebels,” “revolutionists,” “anarchists,” that they did not believe in government in any form, and they declared that they had no interest whatever in the Government of the United States. The fourth defendant testified that he was a “socialist,” and believed in “a proper kind of government, not capitalistic,” but, in his classification, the Government of the United States was “capitalistic.”

It was admitted on the trial that the defendants had united to print and distribute the described circulars, and that five thousand of them had been printed and distributed about the 22nd day of August, 1918.

The defendants pleaded “not guilty,” and the case of the Government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment ...

*** [The Court excerpted the leaflets].

These excerpts sufficiently show that, while the immediate occasion for this particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our Government’s sending troops into Russia as a strategic operation against the Germans on the eastern battlefront, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing, and, if possible, defeating the military plans of the Government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or language intended to bring the form of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus, it is clear not only that some evidence, but that much persuasive evidence, was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment, and, under the long established rule of law hereinbefore stated, the judgment of the District Court must be

Affirmed.

Mr. Justice Holmes Dissenting [Mr. Justice Brandeis Joins].

...

The first of these leaflets says that the President’s cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that “German militarism combined with allied capitalism to crush the Russian evolution” — goes on that the tyrants of the world fight each other until they see a common enemy — working class enlightenment, when they combine to crush it, and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world, and that is capitalism; that it is a crime for workers of America, &c., to fight the workers’ republic of Russia, and ends “Awake! Awake, you Workers of the World, Revolutionists!” A note adds

“It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.”

The other leaflet, headed “Workers — Wake Up,” with abusive language says that America together with the Allies will march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America ... The leaflet winds up by

saying “Workers, our reply to this barbaric intervention has to be a general strike!” and, after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends, “Woe unto those who will be in the way of progress. Let solidarity live! The Rebels.”

No argument seems to me necessary to show that these *pronunciamentos* in no way attack the form of government of the United States ... With regard to that, it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war ... But to make the conduct criminal, that 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.

I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, 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.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. 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 ...

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 ... 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.

... 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 wholeheartedly 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. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law ... abridging the freedom of speech.” Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

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Gitlow v. New York

268 U.S. 652 (1925)

Vote: 7-2

Majority: Sanford, joined by Taft, Van Devanter, McReynolds, Sutherland, Butler, Sanford and Stone

Dissent: Homes, joined by Brandeis

Mr. Justice Sanford delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. * * * 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. Its material provisions are:

“§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.”

“§ 161. Advocacy of criminal anarchy. Any person who:”

“1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,”

“2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means”

“Is guilty of a felony and punishable by imprisonment or fine, or both.”

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

... The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a “Manifesto.” This was published in *The Revolutionary Age*, the official organ of the Left Wing. * * * Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the *Revolutionary Age* and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant’s direction, and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption, and that he was responsible for the Manifesto as it appeared, that “he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation.”

There was no evidence of any effect resulting from the publication and circulation of the Manifesto. * * *

Coupled with a review of the rise of Socialism, [the Manifesto] condemned the dominant “moderate Socialism” for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures, and advocated, in plain and unequivocal language, the necessity of accomplish-

ing the “Communist Revolution” by a militant and “revolutionary Socialism”, based on “the class struggle” and mobilizing the “power of the proletariat in action,” through mass industrial revolts developing into mass political strikes and “revolutionary mass action”, for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a “revolutionary dictatorship of the proletariat”, the system of Communist Socialism. The then recent strikes ... were cited as instances of ... revolutionary action ... it was urged ... to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

*** [Gitlow was convicted and the convictions upheld by the New York courts.]

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, and that, as the exercise of the right of free expression with relation to government is only punishable “in circumstances involving likelihood of substantive evil,” the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, that the “liberty” protected by the Fourteenth Amendment includes the liberty of speech and of the press, and 2nd, that while liberty of expression “is not absolute,” it may be restrained “only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely,” and as the statute “takes no account of circumstances,” it unduly restrains this liberty and is therefore unconstitutional.

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

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. Advocacy is defined in the Century Dictionary as: “1. The act of pleading for, supporting, or recommending; active espousal.” It is not the abstract “doctrine” of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose ...

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.

... 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 ...

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited ... this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * *

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means ... And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. 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. * * *

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.

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

Affirmed.

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Terminiello v. Chicago

337 U.S. 1 (1949)

Vote: 5-4

Majority: Douglas, joined by Black, Reed, Murphy, and Rutledge

Dissent: Vinson

Dissent: Frankfurter, joined by Jackson and Burton

Dissent: Jackson, joined by Burton

Petitioner after jury trial was found guilty of disorderly conduct in violation of a city ordinance of Chicago, and fined. The case grew out of an address he delivered in an auditorium in Chicago under the auspices of the Christian Veterans of America. The meeting commanded considerable public attention. The auditorium was filled to capacity, with over eight hundred persons present. Others were turned away. Outside of the auditorium, a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order, but they were not able to prevent several disturbances. The crowd outside was angry and turbulent.

Petitioner in his speech condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare.

The trial court charged that 'breach of the peace' consists of any 'misbehavior which violates the public peace and decorum'; and that the 'misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.'

Petitioner did not take exception to that instruction. But he maintained at all times that the ordinance as applied to his conduct violated his right of free speech ... The case is here on a petition for certiorari which we granted because of the importance of the question presented.

... 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 or unrest, or creates a disturbance ...

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, *Chaplinsky v NH*, (1942), 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. *Bridges v California*, (1941). 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 ...

... As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.

The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less ripe for our review ... We can only take the statute as the state courts read it ... The pinch of the statute is in its application. It is that question which the petitioner has brought here ...

But it is said that throughout the appellate proceedings the Illinois courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting 'fighting words.' That emphasizes, however, the importance of the rule of the *Stromberg* case. Petitioner was not convicted under a statute so narrowly construed. For all anyone knows he 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. We cannot avoid that issue by saying that all Illinois did was to measure petitioner's conduct, not the ordinance, against the Constitution. Petitioner raised both points that his speech was protected by the constitution; that the inclusion of his speech within the ordinance was a violation of the Constitution. We would, therefore, strain at technicalities

to conclude that the constitutionality of the ordinance as construed and applied to petitioner was not before the Illinois courts. The record makes clear that petitioner at all times challenged the constitutionality of the ordinance as construed and applied to him.

Reversed.

Excerpted by Sarah Mason



Dennis v. U.S.

341 U.S. 494 (1951)

Vote: 6-2

Opinion: Vinson, joined by Reed, Burton and Minton

Decision: for the U.S.

Concurring Opinion: Frankfurter

Concurring Opinion: Jackson

Dissenting Opinion: Black

Dissenting Opinion: Douglas

Not participating: Clark

Mr. Chief Justice Vinson announced the judgment of the Court.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, inter alia, that the statute was unconstitutional was denied. A verdict of guilty as to all the petitioners was returned by the jury. The Court of Appeals affirmed the convictions. We granted certiorari, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) §§ 10, 11 (see present 18 U. S. C. § 2385), provide as follows:

“SEC. 2. (a) It shall be unlawful for any person—

“(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

“(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

“(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

“(b) For the purposes of this section, the term ‘government in the United States’ means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

“SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.”

The indictment charged the petitioners with willfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages ... Whether, on this record, the petitioners did, in fact advocate the overthrow of the Government ... is not before us, and we must base any discussion of this point upon the conclusions states in the opinion in the Court of Appeals ... That court held the record in this case amply supports the necessary finding of the jury that petitioners, were unwilling to work within our framework of democracy ...

...

The obvious purpose of the statute is to protect existing Government not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a “right” to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such power, but whether the means which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that, by its terms, it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press.

... The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did “no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.” He further charged that it was not unlawful “to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence.” Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech ...

No important case involving free speech was decided by this Court prior to *Schenck v. United States* (1919). Indeed, the summary treatment accorded an argument based upon an individual’s claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. It was not until the classic dictum of Justice Holmes in the *Schenck Case* that speech per se received that emphasis in a majority opinion ...

The next important case before the Court in which free speech was the crux of the conflict was *Gitlow v. New York* (1925) ... Its reasoning was as follows: The “clear and present danger” test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow*, however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was “reasonable.” Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that wherever speech was the evidence of the violation, it was necessary to show that the speech created the “clear and present danger” of the substantive evil which the legislature had the right to prevent ...

... [T]here is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale ... But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case.

Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

In this case we are squarely presented with the application of the “clear and present danger” test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. * * * Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase “clear and present danger” of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required ... Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers of power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt ... We must therefore reject the contention that success or probability of success is the criterion.

... It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

Affirmed.

Mr. Justice Frankfurter, concurring in affirmance of the judgment.

... But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are.

... The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. * * *

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

... The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

... But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make ... Even though advocacy of overthrow deserves little protection, we should hesitate to prohibit it if we thereby inhibit the interchange of rational ideas so essential to representative government and free society ...

Mr. Justice Black, dissenting.

* * * At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of

the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

... The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press. ..." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthestmost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights."

...

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

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Feiner v. People of the State of New York

340 U.S. 315 (1951)

Vote: 6-3

Decision: for the State of New York

Majority: Vinson, joined by Reed, Jackson, Burton, Clark and Minton

Concurring: Frankfurter

Dissent: Black

Dissent: Douglas joined by Minton

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

Petitioner was convicted of the offense of disorderly conduct, a misdemeanor under the New York penal laws ... and was sentenced to thirty days in the county penitentiary. The conviction was affirmed by the Onondaga County Court and the New York Court of Appeals ... The case is here on certiorari ... petitioner having claimed that the conviction is in violation of his right of free speech under the Fourteenth Amendment.

... On the evening of March 8, 1949, petitioner Irving Feiner was addressing an open-air meeting ... At approximately 6:30 p.m., the police received a telephone complaint concerning the meeting, and two officers were detailed to investigate. One of these officers went to the scene immediately, the other arriving some twelve minutes later. They found a crowd of about seventy-five or eighty people, both Negro and white, filling the sidewalk and spreading out into the street. Petitioner, standing on a large wooden box on the sidewalk, was addressing the crowd through a loud-speaker system attached to an automobile. Although the purpose of his speech was to urge his listeners to attend a meeting to be held that night in the Syracuse Hotel, in its course he was making derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse, and other local political officials.

The police officers made no effort to interfere with petitioner's speech, but were first concerned with the effect of the crowd on both pedestrian and vehicular traffic. They observed the situation from the opposite side of the street, noting that some pedestrians were forced to walk in the street to avoid the crowd. Since traffic was passing at the time, the officers attempted to get the people listening to petitioner back on the sidewalk. The crowd was restless and there was some pushing, shoving and milling around. One of the officers telephoned the police station from a nearby store, and then both policemen crossed the street and mingled with the crowd without any intention of arresting the speaker.

At this time, petitioner was speaking in a 'loud, high-pitched voice.' He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights. The statements before such a mixed audience 'stirred up a little excitement.' Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the officers finally 'stepped in to prevent it from resulting in a fight.' One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then demanded that he cease talking. Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that 'the law has arrived, and I suppose they will take over now.' In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.

On these facts, petitioner was specifically charged with violation of § 722 of the Penal Law of New York, Mc.K.Consol. Laws, c. 40 ... The bill of particulars, demanded by petitioner and furnished by the State, gave in detail the facts upon which the prosecution relied to support the charge of disorderly conduct. Paragraph C is particularly pertinent here: 'By ignoring and refusing to heed and obey reasonable police orders issued at the time and place mentioned in the Information to regulate and control said crowd and to prevent a breach or breaches of the peace and to prevent injury to pedestrians attempting to use said walk, and being forced into the highway adjacent to the place in question, and prevent injury to the public generally.'

We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.

The language of *Cantwell v. State of Connecticut*, (1940), is appropriate here.

'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. On one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. 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.'

The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets ... We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. 'A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.' *Cantwell v. State of Connecticut*. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order.

The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.

Affirmed.

Excerpted by Sarah Mason



Brandenburg v. Ohio

395 U.S. 44 (1969)

Per Curiam

Concurring: Douglas

Concurring: Black

Per Curiam

Opinion for the Court.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” Ohio Rev. Code Ann. § 2923.13. He was fined \$1,000 and sentenced to one to 10 years’ imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion ... Appeal was taken to this Court, and we noted probable jurisdiction. We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan “rally” to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution’s case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally ...

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film.

Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

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

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

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

... [L]ater 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 ...”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*, cannot be supported, and that decision is therefore overruled.

Reversed.

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Note: Wondering if the broadcast of the rallies might have an effect? See Nelson, Thomas E., Rosalee A. Clawson, and Zoe M. Oxley. "Media framing of a civil liberties conflict and its effect on tolerance." *American Political Science Review* 91.3 (1997): 567-583.



Hess v. Indiana

414 U.S. 105 (1973)

Per Curiam Opinion for the Court. Justice Rehnquist Filed a dissenting opinion, in which the Chief Justice and Justice Blackmun joined.

Per Curiam Opinion for the Court.

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute. Appellant contends that his conviction should be reversed because the statute is unconstitutionally vague, because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments, and because the statute, as applied here, abridged his constitutionally protected freedom of speech. These contentions were rejected in the City Court, where Hess was convicted, and in the Superior Court, which reviewed his conviction. The Supreme Court of Indiana, with one dissent, considered and rejected each of Hess' constitutional contentions, and accordingly affirmed his conviction.

The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction, that they heard Hess' words and witnessed his arrest. They indicated that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.

Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that "[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'"

The words here did not fall within any of these "limited classes." In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene ... Indeed, after *Cohen v. California*, such a contention with regard to the language at issue would not be tenable. By the same token, any suggestion that Hess' speech amounted to "fighting words," could not withstand scrutiny. Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular ... Thus, under our decisions, the State could not punish this speech as "fighting words."

...

The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "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." *Brandenburg v. Ohio*, (1969). (Emphasis added.) Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent disorder*, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'"

Accordingly, the motion to proceed *in forma pauperis* granted and the judgment of the Supreme Court of Indiana is reversed.

Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Blackmun join, dissenting.

The Court's *per curiam opinion* rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below. Since it is not clear to me that the Court has a sufficient basis for its action, I dissent.

... The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd. The opinions of two defense witnesses cannot be considered *proof to* the contrary, since the trial court was perfectly free to reject this testimony if it so desired. Perhaps, as these witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, but that is surely not the only rational explanation.

The majority also places great emphasis on appellant's use of the word "later," even suggesting at one point that the statement "could be taken as counsel for present moderation." The opinion continues: "[A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." From that observation, the majority somehow concludes that the advocacy was not directed towards inciting imminent action. But whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police. They should not be rejected out of hand because of an unexplained preference for other acceptable alternatives.

The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below. In doing so, however, I believe the Court has exceeded the proper scope of our review. Rather than considering the "evidence" in the light most favorable to the appellee and resolving credibility questions against the appellant, as many of our cases have required, the Court has instead fashioned its own version of events from a paper record, some "uncontroverted evidence," and a large measure of conjecture. Since this is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court, I dissent.

Excerpted by Sarah Mason

Note: <https://news.iu.edu/stories/2019/11/iub/inside/11-historical-marker-honors-supreme-court-free-speech-case.html>

Note, 40 years later: <https://www.magbloom.com/2014/03/hess-v-indiana-40th-anniversary-of-landmark-free-speech-case-%E2%80%A8and-it-happened-in-bloomington/>



Speech and Expression

Stromberg v. People of the State of California

283 U.S. 359 (1931)

Vote: 7-2

Majority: Hughes, joined by Holmes, Van Devanter, Brandeis, Sutherland, Stone and Roberts

Concur/dissent: McReynolds

Dissent: Butler

Chief Justice Hughes delivered the opinion of the Court.

The appellant was convicted in the superior court of San Bernardino county, California, for violation of section 403a of the Penal Code of that State. That section provides:

‘Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propoganda that is of a seditious character is guilty of a felony.’

The information, in its first count, charged that the appellant and other defendants, at the time and place set forth, ‘did willfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propoganda that is and was of a seditious character.’

...

On the argument of a general demurrer to the information, the appellant contended, as was permitted by the practice in California, that the statute was invalid because repugnant to the Fourteenth Amendment of the Federal Constitution. The demurrer was overruled, and the appellant pleaded not guilty. Conviction followed, motions for a new trial and in arrest of judgment were denied, and on appeal to the District Court of Appeal the judgment was affirmed ... Petition for a hearing by the Supreme Court of California was denied, and an appeal has been taken to this Court.

... It appears that the appellant, a young woman of nineteen, a citizen of the United States by birth, was one of the supervisors of a summer camp for children, between ten and fifteen years of age, in the foothills of the San Bernardino mountains ... Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp, in which the appellant supervised and directed the children in raising a red flag, ‘a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States.’ In connection with

the flag-raising, there was a ritual at which the children stood at salute and recited a pledge of allegiance ‘to the workers’ red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class.’ ...

The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named. The instruction was as follows:

‘In this connection you are instructed that if the jury should believe beyond a reasonable doubt that the defendants, or either of them, displayed, or caused to be displayed, a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place, as charged in count one of the information, and if you further believe from the evidence beyond a reasonable doubt that said flag, badge, banner, or device was displayed, or caused to be displayed, as a sign, symbol, or emblem of opposition to organized government, or was an invitation or stimulus to anarchistic action, or was in aid to propaganda that is of a seditious character, you will find such defendants guilty as charged in count one of the information ... Proof, beyond a reasonable doubt of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information.’

... The opinions make it clear that the appellant insisted that, under the Fourteenth Amendment, the statute was invalid as being ‘an unwarranted limitation on the right of free speech.’

... We are not left in doubt as to the construction placed by the state court upon each of the clauses of the statute. The first purpose described, that is, relating to the display of a flag or banner ‘as a sign, symbol or emblem of opposition to organized government,’ is discussed by the two concurring justices. After referring, in the language above quoted, to the constitutional question raised by the appellant with respect to this clause, these justices said in their opinion:

‘If opposition to organized government were the only act prohibited by this section, we might be forced to agree with appellant ... With respect to the second purpose described in the statute, the display of a flag or banner ‘as an invitation or stimulus to anarchistic action,’ the concurring justices quoted accepted definitions and judicial decisions as to the meaning of ‘anarchistic action.’ These authorities, as set forth and approved in the opinion, show clearly that the term was regarded by the state court as referring to the overthrow by force and violence of the existing law and order, to the use of ‘unlawful, violent and felonious means to destroy property and human life.’ The conclusion was thus stated: ‘It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which, if allowed to be put into force and effect, would mean revolution in its most dreaded form.’

The state court further gave its interpretation of the third clause of the statute, that is, in relation to the display of a flag or banner ‘as an aid to propaganda that is of a seditious character.’ Both opinions dealt with the meaning of this clause. Thus in one opinion it is said: ‘Appellants’ counsel concedes that sedition laws which ‘interdict against the use of force or violence’ are consistently upheld by the courts, and all of the authorities cited by him

support that proposition ... 'Sedition' is defined as the stirring up of disorder in the state, tending toward treason, but lacking an overt act. Certainly the 'advocacy of force or violence' in overturning the government of a state falls within that definition.' The other opinion takes a similar view ...

Having reached these conclusions as to the meaning of the three clauses of the statute, and doubting the constitutionality of the first clause, the state court rested its decision upon the remaining clauses. The basis of the decision, as more fully stated in the opinion of the two concurring justices, was this: 'The constitutionality of the phrase of this section, 'of opposition to organized government,' is questionable. This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California.' Accordingly, disregarding the first clause of the statute, and upholding the other clauses, the conviction of the appellant was sustained.

We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

We are thus brought to the question whether any one of the three clauses, as construed by the state court, is upon its face repugnant to the Federal Constitution so that it could not constitute a lawful foundation for a criminal prosecution. The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. *Gitlow v. New York*, (1925). The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions. *Gitlow v. New York*. We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence.

The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag 'as a sign, symbol or emblem of opposition to organized government,' and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the State could not constitutionally prohibit. Thus it was said that the clause 'might be construed to include the

peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations.’ The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.

As for this reason the case must be remanded for further proceedings not inconsistent with this opinion, and other facts may be adduced in such proceedings ... Judgment reversed.

Excerpted by Sarah Mason



Minersville School Dist. et al. v. Gobitis et al.

310 U.S. 586 (1940)

Vote: 8-1

Majority: Frankfurter, joined by Hughes, McReynolds, Roberts, Black, Reed, Douglas and Murphy

Dissent: Stone

Justice Frankfurter delivered the opinion of the Court

A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation’s fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy.

Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools ... for refusing to salute the national flag as part of a daily school exercise ... The Gobitis family are affiliated with ‘Jehovah’s Witnesses’, for whom the Bible as the Word of God is the supreme authority. The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture.

...

We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment ...

Situations like the present are phases of the profoundest problem confronting a democracy—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?’ No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.

... The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. ‘We live by symbols.’ The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that ‘* * * the flag is the symbol of the nation’s power,—the emblem of freedom in its truest, best sense. * * * it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.’ *Halter v. Nebraska*, (1907).

... The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.

... That the flag salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

...

Reversed.

Excerpted by Sarah Mason



West Virginia Board of Education v. Barnette

319 U.S. 624 (1943)

Vote: 6-3

Majority: Jackson, joined by Stone, Black, Douglas, Murphy and Rutledge

Dissent: Frankfurter, Reed and Roberts

Justice Jackson delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.” * * *

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court’s *Gobitis* Opinion and ordering that the salute to the flag become “a regular part of the program of activities in the public schools,” that all teachers and pupils “shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.”

... Failure to conform is “insubordination” dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is “unlawfully absent” and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah’s Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government ... They consider that the flag is an “image” within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

* * *

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. Before Turning to the *Gobitis* Case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

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 a right of self-determination in matters that touch individual opinion and personal attitude.

* * *

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 ... 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 ...

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. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights ...

... 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 ... Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

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 ...

The *Gobitis* Decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude

may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* Decision ...

We think these issues may be examined free of pressure or restraint growing out of such considerations.

...

... It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence ... We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

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.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. 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. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom 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.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobotis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Sarah Mason. Licensed under [CC BY-NC-SA](#).



Giboney et al. v. Empire Storage & Ice Co.

336 U.S. 490 (1949)

Vote: 9-0

Majority: Black, joined by Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton and Vinson

Mr. Justice Black delivered the opinion of the Court.

This case here on appeal [...] raises questions concerning the constitutional power of a state to apply its antitrust restraint law to labor union activities, and to enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which is in violation of the state law. The picketing occurred in Kansas City, Missouri. The injunction was issued by a Missouri state court.

The appellants are members and officers of the Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with the American Federation of Labor. Its membership includes about 160 of 200 retail ice peddlers who drive their own trucks in selling ice from door to door in Kansas City. The union began efforts to induce all the nonunion peddlers to join. One objective of the organizational drive was to better wage and working conditions of peddlers and their helpers. Most of the nonunion peddlers refused to join the union. To break down their resistance the union adopted a plan which was designed to make it impossible for nonunion peddlers to buy ice to supply their retail customers in Kansas City. Pursuant to the plan the union set about to obtain from all Kansas City wholesale ice distributors agreements that they would not sell ice to nonunion peddlers. Agreements were obtained from all distributors except the appellee, Empire Storage and Ice Company. Empire refused to agree. The union thereupon informed Empire that it would use other means at its disposal to force Empire to come around to the union view. Empire still refused to agree. Its place of business was promptly picketed by union members although the only complaint registered against Empire, as indicated by placards carried by the pickets, was its continued sale of ice to nonunion peddlers.

Thus the avowed immediate purpose of the picketing was to compel Empire to agree to stop selling ice to nonunion peddlers. Missouri statutes, set out in note 1, make such an agreement a crime punishable by a fine of

not more than \$5,000 and by imprisonment in the penitentiary for not more than five years. Furthermore, had Empire made the agreement, the ice peddlers could have brought actions for triple damages for any injuries they sustained as a result of the agreement under § 8308 of the Missouri Revised Statutes 1939, Mo.R.S.A.

About 85% of the truck drivers working for Empire's customers were members of labor unions. These union truck drivers refused to deliver goods to or from Empire's place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member.

Because of the foregoing facts shown either by admissions, by undisputed evidence, or by unchallenged findings, the picketing had an instantaneous adverse effect on Empire's business. It was reduced 85%. In this dilemma, Empire was faced with three alternatives: It could continue to sell ice to nonunion peddlers, in which event it would be compelled to wage a fight for survival against overwhelming odds; it could stop selling ice to nonunion peddlers thereby relieving itself from further conflict with the union, in which event it would be subject to prosecution for crime and suits for triple damages; it could invoke the protection of the law. The last alternative was adopted.

Empire's complaint charged that the concerted efforts of union members to restrain Empire from selling to nonunion members was a violation of the antitrust restraint statute and that an agreement by Empire to refuse to make such sales would violate the same statute. It prayed for an injunction against the picketing. In answering, appellants asserted a constitutional right to picket Empire's premises in order to force it to discontinue sale of ice to nonunion peddlers. They contended that their right to do so was 'guaranteed by the First and Fourteenth Amendments' because there was 'a labor dispute existing' between appellants and appellee, and because the picketers publicized only the truthful information that appellee was 'selling ice to peddlers who are not members of the said defendant union.'

The trial court heard evidence, made findings and issued an injunction restraining the appellants from 'placing pickets or picketing around or about the buildings' of Empire.

The State Supreme Court affirmed ... It agreed with the findings of the trial court that the conduct of appellants was pursuant to a local transportation combination used to compel Empire to stop selling ice to nonunion peddlers and that the purpose of the picketing was to force Empire to become a party to such combination. It held that such activities were unlawful because in violation of § 8301 of the Missouri statutes and further held that the injunction to prevent picketing for such unlawful purpose did not contravene the appellants' right of free speech.

... Attacking the Missouri statute as construed and applied, appellants broadly challenge the power of the state to issue any injunction against their conduct since, they assert, the primary objective of their combination and picketing was to improve wage and working conditions. On this premise they argue that their right to combine, to picket, and to publish must be determined by focusing attention exclusively upon their lawful purpose to improve labor conditions, and that their violation of the state antitrust restraint laws must be dismissed as merely incidental to this lawful purpose.

First. States have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question ... There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing such policy ...

Second. It is contended that though the Missouri statute can be applied validly to combinations of businessmen who agree not to sell to certain persons, it cannot be applied constitutionally to combinations of union workers who agree in their self-interest to use their joint power to prevent sales to nonunion workers. This contention appears to be grounded on the guaranties of freedom of speech and press stemming from the Fourteenth and First Amendments. Aside from the element of disseminating information through peaceful picketers, later discussed, it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people.

The objective of unions to improve wages and working conditions has sometimes commended itself to Congress and to state legislatures. To the extent that the states or Congress, for this or other reasons, have seen fit to exempt unions from antitrust laws, this Court has sustained legislative power to grant the exemptions ... On the other hand where statutes have not granted exemptions, we have declared that violations of antitrust laws could not be defended on the ground that a particular accused combination would not injure but would actually help manufacturers, laborers, retailers, consumers, or the public in general. *Fashion Guild v. Trade Comm'n*, (1941).

The foregoing holdings rest on the premise that legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general. In making this determination Missouri has decided to apply its law without exception to all persons who combine to restrain freedom of trade. We are without constitutional authority to modify or upset Missouri's determination that it is in the public interest to make combinations of workers subject to laws designed to keep the channels of trade wholly free and open. To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. *Allen Bradley Co. v. Union*, (1945).

Third. It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute ... But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did not more than enjoin an offense against Missouri law, a felony.

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for different holding ...

We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California*, (1941). States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State*, (1939). But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *VA Electric Co. v. Board*, (1943). Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins*, (1945). For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed ... Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

The interest of Missouri in enforcement of its antitrust laws cannot be classified as an effort to outlaw only a slight public inconvenience or annoyance. The Missouri policy against restraints of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century. It is clearly drawn in an attempt to afford all persons an equal opportunity to buy goods. There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned. Appellants' power with that of their allies was irresistible. And it is clear that appellants were doing more than exercising a right of free speech or press. *Fox v. WA*, (1915). They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.

...

While the State of Missouri is not a party in this case it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines ... We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not

to apply its antitrust restraint law to groups of workers, businessmen or others. Of course this Court does not pass on the wisdom of the Missouri statute. We hold only that as here construed and applied it does not violate the Federal Constitution.

Affirmed.

Excerpted by Sarah Mason



United States v. O'Brien

391 U.S. 367 (1968)

Vote: 7-1

Majority: Warren, joined by Black, Warren, Harlan, Brennan, Stewart, White and Fortas

Concurrence: Harlan

Dissent: Douglas

Not participating: Justice Marshall

Chief Justice Warren delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning ... [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." * * * [It had been] amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate. ..." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. *** [This] decision conflicted with decisions by the Courts of Appeals for the Second and Eighth Circuit Upholding the 1965 Amendment against identical constitutional challenges. *** We hold that the 1965 Amendment is constitutional both as enacted and as applied. ***

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. He is assigned a Selective Service number ... Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110) ...

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he registered ... and his Selective Service number. The Selective Service number itself indicates the State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.

...

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged ...

By the 1965 Amendment, Congress added to § 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b) (3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

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 issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

...

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 willful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct.

The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

...

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

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.

...

Since the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act is constitutional as enacted and as applied * * * we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court ...

It is so ordered.

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Spence v. Washington

418 U.S. 405 (1974)

Per Curiam

Concurrence: Blackmun

Concurrence: Douglas

Dissent: Burger

Dissent: Rehnquist, joined by Burger and White

Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. It rejected appellant's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol (i. e., a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

Appellant was not charged under Washington's flag-desecration statute ... Rather, the State relied on the so-called "improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state ... or

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement. ..."

... [At trial] he testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence:

“I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace.”

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag. The State made no effort to controvert any of appellant’s testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner. The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a \$75 fine. The Washington Court of Appeals reversed the conviction. It held the improper-use statute overbroad and invalid on its face under the First and Fourteenth Amendments. With one justice dissenting and two concurring in the result, the Washington Supreme Court reversed and reinstated the conviction.

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant’s purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication. Although the stipulated facts fail to show that any member of the general public viewed the flag, the State’s concession is inevitable on this record ... To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O’Brien*, “[w]e 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.” But the nature of appellant’s activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. In many of their uses flags are a form of symbolism comprising a “primitive but effective way of communicating ideas ...,” and “a short

cut from mind to mind.” *Board of Education v. Barnette* (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol ... A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity ... Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

*** [The] state court’s thesis [was] that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. Mr. Justice Rehnquist’s dissenting opinion today, adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement. Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message ... It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest advanced by the court below is valid. We assume, *arguendo*, that it is. The statute is nonetheless unconstitutional as applied to appellant’s activity. There was no risk that appellant’s acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not. Appellant was not charged under the desecration statute nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.

The judgment is reversed.

It is so ordered.

Mr. Justice Rehnquist, with whom The Chief Justice and Mr. Justice White join, dissenting.

... Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

... This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language ...

Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately owned flag to convey his personal message. Expressing its willingness to assume, *arguendo*, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts. ..." The Court takes pains to point out that appellant did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to be understood, and within the contours of the First Amendment." In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring appellant's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. * * *

What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag, or compel citizens to salute one. *Board of Education v. Barnette* (1943). It presumably cannot punish criticism of the flag, or the principles for which it stands, any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.

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Neal R. Wooley etc., et al. v. George Maynard et ux.

430 U.S. 705 (1977)

Vote: 6-3

Majority: Burger, joined by Brennan, Stewart, Marshall, Powell, Stevens and White (in part)

Dissent: White (in part), joined by Blackmun, Rehnquist (in part)

Dissent: Rehnquist, joined by Blackmun

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

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." ... Another New Hampshire statute makes it a misdemeanor "knowingly (to obscure) ... the figures or letters on any number plate." ... The term "letters" in this section has been interpreted by the State's highest court to include the state motto ...

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles. Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.

On November 27, 1974, Mr. Maynard was issued a citation for violating [the law above mentioned] ... After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objection to the motto. The state trial judge expressed sympathy ... but considered himself bound [precedent] ... to hold Maynard guilty. A \$25 fine was imposed, but execution was suspended during “good behavior.”

On December 28, 1974, Mr. Maynard was again charged ... again chose to represent himself; he was found guilty, and fined \$50, and sentenced to six months in the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the \$25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced him to jail for a period of 15 days. He has served his full sentence.

Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of § 262:27-c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was “continued for sentence” so that Maynard received no punishment in addition to the 15 days.

On March 4, 1975, appellees brought the present ... They sought injunctive and declaratory relief against enforcement ... insofar as these [laws] required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto. On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. Because the appellees sought an injunction against a state statute on grounds of its unconstitutionality, a three-judge District Court was convened pursuant to 28 U.S.C. § 2281. Following a hearing on the merits, the District Court entered an order enjoining the State “from arresting and prosecuting (the Maynards) at any time in the future for covering over that portion of their license plates that contains the motto ‘Live Free or Die.’ ” ... We noted probable jurisdiction of the appeal ...

The District Court held that by covering up the state motto “Live Free or Die” on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that “New Hampshire’s interest in the enforcement of its defacement statute is not sufficient to justify the restriction on (appellee’s) constitutionally protected expression.” ... We find it unnecessary to pass on the “symbolic speech” issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to what in our view is the essence of appellees’ objection to the requirement that they display the motto “Live Free or Die” on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District Court:

“I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.”

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.” ...

The Court in *Barnette* was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures ... Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable ...

New Hampshire’s statute in effect requires that appellees use their private property as a “mobile billboard” for the State’s ideological message or suffer a penalty, as Maynard already has. As a condition to driving an automobile a virtual necessity for most Americans the Maynards must display “Live Free or Die” to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire’s motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards’ interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. *US v. O’Brien*, (1968). The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto. Even were we to credit the State’s reasons and “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved ...

The State’s second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, 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.

We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

Affirmed.

Excerpted by Sarah Mason



William P. Clark, Secretary of the Interior, et al. v. Community for Creative Non-Violence et al.

468 U.S. 288 ([1984](#))

Vote: 6-3

Majority: White, joined by Burger, Blackmun, Powell, Rehnquist, Stevens and O'Connor

Concurrence: Burger

Dissent: Marshall, joined by Brennan

Justice White delivered the opinion of the Court.

The issue in this case is whether a National Park Service regulation prohibiting camping in certain parks violates the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the [National] Mall in connection with a demonstration intended to call attention to the plight of the homeless. We hold that it does not and reverse the contrary judgment of the Court of Appeals.

* The Interior Department, through the National Park Service, is charged with responsibility for the management and maintenance of the National Parks and is authorized to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established ... The network of National Parks includes the National Memorial-core parks, Lafayette Park and the Mall, which are set in the heart of Washington, D.C., and which are unique resources that the Federal Government holds in trust for the American people ... Under the regulations involved in this case, camping in National Parks is permitted only in campgrounds designated for that purpose ... No such campgrounds have ever been designated in Lafayette Park or the Mall.

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Under the regulations involved in this case, camping in the National Parks is permitted only in campgrounds designated for that purpose. No such campgrounds have ever been designated in Lafayette Park the Mall. Camping is defined as “the use of park land for living accommodation purposes such as sleeping activities, or making

preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or ... other structure ... for sleeping or doing any digging or earth breaking or carrying on cooking activities.”

These activities, the regulation provides,

“constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.”

Demonstrations for the airing of views or grievances are permitted in the Memorial-core parks, but for the most part only by Park Service permits ... Temporary structures may be erected for demonstration purposes but may not be used for camping ...

In 1982, the Park Service issued a renewable permit to respondent Community for Creative Non-Violence (CCNV) to conduct a wintertime demonstration in Lafayette Park and the Mall for the purpose of demonstrating the plight of the homeless. The permit authorized the erection of two symbolic tent cities: 20 tents in Lafayette Park that would accommodate 50 people and 40 tents in the Mall with a capacity of up to 100. The Park Service, however, relying on the above regulations, specifically denied CCNV’s request that demonstrators be permitted to sleep in the symbolic tents.

CCNV and several individuals then filed an action to prevent the application of the no-camping regulations to the proposed demonstration, which, it was claimed, was not covered by the regulation. It was also submitted that the regulations were unconstitutionally vague, had been discriminatorily applied, and could not be applied to prevent sleeping in the tents without violating the First Amendment. The District Court granted summary judgment in favor of the Park Service. The Court of Appeals, sitting en banc, reversed. The 11 judges produced 6 opinions. Six of the judges believed that application of the regulations so as to prevent sleeping in the tents would infringe the demonstrators’ First Amendment right of free expression. The other five judges disagreed and would have sustained the regulations as applied to CCNV’s proposed demonstration. We granted the Government’s petition for certiorari and now reverse.

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... We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present

purposes, but do not decide, that such is the case, cf. *United States v. O'Brien* ... but this assumption only begins the inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they 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 ...

It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative ... Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *United States v. O'Brien*, *supra*.

We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, but this assumption only begins the inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they 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.

Petitioners submit, as they did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment. The permit that was issued authorized the demonstration but required compliance with 36 CFR § 50.19 (1913), which prohibits “camping” on park lands, that is, the use of park lands for living accommodations ... These provisions, including the ban on sleeping, are clearly limitations on the manner in which the demonstration could be carried out. That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid ... Neither does the fact that sleeping, *arguendo*, may be expressive conduct, rather than oral or written expression, render the sleeping prohibition any less a time, place, or manner regulation. To the contrary, the Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks. It has established areas for camping and forbids it elsewhere, including Lafayette Park and the Mall. Considered as such, we have very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here.

The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented. Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the

presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping—using these areas as living accommodations—would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas.

It is urged by respondents, and the Court of Appeals was of this view, that if the symbolic city of tents was to be permitted and if the demonstrators did not intend to cook, dig, or engage in aspects of camping other than sleeping, the incremental benefit to the parks could not justify the ban on sleeping, which was here an expressive activity said to enhance the message concerning the plight of the poor and homeless. We cannot agree. In the first place, we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people ... The sleeping ban, if enforced, would thus effectively limit the nature, extent, and duration of the demonstration and to that extent ease the pressure on the parks.

... With the prohibition, however, as is evident in the case before us, at least some around-the-clock demonstrations lasting for days on end will not materialize, others will be limited in size and duration, and the purposes of the regulation will thus be materially served. Perhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out ...

We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny. Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial-core parks by those who wish to demonstrate and deliver a message to the public and the central Government. Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by non demonstrators. In neither case must the Government tolerate it. All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable.

... We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park and the Mall. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Excerpted by Sarah Mason



Texas v. Johnson

491 U.S. 397 (1989)

Vote: 5-4

Decision: Affirmed

Majority: Brennan, joined by Marshall, Blackmun, Scalia and Kennedy

Concurrence: Kennedy

Dissent: Rehnquist, joined by White and O'Connor

Dissent: Stevens

Justice Brennan delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended

to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: “America, the red, white, and blue, we spit on you.” After the demonstrators dispersed, a witness to the flag burning collected the flag’s remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson’s conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

...

Because it reversed Johnson’s conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson’s argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari and now affirm.

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. *Spence v. Washington*, (1974). If his conduct was expressive, we next decide whether the State’s regulation is related to the suppression of free expression. *US v. O’Brien*, (1968). If the State’s regulation is not related to expression, then the less stringent standard we announced in *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.

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

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

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, “the one visible manifestation of two hundred years of nationhood.” *** Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in “America.”

*** The State of Texas conceded for purposes of its oral argument in this case that Johnson’s conduct was expressive conduct, and this concession seems to us as prudent as was Washington’s in *Spence* ... The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. ***

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O’Brien*. It may not, however, proscribe particular conduct because it has expressive elements. *** 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.

Thus, 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,” *O’Brien*, 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.” [We] have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O’Brien*’s less demanding rule.

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. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that “no actual breach of the peace occurred at the time of the flag burning or in response to 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. ***

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*, (1969) ...

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 ... And, 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.

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government’s interest in preserving the flag’s special symbolic value “is directly related to expression in the context of activity” such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson’s burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related “to the suppression of free expression” within the meaning of *O’Brien*. We are thus outside of *O’Brien*’s test altogether.

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. *** Johnson’s political expression was restricted because of the content of the message he conveyed. We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.”

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag’s historic and symbolic role in our society, the State emphasizes the “special place” reserved for the flag in our Nation. The State’s argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State’s position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson’s. Rather, 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.

We have not recognized an exception to this principle even where our flag has been involved. * * *

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

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

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. * * *

There is, moreover, no indication – either in the text of the Constitution or in our cases interpreting it – that a separate juridical category exists for the American flag alone ... The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas. See *Brandenburg*. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment ...

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign

and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag – and it is that resilience that we reassert today.

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 flag burner 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 flag burner'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 write not to qualify the words Justice BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, 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.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Chief Justice Rehnquist, with whom Justice White and Justice O'Connor join, dissenting.

... For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. * * *

... 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. * * *

Our Constitution wisely places limits on powers of legislative majorities to act, ... Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. 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.

Stevens, J., dissenting.

... In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags – the swastika, for example – may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, 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.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not “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.” *West Virginia Board of Education v. Barnette* (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

... The Court is therefore quite wrong in blandly asserting that respondent “was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. 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 ...

I respectfully dissent.

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United States v. Eichman

496 U.S. 310 (1990)

Vote: 5-4

Decision: Reversed

Majority: Brennan, joined by Marshall, Blackmun, Scalia and Kennedy

Dissent: Stevens, joined by Rehnquist, White and O'Connor

Justice Brennan delivered the opinion of the court.

In these consolidated appeals, we consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment. Applying our recent decision in *Texas v. Johnson*, the District Courts held that the Act cannot constitutionally be applied to appellees. We affirm.

* In No. 89-1433, the United States prosecuted certain appellees for violating the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. § 700 (1988 ed. and Supp. I), by knowingly setting fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government's domestic and foreign policy. In No. 89-1434, the United States prosecuted other appellees for violating the Act by knowingly setting fire to a United States flag in Seattle while protesting the Act's passage. In each case, the respective appellees moved to dismiss the flag-burning charge on the ground that the Act, both on its face and as applied, violates the First Amendment. Both the United States District Court for the Western District of Washington (1990), and the United States District Court for the District of Columbia (1990), following *Johnson, supra*, held the Act unconstitutional as applied to appellees and dismissed the charges. The United States appealed both decisions directly to this Court ...

Last Term in *Johnson*, we held that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration ...

After our decision in *Johnson*, Congress passed the Flag Protection Act of 1989. The Act provides in relevant part:

After our decision in *Johnson*, Congress passed the Flag Protection Act of 1989. The Act provides in relevant part:

“(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

“(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

“(b) As used in this section, the term ‘flag of the United States’ means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.” 18 U.S.C. § 700 (1988 ed., Supp. I).

... The only remaining question is whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees’ expressive conduct.

The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in *Johnson*, the Act does not target expressive conduct on the basis of the content of its message. The Government asserts an interest in “protect[ing] the physical integrity of the flag under all circumstances” in order to safeguard the flag’s identity “as the unique and unalloyed symbol of the Nation.” ... The Act proscribes conduct (other than disposal) that damages or mistreats a flag, without regard to the actor’s motive, his intended message, or the likely effects of his conduct on onlookers. By contrast, the Texas statute expressly prohibited only those acts of physical flag desecration “that the actor knows will seriously offend” onlookers, and the former federal statute prohibited only those acts of desecration that “cas[t] contempt upon” the flag.

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted *interest* is “related ‘to the suppression of free expression,’” and concerned with the content of such expression. The Government’s interest in protecting the “physical integrity” of a privately owned flag rests upon a perceived need to preserve the flag’s status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one’s own basement would not threaten the flag’s recognized meaning. Rather, the Government’s desire to preserve the flag as a symbol for certain national ideals is implicated “only when a person’s treatment of the flag communicates [a] message” to others that is inconsistent with those ideals ... Moreover, the precise language of the Act’s prohibitions confirms Congress’ interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag.” ... Each of the specified terms—with the possible exception of “burns”—unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag’s symbolic value. And the explicit exemption in § 700(a)(2) for disposal of “worn or soiled” flags protects certain acts traditionally associated with patriotic respect for the flag.

As we explained in *Johnson*, ... “[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag’s symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be ... 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.” Although Congress cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact ... The Act therefore must be subjected to “the most exacting scrutiny,” and for the reasons stated in *Johnson* ... the Government’s interest cannot justify its infringement on First Amendment rights. We decline the Govern-

ment’s invitation to reassess this conclusion in light of Congress’ recent recognition of a purported “national consensus” favoring a prohibition on flag burning. ... Even assuming such a consensus exists, any suggestion that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.

... Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act of 1989 goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

... ”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.” ... Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering. The judgments of the District Courts are

Affirmed.

Excerpted by Sarah Mason



Donald H. Rumsfeld, Secretary of Defense, et al. v. Forum for Academic and Institutional Rights et al.

547 U.S. 47 (2006)

Vote: 8-0

Majority: Roberts, joined by Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer

Chief Justice Roberts delivered the opinion of the Court

When law schools began restricting the access of military recruiters to their students because of disagreement with the Government’s policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment ... That provision specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. The District Court disagreed but was reversed by a divided panel of the Court of Appeals for the Third Circuit, which ordered the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. We granted certiorari.

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties ... Its declared mission is “to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education.” ... FAIR members have adopted

policies expressing their opposition to discrimination based on, among other factors, sexual orientation ... They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military ... The Solomon Amendment, however, forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding.

In 2003, FAIR sought a preliminary injunction against enforcement of the Solomon Amendment, which at that time—it has since been amended—prevented the Department of Defense (DOD) from providing specified federal funds to any institution of higher education “that either prohibits, or in effect prevents” military recruiters “from gaining entry to campuses.” ... Although the statute required only “entry to campuses,” the Government—after the terrorist attacks on September 11, 2001—adopted an informal policy of “ ‘requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters.’ ” ... Prior to the adoption of this policy, some law schools sought to promote their nondiscrimination policies while still complying with the Solomon Amendment by having military recruiters interview on the undergraduate campus ... But under the equal access policy, military recruiters had to be permitted to interview at the law schools, if other recruiters did so.

FAIR argued that this forced inclusion and equal treatment of military recruiters violated the law schools’ First Amendment freedoms of speech and association. According to FAIR, the Solomon Amendment was unconstitutional because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter’s message, and ensuring the availability of federal funding for their universities.

We granted certiorari.

... The statute provides an exception for an institution with “a longstanding policy of pacifism based on historical religious affiliation.” ... The Government and FAIR agree on what this statute requires: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access ...

... [I]t [the Solomon Amendment] looks to the *result* achieved by the policy and compares the “access ... provided” military recruiters to that provided other recruiters. Applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military. Law schools must ensure that their recruiting policy operates in such a way that military recruiters are given access to students at least equal to that “*provided* to any other employer.” (Emphasis added.)

Not only does the text support this view, but this interpretation is necessary to give effect to the Solomon Amendment’s recent revision. Under the prior version, the statute required “entry” without specifying how military recruiters should be treated once on campus ... Congress responded directly to this decision by codifying the DOD policy ...

We therefore read the Solomon Amendment the way both the Government and FAIR interpret it. It is insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy. Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area is “broad and sweeping,” ... But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality ...

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress’ decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress’ choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

...

This case does not require us to determine when a condition placed on university funding goes beyond the “reasonable” choice ... and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. *Speiser v. Randall*, (1958). Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

The Solomon Amendment neither limits what law schools may say nor 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 retaining eligibility for federal funds ... As a general matter, the 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*.

...

Some of this Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. ...

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer’s behalf ... Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact (“The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.”), like compelled statements of opinion, are subject to First Amendment scrutiny ...

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only “compelled” if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment’s regulation of conduct ... Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct ... Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto “Live Free or Die,” and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

... The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate. The expressive nature of a parade was central to our holding in *Hurley* ... As a result, we held that the State’s public accommodation law, as applied to a private parade, “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”

... In this case, accommodating 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.

...

Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment’s protection. In *O’Brien*, we recognized that some forms of “symbolic speech” were deserving of First Amendment protection. But we rejected the view that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas v. Johnson*, for example, we applied *O’Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive ... The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O’Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into “speech” simply by talking about it ... Neither *O’Brien* nor its progeny supports such a result.

... We have held that “an incidental burden on speech is no greater than is essential, and therefore is permissible under *O’Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” The Solomon Amendment clearly satisfies this requirement. Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers ... The issue is not whether other means of raising an army and providing for a navy might be adequate ... That is a judgment for Congress, not the courts ... It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O’Brien*.

... FAIR argues that the Solomon Amendment violates law schools’ freedom of expressive association. According to FAIR, law schools’ ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools’ obligation to assist them ...

... The Solomon Amendment, however, does not similarly affect a law school’s associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore “associate” with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school’s expressive association. This distinction is critical ...

... Students and faculty are free to associate to voice their disapproval of the military’s message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school’s First Amendment rights. A military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message.

...

In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment . To the extent that the Solomon Amendment incidentally affects expression, the law schools’ effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

Because Congress could require law schools to provide equal access to military recruiters without violating the schools’ freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment . We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

Excerpted by Sarah Mason and Kimberly Clairmont



Types of Speech

See case [Gitlow v. NY](#) 268 U.S. 652 (1925) in [Two Track Incorporation](#).



Chaplinsky v. New Hampshire

315 U.S. 568 ([1942](#))

Vote: 9-0

Decision: Affirmed

Majority: Murphy, joined by Stone, Roberts, Black, Reed, Douglas, Byrnes, Jackson

Mr. Justice Murphy delivered the opinion of the Court.

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

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

The complaint charged that appellant,

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

... Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

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

...

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action ..."

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

"Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut* (1940).

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

"The word 'offensive' is not to be defined in terms of what a particular addressee thinks. ... The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. ... The English language has a number of words and expressions which, by general consent, are 'fighting words' when said without a disarming smile. ... The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

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

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

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

Affirmed.

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Cohen v. California

403 U.S. 15 (1971)

Vote: 5-4

Decision: Reversed

Majority: Harlan, joined by Douglas, Brennan, Stewart, and Marshall

Dissent: Blackmun, joined by Burger, Black, and White (in part)

Mr. Justice Harlan delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person ... by ... offensive conduct. ...” He was given 30 days’ imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

“On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

“The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.”

In affirming the conviction the Court of Appeal held that “offensive conduct” means “behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,” and that the State had proved this element because, on the facts of this case, “[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.” The California Supreme Court declined review by a divided vote ... We now reverse ...

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The 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 nevertheless, under California law, 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. Whatever else may be necessary to give rise to the States’ broader power to prohibit

obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic 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*, (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." *Cantwell v. Connecticut*, (1940). 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. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

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, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, 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 ... Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the the-

ory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable ... We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with excretions like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

...

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Against this perception of the constitutional policies involved, 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? ... 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.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

...

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. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

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Republican Party of Minnesota v. White 536 U.S. 765 (2002)

Vote: 5-4

Decision: Reversed

Majority: Scalia, joined by Rehnquist, O'Connor, Kennedy and Thomas

Concurrence: O'Connor

Concurrence: Kennedy

Dissent: Stevens, joined by Souter, Ginsburg and Breyer

Dissent: Ginsburg, joined by Stevens, Souter and Breyer

Justice Scalia delivered the opinion of the Court.

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, §7. Since 1912, those elections have been nonpartisan. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ... Those who violate it are subject to ... disbarment, suspension, and probation.

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.

Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents, seeking, *inter alia*, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. The parties filed cross-motions for summary judgment, and the District Court found in favor of respondents, holding that the announce clause did not violate the First Amendment. Over a dissent by Judge Beam, the United States Court of Appeals for the Eighth Circuit affirmed. We granted certiorari.

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not “announce his or her views on disputed legal or political issues.” Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002).

We know that “announc[ing] ... views” on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate’s mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called “pledges or promises” clause, which *separately* prohibits judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,” *ibid.*-a prohibition that is not challenged here and on which we express no view.

... In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer ... Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

... The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression."

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of impartiality of the state judiciary ... the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary. Respondents are rather vague, however, about what they mean by "impartiality." Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

One meaning of "impartiality" in the judicial context-and of course its root meaning-is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party ...

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

... Respondents argue that the announce clause serves the interest in openmindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible ...

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous ...

... The Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

It is so ordered.

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United States v. Alvarez

567 U.S. 709 (2012)

Vote: 6-3

Decision: Affirmed

Plurality: Kennedy, joined by Roberts, Ginsburg, and Sotomayor

Concurrence: Breyer (in judgment), joined by Kagan

Dissent: Alito, joined by Scalia and Thomas

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Sotomayor join.

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. §704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.” None of this was true. For all the record

shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. With further opinions on the issue, and over a dissent by seven judges, rehearing en banc was denied. This Court granted certiorari.

After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States v. Strandlof*, (2012). So there is now a conflict in the Courts of Appeals on the question of the Act's validity.

... It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

... When content-based speech regulation is in question ... exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning. On this premise, respondent violated §704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

"(b) False Claims About Receipt of Military Decorations or Medals.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States ... shall be fined under this title, imprisoned not more than six months, or both.

"(c) Enhanced Penalty for Offenses Involving Congressional Medal of Honor.—

"(1) In General.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both."

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the

statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements “have no First Amendment value in themselves,” and thus “are protected only to the extent needed to avoid chilling fully protected speech.” Although the statute covers respondent’s speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government’s arguments cannot suffice to save the statute.

... In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as “startling and dangerous” a “free-floating test for First Amendment coverage ... Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few ” ‘historic and traditional categories [of expression] long familiar to the bar.’ ... These categories have a historical foundation in the Court’s free speech tradition ...

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee ...

The Government disagrees with this proposition. It cites language from some of this Court’s precedents to support its contention that false statements have no value and hence no First Amendment protection. These isolated statements in some earlier decisions do not support the Government’s submission that false statements, as a general rule, are beyond constitutional protection. That conclusion would take the quoted language far from its proper context. For instance, the Court has stated “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas,” *Hustler Magazine, Inc. v. Falwell*, (1988), and that false statements “are not protected by the First Amendment in the same manner as truthful statements,” *Brown v. Hartlage*, (1982) ...

These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.

... The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official, 18 U. S. C. §1001; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government, see, e.g., §912; §709. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials punishes “whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government ... makes any materially false, fictitious, or fraudulent statement or representation.” §1001. Section 1001’s prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about what the Court has confirmed is the “unquestioned constitutionality of perjury statutes,” both the federal statute, §1623, and its state-law equivalents. It is not simply because perjured statements are false that they lack First Amendment protection ... Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system. Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech ...

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be ... But [this opinion] rejects the notion that false speech should be in a general category that is presumptively unprotected.

... Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,” *Brown v. Entertainment Merchants Assn.*, (2011). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law’s distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle ... Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment ... But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, but rather has applied the "most exacting scrutiny." Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also "foste[r] morale, mission accomplishment and esprit de corps' among service members." ...

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown ... It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez ...

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest ...

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth ... The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom

of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

... The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the “least restrictive means among available, effective alternatives.” There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, and at least one database of past winners is online and fully searchable ... The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government “concluded that such a database would be impracticable and insufficiently comprehensive.” Without more explanation, it is difficult to assess the Government’s claim, especially when at least one database of Congressional Medal of Honor winners already exists.

...

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is *affirmed*.

It is so ordered.

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Elonis v. United States

575 U.S. 723 (2015)

Vote: 7-2

Majority: Roberts, joined by Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan

Concur/Dissent: Alito

Dissent: Thomas

Note: In the majority's opinion, *Elonis* is a statutory case involving potentially threatening posts delivered over social media. Justice Thomas notes the First Amendment implications in his dissent.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce “any communication containing any threat ... to injure the person of another.” 18 U. S. C. §875I. Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

Anthony Douglas *Elonis* was an active user of the social networking Web site Facebook. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook “friends” who are notified when new content is posted. In May 2010, *Elonis*'s wife of nearly seven years left him, taking with her their two young children. *Elonis* began “listening to more violent music” and posting self-styled “rap” lyrics inspired by the music ... Eventually, *Elonis* changed the user name on his Facebook page from his actual name to a rap-style nom de plume, “Tone Dougie,” to distinguish himself from his “on-line persona.” ... The lyrics *Elonis* posted as “Tone Dougie” included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were “fictitious,” with no intentional “resemblance to real persons.” ... *Elonis* posted an explanation to another Facebook user that “I’m doing this for me. My writing is therapeutic.”

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, *Elonis* posted a photograph of himself and a co-worker at a “Halloween Haunt” event at the amusement park where they worked. In the photograph, *Elonis* was holding a toy knife against his co-worker's neck, and in the caption *Elonis* wrote, “I wish.” ... *Elonis* was not Facebook friends with the co-worker and did not “tag” her, a Facebook feature that would have alerted her to the posting ... But the chief of park security was a Facebook “friend” of *Elonis*, saw the photograph, and fired him ...

In response, *Elonis* posted a new entry on his Facebook page:

“Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?”

This post became the basis for Count One of Elonis’s subsequent indictment, threatening park patrons and employees.

Elonis’s posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together ... In the actual sketch, called “It’s Illegal to Say ...,” a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. This posting was part of the basis for Count Two of the indictment, threatening his wife ...

“ ... I also found out that it’s incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you’d have a clear line of sight through the sun room. ...

Yet even more illegal to show an illustrated diagram.

[diagram of the house]. ...”

The details about the home were accurate. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, “Art is about pushing limits. I’m willing to go to jail for my Constitutional rights. Are you?”

After viewing some of Elonis’s posts, his wife felt “extremely afraid for [her] life.” A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). Elonis referred to the order in another post on his “Tone Dougie” page, also included in Count Two of the indictment:

“Fold up your [protection-from-abuse order] and put it in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order
that was improperly granted in the first place
Me thinks the Judge needs an education
on true threat jurisprudence
And prison time’ll add zeros to my settlement ...
And if worse comes to worse
I’ve got enough explosives
to take care of the State Police and the Sheriff’s Department.”

At the bottom of this post was a link to the Wikipedia article on “Freedom of speech.” Elonis’s reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

That same month, interspersed with posts about a movie Elonis liked and observations on a comedian’s social commentary, Elonis posted an entry that gave rise to Count Four of his indictment:

“That’s it, I’ve had about enough
 I’m checking out and making a name for myself
 Enough elementary schools in a ten mile radius
 to initiate the most heinous school shooting ever imagined
 And hell hath no fury like a crazy man in a Kindergarten class
 The only question is ... which one?”

Meanwhile, park security had informed both local police and the Federal Bureau of Investigation about Elonis’s posts, and FBI Agent Denise Stevens had created a Facebook account to monitor his online activity ... After the post about a school shooting, Agent Stevens and her partner visited Elonis at his house ... Following their visit, during which Elonis was polite but uncooperative, Elonis posted another entry on his Facebook page, called “Little Agent Lady which led to Count Five ...

A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U. S. C. §875(c). In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis “intentionally made the communication, not that he intended to make a threat.” At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife ... The Government presented as witnesses Elonis’s wife and co-workers, all of whom said they felt afraid and viewed Elonis’s posts as serious threats ...

Elonis requested a jury instruction that “the government must prove that he intended to communicate a true threat.” ... The District Court denied that request. The jury instructions instead informed the jury that

“A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.”

The Government’s closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—“it doesn’t matter what he thinks.” A jury convicted Elonis on four of the five counts against him, acquitting only on the charge of threatening park patrons and employees ... Elonis was sentenced to three years, eight months’ imprisonment and three years’ supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his posts to be threats. The Court of Appeals disagreed, holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat ...

We granted certiorari.

... This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word “threat” itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of “threat” or “threaten” conveys the notion of an intent to inflict harm ...

These definitions, however, speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says “I’m going to kill you” is “an expression of an intention to inflict loss or harm” regardless of the author’s intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and 875(d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an “intent to extort.” ... According to the Government, the express “intent to extort” requirements ... should preclude courts from implying an unexpressed “intent to threaten” requirement in Section 875(c).

The Government takes this *expressio unius est exclusio alterius* [the expression of one thing excludes others] canon too far. The fact that Congress excluded the requirement of an “intent to extort” from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

In sum, neither Elonis nor the Government has identified any indication of a particular mental state requirement in the text of Section 875(c).

The fact that the statute does not specify any required mental state, however, does not mean that none exists ... The “central thought” is that a defendant must be “blameworthy in mind” before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like ...

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim “ignorance of the law is no excuse” typically holds true. Instead, our cases have explained that a defendant generally must “know the facts that make his conduct fit the definition of the offense,” *Staples v. United States*, (1994), even if he does not know that those facts give rise to a crime ...

... in *Liparota v. United States*, (1985), we considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. The Government’s argument, similar to its position in this case, was that a defendant’s conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. But this Court rejected that interpretation of the statute, because it would

have criminalized “a broad range of apparently innocent conduct” and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. For example, the statute made it illegal to use food stamps at a store that charged higher prices to food stamp customers. Without a mental state requirement in the statute, an individual who unwittingly paid higher prices would be guilty under the Government’s interpretation. The Court noted that Congress *could* have intended to cover such a “broad range of conduct,” but declined “to adopt such a sweeping interpretation” in the absence of a clear indication that Congress intended that result. The Court instead construed the statute to require knowledge of the facts that made the use of the food stamps unauthorized.

...

When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute “only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’ ” *Carter v. United States*, (2000).

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat ... The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct “wrongful.” Here “the crucial element separating legal innocence from wrongful conduct” is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct—*awareness* of some wrongdoing.” *Staples*, (quoting *United States v. Dotterweich*, (1943); emphasis added) ...

... That is precisely the Government’s position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

...

In light of the foregoing, Elonis’s conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis’s communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state ...

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. §875(c). Save two, every Circuit to have considered the issue—11 in total—has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction. Adopting the minority position, *Elonis* urges us to hold that §875(c) and the First Amendment require proof of an intent to threaten. The Government in turn advocates a general-intent approach.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for §875(c). All they know after today's decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough ...

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. This uncertainty could have been avoided had we simply adhered to the background rule of the common law favoring general intent. Although I am sympathetic to my colleagues' policy concerns about the risks associated with threat prosecutions, the answer to such fears is not to discard our traditional approach to state-of-mind requirements in criminal law. Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by *Inis* were "true threats" unprotected by the First Amendment, I would affirm the judgment below ...

I respectfully dissent.

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Hate Speech

R.A.V. v. St Paul

505 U.S. 377 (1992)

Vote: 9-0

Majority: Scalia, joined by Rehnquist, Kennedy, Souter, and Thomas

Concurrence: White, joined by Blackmun, O'Connor, and Stevens (in part)

Concurrence: Blackmun

Concurrence: Stevens, joined by White (in part), and Blackmun (in part)

Justice Scalia delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family ... Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code 292.02 (1990), which provides:

“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.”

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based, and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner’s overbreadth claim because, as construed in prior Minnesota cases, the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words.” *Chaplinsky v. New Hampshire*, (1942). The court also concluded that the ordinance was not impermissibly content based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” We granted certiorari.

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court’s authoritative statement that the ordinance reaches only those expressions that constitute “fighting words” within the meaning of *Chaplinsky* ... Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the “fighting words” doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas ... We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations [obscenity, defamation, fighting words] ...

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution ... Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government ...

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not ... And just as the power to proscribe particular speech on the basis of a non-content element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element, so also the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements.

In other words, 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, as Justice Frankfurter recognized, 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, see 18 U.S.C. 871 – since the reasons why threats of violence are outside the

First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President ... But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities ...

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the ... speech.” A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

... There may be other such bases as well ... Save for that limitation, the regulation of “fighting words,” like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

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.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a person’s mother, for example – would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

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.” One must wholeheartedly agree with the Minnesota Supreme Court that “[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,” but the manner of that confrontation cannot consist of selective limitations upon speech ... The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice Stevens suggests that this “fundamentally misreads” the ordinance. It is directed, he claims, not to speech of a particular content, but to particular “injur[ies]” that are “qualitatively different” from other injuries. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily ...

Finally, St. Paul and its amici defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they 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. But the “danger of censorship” presented by a facially content-based statute, requires that that weapon be employed only where it is “necessary to serve the asserted [compelling] interest.” The existence of adequate content-neutral alternatives thus “undercut[s] significantly” any defense of such a statute, casting considerable doubt on the government’s protestations that “the asserted justification is in fact an accurate description of the purpose and effect of the law.” The dispositive question in this case, therefore, 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 ...

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.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.

...

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. Indeed, by characterizing fighting words as a form of "debate," the majority legitimates hate speech as a form of public discussion ...

As with its rejection of the Court's categorical analysis, the majority offers no reasoned basis for discarding our firmly established strict scrutiny analysis at this time. The majority appears to believe that its doctrinal revisionism is necessary to prevent our elected lawmakers from prohibiting libel against members of one political party, but not another, and from enacting similarly preposterous laws. The majority is misguided.

Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," would unquestionably fail rational-basis review. * * *

...

The Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law ...

The exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since "the reasons why [fighting words] are outside the First Amendment ... have special force when applied to [groups that have historically been subjected to discrimination]."

To avoid the result of its own analysis, the Court suggests that fighting words are simply a mode of communication, rather than a content-based category, and that the St. Paul ordinance has not singled out a particularly objectionable mode of communication. Again, the majority confuses the issue. A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, a message that is at its ugliest when directed against groups that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.

... As I see it, the Court's theory does not work, and will do nothing more than confuse the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles ...

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Wisconsin v. Mitchell

508 U.S. 476 (1993)

Vote: 9-0

Majority: Rehnquist, joined by White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter and Thomas

Chief Justice Rehnquist delivered the opinion of the unanimous Court.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and Fourteenth Amendments. We hold that it is not.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture "Mississippi Burning" in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: "Do you all feel hyped up to move on some white people?" Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed in the boy's direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery ... That offense ordinarily carries a maximum sentence of two years' imprisonment. But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under 939.645. That provision enhances the maximum penalty for an offense whenever the defendant "[i]ntentionally selects the person against whom the crime ... is committed ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. ..." 939.645(1)(b). The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

Mitchell unsuccessfully sought postconviction relief in the Circuit Court. Then he appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty-enhancement provision on First Amendment grounds. The Wisconsin Court of Appeals rejected Mitchell's challenge, but the Wisconsin Supreme Court

reversed. The [WI] Supreme Court held that the statute “violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought.” It rejected the State’s contention “that the statute punishes only the ‘conduct’ of intentional selection of a victim.” According to the court, “[t]he statute punishes the “because of” aspect of the defendant’s selection, the reason the defendant selected the victim, the motive behind the selection.” And under *R.A.V. v. St. Paul*, (1992), “the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.”

The [WI] Supreme Court also held that the penalty-enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim’s protected status, the State would often have to introduce evidence of the defendant’s prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a “chilling effect” on those who feared the possibility of prosecution for offenses subject to penalty enhancement. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the “subjective mental process” of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit “objective acts of discrimination.”

We granted certiorari because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin’s penalty-enhancement provision. We reverse.

Mitchell argues that we are bound by the Wisconsin Supreme Court’s conclusion that the statute punishes bigoted thought, and not conduct. There is no doubt that we are bound by a state court’s construction of a state statute ... But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the “practical effect” of the statute for First Amendment purposes. This assessment does not bind us ...

But the fact remains that, under the Wisconsin statute, the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant’s discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders’ bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant ... Thus, in many States, the commission of a murder or other capital offense for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute.

But it is equally true that a defendant’s abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge ...

Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. Title VII, of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." (emphasis added.) ... And more recently, in *R.A.V. v. St. Paul*, we cited Title VII ... as an example of a permissible content-neutral regulation of conduct.

Nothing in our decision last Term in *R.A.V.* compels a different result here ... But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression, the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest ... The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that, among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness."

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should, in the future, commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that, if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim ...

For the foregoing reasons, we hold that Mitchell’s First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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Virginia v. Black

538 U.S. 343 (2003)

Vote: 7-2

Majority: O’Connor (Parts I, II, and III), joined by Rehnquist, Stevens, Scalia, and Breyer

Concurrence: O’Connor (Parts IV, V), joined by Rehnquist, Stevens and Breyer

Concurrence: Stevens

Concur/Dissent: Scalia, joined by Thomas (Parts I and II)

Concur/Dissent: Souter, joined by Kennedy and Ginsburg

Dissent: Thomas

Justice O’Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which The Chief Justice, Justice Stevens, and Justice Breyer join.

In this case we consider whether the Commonwealth of Virginia’s statute banning cross burning with “an intent to intimidate a person or group of persons” violates the First Amendment ... We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

Respondents Barry Black, Richard Elliott, and Jonathan O’Mara were convicted separately of violating Virginia’s cross-burning statute, §18.2-423. That statute provides:

“It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

“Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a “few” of which stopped to ask the sheriff what was happening on the property. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, “sat and watched to see wha[t] [was] going on” ...

During the rally, Sechrist heard Klan members speak about “what they were” and “what they believed in.” The speakers “talked real bad about the blacks and the Mexicans. One speaker told the assembled gathering that “he would love to take a .30/.30 and just random[ly] shoot the blacks.” The speakers also talked about “President Clinton and Hillary Clinton,” and about how their tax money “goes to ... the black people.” Sechrist testified that this language made her “very ... scared.”

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross “then all of a sudden ... went up in a flame.” As the cross burned, the Klan played *Amazing Grace* over the loudspeakers. Sechrist stated that the cross burning made her feel “awful” and “terrible.”

When the sheriff observed the cross burning, he ... went down the driveway, entered the rally, and asked “who was responsible for burning the cross.” Black responded, “I guess I am because I’m the head of the rally.” The sheriff then told Black, “[T]here’s a law in the State of Virginia that you cannot burn a cross and I’ll have to place you under arrest for this.”

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of §18.2-423. At his trial, the jury was instructed that “intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim.” The trial court also instructed the jury that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was “taken straight out of the [Virginia] Model Instructions.” The jury found Black guilty, and fined him \$2,500. The Court of Appeals of Virginia affirmed Black’s conviction.

On May 2, 1998, respondents Richard Elliott and Jonathan O’Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott’s next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott’s mother to inquire about shots being fired from behind the Elliott home. Elliott’s mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee’s property, planted a cross, and set it on fire. Their apparent motive was to “get back” at Jubilee for complaining about the shooting in the backyard. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was “very nervous” because he “didn’t know what would be the next phase,” and because “a cross burned in your yard ... tells you that it’s just the first round.”

Elliott and O’Mara were charged with attempted cross burning and conspiracy to commit cross burning. O’Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O’Mara to 90 days in jail and fined him \$2,500. The judge also suspended 45 days of the sentence and \$1,000 of the fine.

At Elliott’s trial, the judge originally ruled that the jury would be instructed “that the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” At trial, however, the court instructed the jury that the Commonwealth must prove that “the defendant intended to commit cross burning,” that “the defendant did a direct act toward the commission of the cross burning,” and that “the defendant had the intent of intimidating any person or group of persons.” The court did not instruct the jury on the meaning of the word “intimidate,” nor on the prima facie evidence provision of §18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O’Mara.

Each respondent appealed to the Supreme Court of Virginia, arguing that §18.2-423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. It held that the Virginia cross-burning statute “is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.* The Virginia statute, the court held, discriminates on the basis of content since it “selectively chooses only cross burning because of its distinctive message.” The court also held that the prima facie evidence provision renders the statute overbroad because “[t]he enhanced probability of prosecution under the statute chills the expression of protected speech.”

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R.A.V.*, the Virginia statute does not just target cross burning “on the basis of race, color, creed, religion or gender.” Rather, “the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate.” The dissenters also disagreed with the majority’s analysis of the prima facie provision because the inference alone “is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate.” The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari.

... Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866 ... The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

Soon the Klan imposed “a veritable reign of terror” throughout the South ... The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder ...

The activities of the Ku Klux Klan prompted legislative action at the national level ... Congress passed what is now known as the Ku Klux Klan Act. President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon’s *The Clansmen: An Historical Romance of the Ku Klux Klan* ... Although the first Klan never actually practiced cross burning, Dixon’s book depicted the Klan burning crosses to celebrate the execution of former slaves ... When D.W. Griffith turned Dixon’s book into the movie *The Birth of a Nation* in 1915, the association between cross burning and the Klan became indelible.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology ... The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a “gigantic cross” on Stone Mountain that was “visible throughout” Atlanta.

...

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence ... After one cross burning at a synagogue, a Klan member noted that if the cross burning did not “shut the Jews up, we’ll cut a few throats and see what happens ...”

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American “school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police ... after the burning of a cross in his front yard.” And after a cross burning in Suffolk, Virginia during the late 1940’s, the Virginia Governor stated that he would “not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization.” These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

... Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the “fiery cross” was the “emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused.” And the Klan has often published its newsletters and magazines under the name *The Fiery Cross*.

... To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a “symbol of hate.” And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of

intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

... The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. Thus, the First Amendment "ordinarily" denies a State "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 ...

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution ... The First Amendment permits "restrictions upon the content of speech in a few limited areas, which 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.'"

... We have consequently held that 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"—are generally proscribable under the First Amendment ... And, the First Amendment also permits a State to ban a "true threat."

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals ... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

The Supreme Court of Virginia ruled that in light of *R.A.V. v. City of St. Paul*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place

a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V. v. City of St. Paul* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

... We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment ...

Indeed, we noted that it would be constitutional to ban only a particular type of threat ... Consequently, while the holding of *R.A.V.* does not permit a State to ban only obscenity based on “offensive *political* messages,” or “only those threats against the President that mention his policy on aid to inner cities,” the First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue ... is proscribable.”

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's “political affiliation, union membership, or homosexuality.” ...

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

... The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that “the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.” ...

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional ... As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate ... The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted “would create an unacceptable risk of the suppression of ideas.” The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, “[b]urning a cross at a political rally would almost certainly be protected expression.” Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott’s *The Lady of the Lake*.

... It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings ... The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

... We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike *Justice Scalia*, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment ... We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility.

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O’Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

Justice Thomas, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, (1989) and the profane. I believe that cross burning is the paradigmatic example of the latter.

Although I agree with the majority’s conclusion that it is constitutionally permissible to “ban ... cross burning carried out with intent to intimidate,” I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it

out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

“In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’”

...

To me, the majority’s brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those its dislikes, uses the most brutal of methods.

Such methods typically include cross burning—“a tool for intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.” ... As the Solicitor General points out, the association between acts of intimidating cross burning and violence is well documented in recent American history.

...

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well and grounded fear of physical violence.

Virginia’s experience is not exception ... Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, “[f]or purposes of the child molesting statute ... consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16).” The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

... Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our Due Process precedents to sustain this statute.

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross-burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits “the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself.” First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable, ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *Ferber v. New York* (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California* (1973). As a result, those pornographers trafficking in images of adults who look like minors, may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This “chilling” effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality’s analysis, the determination of whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado* (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments “from unwanted advice” and “unwanted communication.” In so concluding, the Court placed heavy reliance on the “vulnerable physical and emotional conditions” of patients. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on “unwanted advice,” which, notably, can be given only from a distance of at least 8 feet from a prospective patient, justified by the countervailing interest in obtaining abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience to extreme emotional distress, and is virtually never viewed merely as “unwanted communication,” but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality’s view, physical safety will be valued less than the right to be free from unwanted communications.

Because I would uphold the validity of this statute, I respectfully dissent.

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Obscenity and Extreme Violence

Roth v. United States

354 U.S. 476 (1957)

[consolidated with *Alberts v. California* 354 U.S. 476]

Majority: Brennan, joined by Frankfurter, Burton, Clark, and Whittaker

Concurrence: Warren

Dissent: Harlan

Dissent: Douglas, joined by Black

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. ...”

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit. We granted certiorari.

Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. We noted probable jurisdiction.

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.

... In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous

utterances are not within the area of constitutionally protected speech. 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.

... 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 *Chaplinsky v. New Hampshire* (1942):

” ... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene. ... 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. ...*” (Emphasis added.)

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

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: “The words ‘obscene, lewd and lascivious’ as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.” (Emphasis added.) ... It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beaubarnais v. Illinois, supra*:

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

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press ...

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment

upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

... in *Roth*, the trial judge instructed the jury as follows:

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

“ ”

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

“ ”

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

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process ... The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.” ... [T]he Constitution does not require impossible standards”; all that is required is that the language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. ...”

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

...

We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7 ...

The judgments are

Affirmed.

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Jacobellis v. Ohio

378 U.S. 184 (1964)

Vote: 6-3

Plurality: Brennan, joined by Goldberg

Concurrence: Black, joined by Douglas

Concurrence: Stewart

Concurrence: White

Dissent: Warren, joined by Clark

Dissent: Harlan

Justice Brennan announced the judgment of the Court and delivered an opinion in which Justice Goldberg joins.

Appellant, Nico Jacobellis, manager of a motion picture theater in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film in violation of Ohio Revised Code (1963 Supp.) § 2905.34.1 He was fined \$500 on the first count and \$2,000 on the second, and was sentenced to the workhouse if the fines were not paid. His conviction, by a court of three judges upon waiver of trial by jury, was affirmed by an intermediate appellate court, and by the Supreme Court of Ohio. We noted probable jurisdiction of the appeal, and subsequently restored the case to the calendar for reargument. The dispositive question is whether the state courts properly found that the motion picture involved, a French film called ‘Les Amants’ (‘The Lovers’), was obscene and hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments. We conclude that the film is not obscene and that the judgment must accordingly be reversed.

Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press. But, in *Roth v. United States* and *Alberts v. California*, we held that obscenity is not subject to those guarantees. Application of an obscenity law to suppress a motion picture thus requires ascertainment of the “dim and uncer-

tain line” that often separates obscenity from constitutionally protected expression. *Bantam Books, Inc. v. Sullivan*, (1963). It has been suggested that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury’s verdict is all but conclusive, or that, in any event, the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by “sufficient evidence.” The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only “obscenity” that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no “substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.”

In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case ...

We cannot understand why the Court’s duty should be any different in the present case, where Jacobellis has been subjected to a criminal conviction for disseminating a work of expression, and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments ...

The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that the test for obscenity enunciated there —

“whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest,”

is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is “utterly without redeeming social importance,” and that

“[t]he 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.”

It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int’l Pictures Corp. v. Regents*, (1959) or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection ...

It has been suggested that the “contemporary community standards” aspect of the *Roth* test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises ... to “the community” in the sense of “society at large; ... the public, or people in general.” ...

We do not see how any “local” definition of the “community” could properly be employed in delineating the area of expression that is protected by the Federal Constitution.

We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to “reduce the adult population ... to reading only what is fit for children.” *Butler v. Michigan*, (1957). State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. Since the present conviction is based upon exhibition of the film to the public at large, and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.

We have applied that standard to the motion picture in question.”The Lovers” involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State’s objections are based almost entirely upon that scene. The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national stature among the best films of the year in which it was produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth v. United States* and *Alberts v. California*, which we reaffirm here.

Reversed.

Justice Stewart, concurring.

It is possible to read the Court’s opinion in *Roth v. United States* in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court’s decisions since *Roth* and *Alberts* that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

The Chief Justice, with whom Mr. Justice Clark joins, dissenting.

In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments. Although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has recently decided that obscenity is not within the protection of

the First Amendment, neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like “negligence,” although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.

... For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law and we have attempted in the *Roth* case to provide such a rule.

... We are told that only ‘hard core pornography’ should be denied the protection of the First Amendment. But who can define ‘hard core pornography’ with any greater clarity than ‘obscenity’? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define ‘obscenity.’ Meanwhile, those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

... In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: Material is obscene and not constitutionally protected against regulation and proscription if ‘to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.’ I would commit the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene. But since a mere modicum of evidence may satisfy a ‘no evidence’ standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society’s right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a ‘sufficient evidence’ standard of review—requiring something more than merely any evidence but something less than ‘substantial evidence on the record (including the allegedly obscene material) as a whole.’ This is the only reasonable way I can see to obviate the necessity of this Court’s sitting as the Super Censor of all the obscenity purveyed throughout the Nation.

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Miller v. California

413 U.S. 15 (1973)

Vote: 5-4

Majority: Burger, joined by White, Blackmun, Powell and Rehnquist

Dissent: Douglas

Dissent: Brennan, joined by Stewart and Marshall

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.”

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called “adult” material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter, and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant’s conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled “Intercourse,” “Man-Woman,” “Sex Orgies Illustrated,” and “An Illustrated History of Pornography,” and a film entitled “Marital Intercourse.” While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

This case involves the application of a State’s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of Justice Brennan reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court’s obscenity decisions. In *Roth v. United States*, (1957), the Court sustained a conviction under a federal statute punishing the mailing of “obscene, lewd, lascivious or filthy ...” materials. The key to that holding was the Court’s rejection of the claim that obscene materials were protected by the First Amendment ...

Nine years later, in *Memoirs v. Massachusetts*, (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* 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.”

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by Justice White’s dissent, was further underscored when the *Memoirs* plurality went on to state:

“The Supreme Judicial Court erred in holding that a book need not be ‘unqualifiedly worthless before it can be deemed obscene.’ A book cannot be proscribed unless it is found to be *utterly* without redeeming social value.” (emphasis in original).

While *Roth* presumed “obscenity” to be “utterly without redeeming social importance,” *Memoirs* required that to prove obscenity it must be affirmatively established that the material is “*utterly* without redeeming social value.” Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.*, that the material was “*utterly* without redeeming social value”—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Justice Harlan [dissenting] to wonder if the “*utterly* without redeeming social value” test had any meaning at all.

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. This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code §311 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 ... 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 part (b) of the standard announced in this opinion:

(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. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

... 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. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then “hard core” pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Justice Douglas contends. In this belief, however, Justice Douglas now stands alone.

... It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate “hard core” pornography from expression protected by the First Amendment ...

This may not be an easy road, free from difficulty. But no amount of “fatigue” should lead us to adopt a convenient “institutional” rationale—an absolutist, “anything goes” view of the First Amendment—because it will lighten our burdens.” ... Nor should we remedy “tension between state and federal courts” by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day ...

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 prerequisite 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 ... On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

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 ...

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity ... We hold that the requirement that the jury evaluate the materials with reference to “contemporary standards of the State of California” serves this protective purpose and is constitutionally adequate.

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 ... 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 ... But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex in any way limited or affected expression of serious literary, artistic, political, or scientific ideas.

... 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.

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is “*utterly* without redeeming social value”; and (c) hold that obscenity is to be determined by applying “contemporary community standards,” not “national standards.” The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion.

Vacated and remanded.

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New York v. Ferber

458 U.S. 747 (1982)

Vote: 9-0

Majority: White, joined by Burger, Powell, Rehnquist, and O'Connor

Concurrence: O'Connor

Concurrence: Brennan, joined by Marshall

Concurrence: Blackmun (in the result)

Concurrence: Stevens

Justice White Delivered the Opinion of the Court

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

In recent years, the exploitive use of children in the production of pornography has become a serious national problem. The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.

... At issue in this case is § 263.15, defining a class D felony:

“A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.”

To “promote” is also defined:

“Promote’ means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.”

§ 263.00(5).

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of violating § 263.10 and two counts of violating § 263.15, the two New York laws controlling dissemination of child pornography. After a jury trial, Ferber was

acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court ...

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment ... The court began by noting that, in light of § 263.10's explicit inclusion of an obscenity standard, § 263.15 could not be construed to include such a standard. Therefore,

“the statute would ... prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.” ... Two judges dissented.

We granted the State's petition for certiorari, 454 U.S. 1052 (1981), presenting the single question:

“To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?”

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller v. California*, (1973), constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography ...

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

... Throughout this period, we recognized “the inherent dangers of undertaking to regulate any form of expression.” *Miller v. California*, *supra*. Consequently, our difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation.

... Over the past decade, we have adhered to the guidelines expressed in *Miller*, which subsequently has been followed in the regulatory schemes of most States.

The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the “sensibilities of unwilling recipients” from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological wellbeing of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court*, (1982) ... Accordingly, we have sustained legislation aimed at protecting the physical and emotional wellbeing of youth even when the laws have operated in the sensitive area of constitutionally protected rights ...

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

"[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances."

1977 N.Y.Laws, ch. 910, § 1.

We shall not second-guess this legislative judgment ... Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children ... Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions ...

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography ... We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.

Third. The advertising and selling of child pornography provide an economic motive for, and are thus an integral part of, the production of such materials, an activity illegal throughout the Nation.

... We note that, were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work ... Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more “realistic” by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions ...

...

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the 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 on the part of the defendant ...

Section 263.15’s prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene ...

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally “under-inclusive” about a statute that singles out this category of material for proscription. It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn ...

... The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the

wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is “strong medicine,” and have employed it with hesitation, and then “only as a last resort.” *Broadrick*. We have, in consequence, insisted that the overbreadth involved be “substantial” before the statute involved will be invalidated on its face.

...

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York’s child pornography law and the situation faced by the Oklahoma state employees with respect to that State’s restriction on partisan political activity. Indeed, it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute’s scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity ...

This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment ...

Applying these principles, we hold that § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications ...

The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

Justice O’Connor, concurring.

Although I join the Court’s opinion, I write separately to stress that the Court does not hold that New York must except “material with serious literary, scientific, or educational value,” ante at 458 U. S. 766, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York’s current statute is not sufficiently overbroad to support respondent’s facial attack. The compelling interests identified in today’s opinion, ... suggest that the Constitution might, in fact, permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. ...

Excerpted by Sarah Mason



Brown v. Entertainment Merchants Association

564 U.S. 786 (2011)

Vote: 7-2

Majority: Scalia, joined by Kennedy, Ginsburg, Sotomayor and Kagan

Concurrence: Alito, joined by Roberts

Dissent: Thomas

Dissent: Breyer

Justice Scalia delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act is punishable by a civil fine of up to \$1,000. Respondents, representing the video-game and software industries, brought a pre enforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed and we granted certiorari.

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try ... Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *United States v. Playboy Entertainment Group, Inc.* (2000) ...

The most basic of those principles is this: “[A]s a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union* (2002). There are of course exceptions ...

Last Term, in *US v. Stevens*, (2010), we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated ...

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct,” *Miller*.

Stevens was not the first time we have encountered and rejected a State’s attempt to shoehorn speech about violence into obscenity ... Our opinion in *Winters v NY* (1948) ... made clear that violence is not part of the obscenity that the Constitution permits to be regulated ... Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* (1968). That case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child. We held that the legislature could “adju[s]t the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests ... ’ of ... minors.” And because “obscenity is not protected expression,” the New York statute could be sustained so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair’s breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

... California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s *Fairy Tales*, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island.

This is not to say that minors’ consumption of violent entertainment has never encountered resistance. In the 1800’s, dime novels depicting crime and “penny dreadfuls” (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead ... Many in the late 1940’s and early 1950’s blamed comic books for fostering a “preoccupation with violence and horror” among the young, leading to a rising juvenile crime rate. But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are “interactive,” in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind ...

Justice Alito [concurring] has done considerable independent research to identify video games in which “the violence is astounding.” “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. ... Blood gushes, splatters, and pools.” Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“‘ethnic cleansing’ [of] ... African Americans, Latinos, or Jews.” To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard.” It is rare that a regulation restricting speech because of its content will ever be permissible.”

California cannot meet that standard ...

The State’s evidence is not compelling ...

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices. That is not how one addresses a serious social problem ...

But leaving that aside, California cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so ...

And finally, the Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to “assisting parents” that restriction of First Amendment rights requires.

California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a “well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *Chaplin v. California* (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive ... As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below. It is so ordered.

Justice Breyer, dissenting.

... [T]he special First Amendment category I find relevant is ... the category of “protection of children.” This Court has held that the “power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Prince v. Massachusetts* (1944). And the “regulatio[n] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.” *Ginsberg v. New York* (1968) ...

In my view, California’s statute provides “fair notice of what is prohibited,” and consequently it is not impermissibly vague. *Ginsberg* explains why that is so. The Court there considered a New York law that forbade the sale to minors of a “picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity ...,” that “predominately appeals to the prurient, shameful or morbid interest of minors,” and “is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,” and “is utterly without redeeming social importance for minors.” This Court upheld the New York statute in *Ginsberg* ...

Comparing the language of California’s statute with the language of New York’s statute it is difficult to find any vagueness-related difference. Why are the words “kill,” “maim,” and “dismember” any more difficult to understand than the word “nudity?” ...

The remainder of California's definition copies, almost word for word, the language this Court used in *Miller v. California* (1973), in permitting a total ban on material that satisfied its definition (one enforced with criminal penalties) ...

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court's long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate. As is well known, at one point Justice Stewart thought he could do no better in defining obscenity than, "I know it when I see it." *Jacobellis v. Ohio* (1964) (concurring opinion). And Justice Douglas dissented from *Miller's* standard, which he thought was still too vague. Ultimately, however, this Court accepted the "community standards" tests used in *Miller* and *Ginsberg*. They reflect the fact that sometimes, even when a precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective ...

...

The upshot is that California's statute, as applied to its heartland of applications (i.e., buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. That restriction is justified by a compelling interest (supplementing parents' efforts to prevent their children from purchasing potentially harmful violent, interactive material). And there is no equally effective, less restrictive alternative. California's statute is consequently constitutional on its face—though litigants remain free to challenge the statute as applied in particular instances, including any effort by the State to apply it to minors aged 17.

I add that the majority's different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?

This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and without literary, artistic, or similar justification, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that *Ginsberg* controls the outcome here a fortiori. And it is why I believe California's law is constitutional on its face ...

For these reasons, I respectfully dissent.

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Speech and Association

Whitney v. California

274 U.S. 357 (1925)

Vote: 9-0

Opinion: Sanford

Decision: Affirmed

Majority: Sanford, joined by Taft, Van Devanter, McReynolds, Sutherland, Butler, Stone

Concurrence: Brandeis, joined by Holmes

MR. JUSTICE SANFORD delivered the opinion of the Court.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. Statutes, 1919, c. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal. App. 449. Her petition to have the case heard by the Supreme Court was denied. *Ib.*, 453. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had.

The pertinent provisions of the Criminal Syndicalism Act are:

“Section 1. The term ‘criminal syndicalism’ as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”

...

And here, since it appears [...] that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment was considered and passed upon by [the Court of Appeals] — this being a federal question constituting an appropriate ground for a review of the judgment — we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

...

... [T]he defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party

held in Chicago in 1919, which resulted in a split between the “radical” group and the old-wing Socialists. The “radicals” — to whom the Oakland delegates adhered — being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party.

... [T]he Party declared that it was in full harmony with “the revolutionary working class parties of all countries,” and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was “to create a unified revolutionary working class movement in America,” organizing the workers as a class in a revolutionary class struggle to conquer the capitalist state for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism, and bring about the Communist Commonwealth[...].

... [I]t is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of “a subsequent event brought about against her will by the agency of others,” with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of “prophetic” understanding, she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; ... that it was not until after the majority of the convention turned out to be “contrary-minded, and other less temperate policies prevailed,” that the convention could have taken on the character of criminal syndicalism, and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime.

[This] argument entirely disregards the facts: that the defendant had previously taken out a membership card in the National Party, that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions, and that, after the constitution of the California Party had been adopted, and this resolution had been voted down and the National Program accepted, she not only remained in the convention, without protest, until its close, but subsequently manifested her acquiescence by attending as an alternate member of the State Executive Committee and continuing as member of the Communist Labor Party.

...

The Act, plainly, meets the essential requirement of due process that a penal statute be “sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,” and be couched in terms that are not “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Construction Co.*, (1926).

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

... [T]here is no substantial basis for the contention that the legislature has arbitrarily or unreasonably limited its application to those advocating the use of violent and unlawful methods to effect changes in industrial and political conditions, there being nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods.

...

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

...

By enacting the provisions of the Syndicalism Act, the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight ...

We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal affirmed.

It is so ordered.

Justice Brandeis, concurring.

[T]he accused is to be punished not for contempt, 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.

... [A]lthough 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. *See Schenck v. United States*, (1919).

...

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 abridgement 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.

...

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 ...

... [E]ven imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive ...

I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances, the judgment of the state court cannot be disturbed.

... Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.

MR. JUSTICE HOLMES joins in this opinion.



NAACP v. Alabama

357 U.S. 449 (1958)

Vote: 9-0

Opinion: Harlan

Decision: Reversed

Justice Harlan delivered the opinion of the Court.

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People, in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

Alabama has a statute, similar to those of many other States, which requires a foreign corporation, except as exempted, to qualify before doing business by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process. The statute imposes a fine on a corporation transacting intrastate business before qualifying, and provides for criminal prosecution of officers of such a corporation. Ala. Code, 1940, Tit. 10, §§ 192-198. The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name, and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. The first Alabama affiliates were chartered in 1918. Since that time, the aims of the Association have been advanced through activities of its affiliates, and, in 1951, the Association itself opened a regional office in Alabama, at which it employed two supervisory persons and one clerical worker. The Association has never complied with the qualification statute, from which it considered itself exempt.

In 1956, the Attorney General of Alabama brought an equity suit in the State Circuit Court, Montgomery County, to enjoin the Association from conducting further activities within, and to oust it from, the State.

...

Petitioner ... contended that its activities did not subject it to the qualification requirements of the statute and that, in any event, what the State sought to accomplish by its suit would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States ... Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists, and postponed the hearing on the restraining order to a date later than the time ordered for production.

... [P]etitioner produced substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure ... The Circuit Court made a further order adjudging petitioner in ... contempt. Under Alabama law, effect of the contempt adjudication was to foreclose petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued *ex parte*, until it purged itself of contempt.

... We granted certiorari because of the importance of the constitutional questions presented.

...

... We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court. In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not, of course, parties to the litigation ...

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are, in every practical sense, identical.

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that, in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

...

In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

...

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn. v. Douds*, (1950):

“A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature.”

Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

...

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner’s members may have upon participation by Alabama citizens in petitioner’s activities follows not from state action, but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

...

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the \$100,000 fine which resulted from petitioner’s refusal to comply with the production order in this respect must fall.

...

For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed, and the case remanded for proceedings not inconsistent with this opinion.

Reversed.

Excerpted by Alexandria Metzdorf



Hurley v. Irish GLB of Boston

515 U.S. 557 (1995)

Vote: 9-0

Decision: Reversed

Justice SOUTER delivered the opinion for a unanimous Court.

The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.

[...] Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day-Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. No other applicant has ever applied for that permit. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade [...]. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of ... sexual orientation ... relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."

...

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. We hold that it does and reverse.

...

... [W]e use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches ...

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so) [other examples omitted], and even “[m]arching, walking or parading” in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, (1977).

...

Respondents’ participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. [...] In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription “Irish American Gay, Lesbian and Bisexual Group of Boston.” GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

...

[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners’ speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

...

Petitioners’ claim to the benefit of this principle of autonomy to control one’s own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the 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.

...

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access for expressive purposes, *Turner Broadcasting System, Inc. v. FCC*, (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, "is more than a passive receptacle or conduit for news, comment, and advertising," and we have held that "[t]he choice of material ... and the decisions made as to limitations on the size and content ... and treatment of public issues ... -whether fair or unfair-constitute the exercise of editorial control and judgment" upon which the State can not intrude ... Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

...

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants.

... Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to "silence the voice of competing speakers," as cable operators do with respect to program providers who wish to reach subscribers, *Turner Broadcasting, supra*. Nor has any other legitimate interest been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.

... When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

... Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the

Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



BSA v. Dale

530 U.S. 640 (2000)

Vote: 5-4

Majority: Rehnquist, joined by O'Connor, Scalia, Kennedy, Thomas

Dissent: Stevens, joined by Souter, Ginsburg, Breyer

Dissent: Souter, joined by Ginsburg, Breyer

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

... The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/ Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals."

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation ...

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment.

...

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York*, (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. US Jaycees*, (1984), *supra*.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

... [T]he general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid*. The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values-both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.

... The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," Brief for Petitioners 39, and that it does "not want to promote homosexual conduct as a legitimate form of behavior." We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality ...

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." 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 ... 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.

...

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey’s public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts’ freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation-like inns and trains. *Romer v. Evans*, (1996). Over time, the public accommodations laws have expanded to cover more places. New Jersey’s statutory definition of “[a] place of public accommodation” is extremely broad. [...] As the definition of “public accommodation” has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

... [A]fter finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any “serious burden” on the organization’s rights of expressive association ... [T]he associational interest in freedom of expression has been set on one side of the scale, and the State’s interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O’Brien*, (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech—in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey’s public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O’Brien* is inapplicable.

...

We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.” While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley v. GLIB of Boston*, (1995).

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



Time, Place and Manner

City Council v. Taxpayers for Vincent

466 U.S. 789 (1984)

Vote: 6-3

Decision: Reversed

Majority: Stevens, joined by Burger, White, Powell, Rehnquist, and O'Connor

Dissent: Brennan, joined by Blackmun and Marshall

JUSTICE STEVENS delivered the opinion of the Court.

Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property. The question presented is whether that prohibition abridges appellees' freedom of speech within the meaning of the First Amendment. In March, 1979, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent (Taxpayers) entered into a contract with a political sign service company known as Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with Vincent's name on them. COGS produced 15- by-44-inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires which support the poles and stapling the cardboard together at the bottom. The signs' message was: "Roland Vincent — City Council."

Acting under the authority of § 28.04 of the Municipal Code, employees of the city's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs. The weekly sign removal report covering the period March 1-March 7, 1979, indicated that among the 1,207 signs removed from public property during that week, 48 were identified as "Roland Vincent" signs. Most of the other signs identified in that report were apparently commercial in character.

...

In its appeal to this Court, the City challenges the Court of Appeals' holding that § 28.04 is unconstitutional on its face. Taxpayers and COGS defend that holding, and also contend that the ordinance is unconstitutional as applied to their posting of political campaign signs on the crosswires of utility poles. There are two quite different ways in which a statute or ordinance may be considered invalid "on its face" — either because it is unconstitutional in every conceivable application or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad." We shall analyze the "facial" challenges to the ordinance, and then address its specific application to appellees.

...

[T]he Court did recognize an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. This “overbreadth” doctrine has its source in *Thornhill v. Alabama*, (1940). In that case, the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it ...

In the development of the overbreadth doctrine, the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute’s very existence will inhibit free expression.

...

Taxpayers and COGS apparently would agree that the prohibition against posting signs on most of the publicly owned objects mentioned in the ordinance is perfectly reasonable. Thus, they do not dispute the City’s power to proscribe the attachment of any handbill or sign to any sidewalk, crosswalk, curb, lamppost, hydrant, or life-saving equipment. Their position with respect to utility poles is not entirely clear, but they do contend that it is unconstitutional to prohibit the attachment of their cardboard signs to the horizontal crosswires supporting utility poles during a political campaign. They have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs. Specifically, Taxpayers and COGS have not attempted to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own crosswire signs ... It would therefore be inappropriate in this case to entertain an overbreadth challenge to the ordinance.

...

In this case, taxpayers and COGS do not dispute that it is within the constitutional power of the City to attempt to improve its appearance, or that this interest is basically unrelated to the suppression of ideas. Therefore the critical inquiries are whether that interest is sufficiently substantial to justify the effect of the ordinance on appellees’ expression, and whether that effect is no greater than necessary to accomplish the City’s purpose.

...

We turn to the question whether the scope of the restriction on appellees’ expressive activity is substantially broader than necessary to protect the City’s interest in eliminating visual clutter. The incidental restriction on expression which results from the City’s attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest ...

Appellees suggest that the public property covered by the ordinance either is itself a “public forum” for First Amendment purposes or at least should be treated in the same respect as the “public forum” in which the property is located.

...

Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that

“the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.” *United States Postal Service v. Greenburgh Civic Assns.*, (1981). Rather, the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue ... Given our analysis of the legitimate interest served by the ordinance, its viewpoint neutrality, and the availability of alternative channels of communication, the ordinance is certainly constitutional as applied to appellees under this standard.

Finally, Taxpayers and COGS argue that Los Angeles could have written an ordinance that would have had a less severe effect on expressive activity such as theirs by permitting the posting of any kind of sign at any time on some types of public property, or by making a variety of other more specific exceptions to the ordinance: for signs carrying certain types of messages (such as political campaign signs), for signs posted during specific time periods (perhaps during political campaigns), for particular locations (perhaps for areas already cluttered by an excessive number of signs on adjacent private property), or for signs meeting design specifications (such as size or color). Plausible public policy arguments might well be made in support of any such exception, but it by no means follows that it is therefore constitutionally mandated, *cf. Singer v. United States*, (1965), nor is it clear that some of the suggested exceptions would even be constitutionally permissible ...

Any constitutionally mandated exception to the City's total prohibition against temporary signs on public property would necessarily rest on a judicial determination that the City's traffic control and safety interests had little or no applicability within the excepted category, and that the City's interests in esthetics are not sufficiently important to justify the prohibition in that category ... [W]e accept the City's position that it may decide that the esthetic interest in avoiding “visual clutter” justifies a removal of signs creating or increasing that clutter. The findings of the District Court that COGS signs add to the problems addressed by the ordinance and, if permitted to remain, would encourage others to post additional signs, are sufficient to justify application of the ordinance to these appellees ...

The judgment of the Court of Appeals is reversed, and the case is remanded to that Court.

It is so ordered.

Excerpted by Alexandria Metzdorf



Ward v. Rock Against Racism

491 U.S. 781 (1992)

Vote: 6-3

Decision: Reversed

Majority: Kennedy, joined by Rehnquist, White, O'Connor, Scalia

Concurrence: Blackmun

Dissent: Marshall, joined by Brennan, Stevens

JUSTICE KENNEDY delivered the opinion of the Court.

In the southeast portion of New York City's Central Park, about 10 blocks upward from the park's beginning point at 59th Street, there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. The trial court sustained the noise control measures, but the Court of Appeals for the Second Circuit reversed. We granted certiorari to resolve the important First Amendment issues presented by the case.

...

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. *See Renton v. Playtime Theatres, Inc.*, (1986). Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech." *Clark v. Comm. For Creative Non-Violence*, (1984).

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 for the guideline "ha[s] nothing to do with content," *Boos v. Barry, supra*, (1988), and it satisfies the requirement that time, place, or manner regulations be content-neutral.

While respondent's arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case. 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. On this record, the 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 aesthetic 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. As related above, the District Court found that the city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR.

...

The court squarely rejected respondent's claim that the city's "technician is not able properly to implement a sponsor's instructions as to sound quality or mix," finding that "[n]o evidence to that effect was offered at trial; as noted, the evidence is to the contrary." In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality. Since the guideline allows the city to control volume without interfering with the performer's desired sound mix, it is not "substantially broader than necessary" to achieve the city's legitimate ends, *City Council of Los Angeles v. Taxpayers for Vincent* (1984), and thus it satisfies the requirement of narrow tailoring.

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it 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 expression 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 city's sound amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert-ground, and the guideline leaves open ample channels of communication.

Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is

Reversed.

Excerpted by Alexandria Metzdorf



Hill v. CO

530 U.S. 703 (2000)

Vote: 6-3

Decision: Affirmed

Majority: Stevens, joined by Rehnquist, O'Connor, Souter, Ginsburg, Breyer

Concurrence: Souter, joined by O'Connor, Ginsburg, Breyer

Dissent: Scalia, joined by Thomas

Dissent: Kennedy

JUSTICE STEVENS delivered the opinion of the Court.

At issue is the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care facility. The specific section of the statute that is challenged makes it unlawful within the regulated areas for any person to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. ...” Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities.

The question is whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.

Excerpted by Alexandria Metzdorf



Watchtower v. Stratton

536 U.S. 150 (2002)

Vote: 8-1

Majority: Stevens, joined by O'Connor, Kennedy, Souter, Ginsburg, Breyer

Concurrence: Breyer, joined by Souter, Ginsburg

Concurrence: Scalia (in judgment), joined by Thomas

Dissent: Rehnquist

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners contend that a village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violates the First Amendment. Through this facial challenge, we consider the door-to-door canvassing regulation not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills.

Petitioner ... coordinates the preaching activities of Jehovah's Witnesses throughout the United States and publishes Bibles and religious periodicals that are widely distributed. Petitioner ... supervises the activities of approximately 59 members in a part of Ohio that includes the Village of Stratton (Village). Petitioners offer religious literature without cost to anyone interested in reading it. They allege that they do not solicit contributions or orders for the sale of merchandise or services, but they do accept donations.

...

District of Ohio, seeking an injunction against the enforcement of several sections of Ordinance No. 1998-5 regulating uninvited peddling and solicitation on private property in the Village. Petitioners' complaint alleged that the ordinance violated several constitutional rights, including the free exercise of religion, free speech, and the freedom of the press.

...

We granted certiorari to decide the following question:

“Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse 7[?]”

...

The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of sollicita-

tion activity. We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.

... [T]he Village's administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." Indeed, on the "No Solicitation Forms" provided to the residents, the canvassers include "Camp Fire Girls," "Jehovah's Witnesses," "Political Candidates," "Trick or Treaters during Halloween Season," and "Persons Affiliated with Stratton Church." The ordinance unquestionably applies, not only to religious causes, but to political activity as well. ...

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition. Three obvious examples illustrate the pernicious effect of such a permit requirement.

First, as our cases involving distribution of unsigned handbills demonstrate, there are a significant number of persons who support causes anonymously ... The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity ... In the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes. Such preclusion may well be justified in some situations-for example, by the special state interest in protecting the integrity of a ballot-initiative process, or by the interest in preventing fraudulent commercial transactions. The Village ordinance, however, sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process.

Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.

...

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

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.

Excerpted by Alexandria Metzdorf



Snyder v. Phelps

562 U.S. 443 (2011)

Vote: 8-1

Decision: Affirmed

Majority: Roberts, joined by Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, Kagan

Concurrence: Breyer

Dissent: Alito

Chief Justice Roberts delivered the opinion of the Court.

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

...

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

...

Westboro’s primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro’s speech. The Court of Appeals agreed. The court reviewed the picket signs and concluded that Westboro’s statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.

We granted certiorari.

...

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.” [S]peech on ‘matters of public concern’ ... is ‘at the heart of the First Amendment’s protection.’” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, (1978)). The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, (1964).

...

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” *Dun & Bradstreet, supra*. The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” [and] “Fag Troops ...” [other examples omitted]. While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as “You’re Going to Hell” and “God Hates You”—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

...

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral.

...

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said “God Bless America” and “God Loves You,” would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”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.” *Texas v. Johnson*, (1989). Indeed, “the point of all speech protection ... is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, (1995).

...

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Excerpted by Alexandria Metzdorf



McCullen v. Coakley

573 U.S. 464 (2014)

Vote: 9-0

Decision: Reversed

Majority: Roberts, joined by Ginsburg, Breyer, Sotomayor, Kagan

Concurrence: Scalia (in judgment), joined by Kennedy, Thomas

Concurrence: Alito (in judgment)

Chief Justice Roberts delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities’ entrances. The question presented is whether the statute violates the First Amendment.

...

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners’ facial challenge after a bench trial based on a stipulated record.

...

We granted certiorari.

By its very terms, the Massachusetts Act regulates access to “public way[s]” and “sidewalk[s].” Such areas occupy a “special position in terms of First Amendment protection” because of their historic role as sites for discussion and debate. *United States v. Grace*, (1983). These places—which we have labeled “traditional public fora”—“have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Pleasant Grove City v. Summum*, (2009) (quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, (1983)).

...

[T]raditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is “very limited.” *Grace*, supra, at 177. In particular, the guiding First Amendment principle that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” applies with full force in a traditional public forum. *Police Dept. of Chicago v. Mosley*, (1972). As a general rule, in such a forum the government may not “selectively ... shield the public from some kinds of speech on the ground that they are more offensive than others.” *Erznoznik v. Jacksonville*, (1975).

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content.”[E]ven 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.’” *Ward*, (quoting *Clark v. Community for Creative Non-Violence*, (1984)).

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test’s three requirements.

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. *See United States v. Playboy Entertainment Group, Inc.*, (2000). Respondents do not argue that the Act can survive this exacting standard.

...

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[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.” *Ward*, supra.

... [T]he Act would not be content neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “[l]isteners’ reactions to speech.” If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener’s reactions. Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

...

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

...

The buffer zones have ... made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

...

[R]espondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the clinics' private lots. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' doorways, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

...

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



Reed v. Town of Gilbert

576 U.S. 155 (2015)

Vote: 9-0

Decision: Reversed

Majority: Thomas, joined by Roberts, Scalia, Kennedy, Alito, Sotomayor

Concurrence: Alito, joined by Kennedy, Sotomayor

Concurrence: Breyer (in judgment)

Concurrence: Kagan (in judgment), joined by Ginsburg, Breyer

Justice Thomas delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

...

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church’s name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town’s Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church’s failure to include the date of the event on the signs. Town officials even confiscated one of the Church’s signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town’s Code compliance manager informed the Church that there would be “no leniency under the Code” and promised to punish any future violations ...

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code’s sign categories were content neutral ...

We granted certiorari, and now reverse.

...

Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V. v. St. Paul*, (1992) [other citations omitted] ...

The Town’s Sign Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” And it defines “Ideological Signs” on the basis of whether a sign “communicat[es] a message or ideas” that do not fit within the Code’s other categories. It then subjects each of these categories to different restrictions ...

A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, (1993) ...

... [A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra*. The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

Our decision today will not prevent governments from enacting effective sign laws ... Not “all distinctions” are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner ...

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *City of Ladue v. Gilleo*, (1994). At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and pas-

sengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



Minnesota Voters Alliance v. Mansky

585 U.S. ____ (2018)

Vote: 7-2

Decision: Reversed

Majority: Roberts, joined by Kennedy, Thomas, Ginsburg, Alito, Kagan, Gorsuch

Dissent: Sotomayor, joined by Breyer

Chief Justice Roberts delivered the opinion of the Court.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

...

Petitioner Minnesota Voters Alliance (MVA) is a nonprofit organization that “seeks better government through election reforms.” Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups—calling themselves “Election Integrity Watch” (EIW)—planned to have supporters wear buttons to the polls printed with the words “Please I. D. Me,” a picture of an eye, and a telephone number and web address for EIW.

...

The First Amendment prohibits laws “abridging the freedom of speech.” Minnesota’s ban on wearing any “political badge, political button, or other political insignia” plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, (1992) (*ISKCON*) ...

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, “no less than a private owner of property,” retains the “power to preserve the property under its control for the use to which it is lawfully dedicated.” *Adderley v. Florida*, (1966). “Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, (1985). Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy. See *Greer v. Spock*, (1976) [other citations omitted].

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is “a special enclave, subject to greater restriction.” *ISKCON* ...

We therefore evaluate MVA’s First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker’s political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota’s ban on political apparel is “reasonable in light of the purpose served by the forum”: voting.

... [W]e see no basis for rejecting Minnesota’s determination that some forms of advocacy should be excluded from the polling place, to set it aside as “an island of calm in which voters can peacefully contemplate their choices.” Casting a vote is a weighty civic act, akin to a jury’s return of a verdict, or a representative’s vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

...

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what

must stay out. See *Cornelius v. NAACP Legal Defense Fund*, (1985). Here, the unmoored use of the term “political” in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail even this forgiving test.

[The statute] does not define the term “political.” And the word can be expansive. It can encompass anything “of or relating to government, a government, or the conduct of governmental affairs,” Webster’s Third New International Dictionary 1755 (2002), or anything “[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,” American Heritage Dictionary 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to “Vote!” could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit “any conceivably ‘political’ message” or cover “all ‘political’ speech, broadly construed.” Instead, the State interprets the ban to proscribe “only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place.”

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import ... Would a “Support Our Troops” shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a “#MeToo” shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had “brought up” the topic.

...

Cases like this “present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote.” *Burson v. Freeman*, (1992) (plurality opinion). Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.

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.

Excerpted by Alexandria Metzdorf



Government Speech

National Endowment for the Arts v. Finley

524 U.S. 569 (1998)

Vote: 8-1

Decision: Reversed

Majority: O'Connor, joined by Rehnquist, Stevens, Kennedy, Breyer and Ginsburg (all but Part I-B)

Concurrence: Scalia (in judgment), joined by Thomas

Dissent: Souter

Justice O'Connor delivered the opinion of the Court.

The National Foundation on the Arts and Humanities Act, as amended in 1990, requires the Chairperson of the National Endowment for the Arts (NEA) to 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.” In this case, we review the Court of Appeals’ determination that [the statute], on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. We conclude that [the statute] is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

With the establishment of the NEA in 1965, Congress embarked on a “broadly conceived national policy of support for the ... arts in the United States,” pledging federal funds to “help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of ... creative talent.” ...

Applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts. Under the 1990 Amendments to the enabling statute, those panels must reflect “diverse artistic and cultural points of view” and include “wide geographic, ethnic, and minority representation,” as well as “lay individuals who are knowledgeable about the arts.” The panels report to the 26-member National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. The Chairperson has the ultimate authority to award grants but may not approve an application as to which the Council has made a negative recommendation.

... Throughout the NEA’s history, only a handful of the agency’s roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public’s trust. Two provocative works, however, prompted public controversy in 1989 and led to congressional reevaluation of the NEA’s funding priorities and efforts to increase oversight of its grant-making procedures ...

When considering the NEA's appropriations for fiscal year 1990, Congress reacted to the controversy surrounding the Mapplethorpe and Serrano photographs by eliminating \$45,000 from the agency's budget, the precise amount contributed to the two exhibits by NEA grant recipients. Congress also enacted an amendment providing that no NEA funds "may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." ...

The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before [the 1990 amendment] was enacted. An advisory panel recommended approval of respondents' projects, both initially and after receiving Frohnmayer's request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding. Respondents filed suit, alleging that the NEA had violated their First Amendment rights by rejecting the applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA's enabling statute, and had breached the confidentiality of their grant applications through the release of quotations to the press ... sought restoration of the recommended grants or reconsideration of their applications ... When Congress enacted [the amendment], respondents, now joined by the National Association of Artists' Organizations (NAAO), amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based ...

We granted certiorari, (1997), and now reverse the judgment of the Court of Appeals.

Respondents raise a facial challenge ... and consequently they confront "a heavy burden" in advancing their claim ... 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 [the statute] constrains the agency's ability to fund certain categories of artistic expression ...

... Respondents' claim that the provision is facially unconstitutional may be reduced to the argument that the criteria in [the statute] 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 ...

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" prong ... and its reference to "respect for the diverse beliefs and values of the American public." Educational programs are central to the NEA's mission ... And it is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. *Bd. Of Ed v. Pico* (1982).

... we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities ... In the 1990

Amendments ... Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "[p]ublic funds ... must ultimately serve public purposes the Congress defines." And as we held in *Rust*, 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. 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." *Maber v. Roe* (1977).

The lower courts also erred in invalidating [the statute] as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. *NAACP v. Button* (1963). The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns ... But when 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." [...] To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable Government programs and countless others like them. [The statute] 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.

Excerpted by Sarah Mason



Pleasant Grove City v. Summum

555 U.S. 460 (2009)

Vote: 9-0

Decision: Reversed

Majority: Alito, joined by Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg and Breyer

Concurrence: Stevens, joined by Ginsburg

Concurrence: Scalia, joined by Thomas

Concurrence: Breyer

Concurrence: Souter (in judgment)

Justice Alito delivered the opinion of the Court.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" and be similar in size and nature to the Ten Commandments monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. After the District Court denied Summum's preliminary injunction request, respondent appealed, pressing solely its free speech claim.

A panel of the Tenth Circuit reversed ...

We granted certiorari and now reverse.

...

... The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth* (2000) ...

This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause ...

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

... Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land ...

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech ... The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

... Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct,

but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance ...

... Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

... To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

It is so ordered.

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Walker v. Texas Division, Sons of Confederate Veterans

576 U. S. 200 (2015)

Vote: 5-4

Decision: Reversed

Majority: Breyer, joined by Thomas, Ginsburg, Sotomayor and Kagan

Dissent: Alito, joined by Roberts, Scalia and Kennedy

Justice Breyer delivered the opinion of the Court.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Constitution’s free speech guarantees. We conclude that it did not.

... Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. And Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate ...

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization ...

Third, the Board “may create new specialty license plates on its own initiative or on receipt of an application from a” nonprofit entity seeking to sponsor a specialty plate. A nonprofit must include in its application “a draft design of the specialty license plate.” And Texas law vests in the Board authority to approve or to disapprove an application. The relevant statute says that the Board “may refuse to create a new specialty license plate” for a number of reasons, for example “if the design might be offensive to any member of the public ... or for any other reason established by rule.” Specialty plates that the Board has sanctioned through this process include plates featuring the words “The Gator Nation,” together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words “SERVICE ABOVE SELF.”

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV’s application included a draft plate design. At the bottom of the proposed plate were the words “SONS OF CONFEDERATE VETERANS.” At the side was the organization’s logo, a square Confederate battle flag framed by the words “Sons of Confederate Veterans 1896.” A

faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. The Board's predecessor denied this application.

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed ...

We granted the Board's petition for certiorari, and we now reverse.

...

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech ... Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. *Johanns v. Livestock Marketing Assn.*, (2005).

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech ...

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. Our reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem. *Pleasant Grove City v. Summum* (2008). We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case.

In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets ... The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause."

... In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. And, in reaching that conclusion, the Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park.

... First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States ...

Texas, too, has selected various messages to communicate through its license plate designs ... In 1977, Texas replaced the Lone Star with a small silhouette of the State. And in 1995, Texas plates celebrated “150 Years of Statehood.” Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, “Read to Succeed,” “Houston Livestock Show and Rodeo,” “Texans Conquer Cancer,” and “Girl Scouts.” This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs “are often closely identified in the public mind with the [State].” Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name “TEXAS” in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Texas license plates are, essentially, government IDs. And issuers of ID “typically do not permit” the placement on their IDs of “message[s] with which they do not wish to be associated.” *Summum*. Consequently, “persons who observe” designs on IDs “routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.”

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas’s license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State “has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Accordingly, like the city government in *Summum*, Texas “has ‘effectively controlled’ the messages [conveyed] by exercising ‘final approval authority’ over their selection.” (quoting *Johanns*).

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling ...

... Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas's specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *Int'l Soc. For Krishna Consc. Inc. v. Lee*, (1992).

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider ...

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park ...

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, the existence of government profit alone is insufficient to trigger forum analysis ...

Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. *Wooley v. Maynard* (1977). But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley*, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

...

For the reasons stated, we hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

Reversed.

Justice Alito, with whom the Chief Justice, Justice Scalia, and Justice Kennedy join, dissenting.

... This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination ...

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

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Matal v. Tam

582 U.S. ____ (2017)

Vote: 8-0 (Justice Gorsuch took no part in the consideration or decision of the case)

Decision: Affirmed

Majority: Alito, joined by Roberts, Kennedy, Ginsburg, Breyer, Sotomayor, Kagan (Parts I, II & III-A), Thomas (except Part II), Roberts, Thomas, Breyer (Parts III-A, III-C, and IV)

Concurrence: Kennedy (in part), joined by Ginsburg, Sotomayor and Kagan

Concurrence: Thomas (in part)

Justice Alito announced the judgment of the court and delivered the opinion of the court with respect to parts I, II, and III-A, and an opinion with respect to parts III-B, III-C, and IV, in which the Chief Justice, Justice Thomas, and Justice Breyer join.

This case concerns a dance-rock band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage ... or bring ... into contemp[t] or disrepute" any "persons, liv-

ing or dead.” 15 U. S. C. §1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

... Under the Lanham Act, trademarks that are “used in commerce” may be placed on the “principal register,” that is, they may be federally registered. 15 U. S. C. §1051(a)(1). And some marks “capable of distinguishing [an] applicant’s goods or services and not registrable on the principal register ... which are in lawful use in commerce by the owner thereof” may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than two million marks that have active federal certificates of registration. This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce ...

... At issue in this case is one such provision, which we will call “the disparagement clause.” This provision prohibits the registration of a trademark “which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” §1052(a). This clause appeared in the original Lanham Act and has remained the same to this day ...

Simon Tam is the lead singer of “The Slants.” He chose this moniker in order to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity. The group “draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes” and has given its albums names such as “The Yellow Album” and “Slanted Eyes, Slanted Hearts.”

Tam sought federal registration of “THE SLANTS,” on the principal register, but an examining attorney at the PTO rejected the request, applying the PTO’s two part framework and finding that “there is ... a substantial composite of persons who find the term in the applied for mark offensive.” The examining attorney relied in part on the fact that “numerous dictionaries define ‘slants’ or ‘slant-eyes’ as a derogatory or offensive term.” The examining attorney also relied on a finding that “the band’s name has been found offensive numerous times” ...

Tam contested the denial of registration before the examining attorney and before the PTO’s Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause ...

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause “is facially invalid under the Free Speech Clause of the First Amendment.”

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new “government-program” doctrine. We address each of these arguments below.

... At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration ... In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

... The PTO has made it clear that registration does not constitute approval of a mark. *In re Old Glory Condom Corp.*, (1993). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. *Application of National Dist. And Chem. Corp.*, (1962) (Rich, concurring).

... This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. First, license plates have long been used by the States to convey state messages. Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” As explained above, none of these factors are present in this case.

... Trademarks are private, not government, speech.

We next address the Government’s argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law ...

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent ... In other cases, we have regarded tax benefits as comparable to cash subsidies. *Regan v. Taxation With Representation of Wash.*, (1983) [other citations omitted]. The federal registration of a trademark is nothing like the programs at issue in these cases ... The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of \$225–\$600 ...

...

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to “government-program” cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer’s collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

... Our cases use the term “viewpoint” discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement

of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

... For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed "government program" doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, (1980) ...

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.

Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing "under-represented groups" from being "bombarded with demeaning messages in commercial advertising." ... Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer* (1929) (Holmes, dissenting).

The second interest asserted is protecting the orderly flow of commerce ...

A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination ... It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted. The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution ...

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

It is so ordered.

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Iancu v. Brunetti

588 U.S. ____ (2019)

Vote: 7-2

Decision: Affirmed

Majority: Kagan, joined by Thomas, Ginsburg, Alito, Gorsuch and Kavanaugh

Concurrence: Alito

Concur/Dissent: Roberts

Concur/Dissent: Breyer

Concur/Dissent: Sotomayor joined by Breyer

JUSTICE KAGAN DELIVERED THE OPINION OF THE COURT.

... Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of “immoral[] or scandalous” trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT ... But you might read it differently and, if so, you would hardly be alone ... That common perception caused difficulties for Brunetti when he tried to register his mark with the U. S. Patent and Trademark Office (PTO).

... This case involves another of the Lanham Act’s prohibitions on registration—one applying to marks that “[c]onsist[] of or comprise[] immoral[] or scandalous matter.” §1052(a). The PTO applies that bar as a “unitary provision,” rather than treating the two adjectives in it separately. To determine whether a mark fits in the category, the PTO asks whether a “substantial composite of the general public” would find the mark “shocking to the sense of truth, decency, or propriety”; “giving offense to the conscience or moral feelings”; “calling out for condemnation”; “disgraceful”; “offensive”; “disreputable”; or “vulgar.”

Both a PTO examining attorney and the PTO’s Trademark Trial and Appeal Board decided that Brunetti’s mark flunked that test ...

Brunetti then brought a facial challenge to the “immoral or scandalous” bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari.

... If the “immoral or scandalous” bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine ... So the key question becomes: Is the “immoral or scandalous” criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based ... So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together

and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter ...

The facial viewpoint bias in the law results in viewpoint-discriminatory application ...

... But in any event, the “immoral or scandalous” bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

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Student Speech

Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969)

Vote: 7-2

Decision: Reversed

Majority: Fortas, joined by Warren, Douglas, Brennan, White and Marshall

Concurrence: Stewart

Concurrence: White

Dissent: Black

Dissent: Harlan

Justice Fortas delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired — that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers ... It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The court

referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, (1966).

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed without opinion. We granted certiorari.

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. As we shall discuss, the 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 protection 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 *West Virginia v. Barnette* (1943) ... this Court held that, under the First Amendment, the student in public school may not be compelled to salute the flag ... On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

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."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, 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 — this kind of openness — 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 principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. 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 intercommuni-

cation 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 interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

... We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice Stewart, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York* (1968). I continue to hold the view I expressed in that case:

"[A] State may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools ..." in the United States is in ultimate effect transferred to the Supreme Court. The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here, the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to

protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order ...

As I read the Court's opinion, it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech," which is "akin to *pure speech*," and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

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, *cf., e.g., Giboney v. Empire Storage & Ice Co.*, (1949), 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 ...

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 ...

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." ... The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases ...

... This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Wash-

ington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

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Island Trees School District v. Pico

457 U.S. 853 (1982)

Vote: 5-4

Decision: Affirmed

Plurality: Brennan, joined by Marshall, Stevens and Blackmun (all but parts IIA(1))

Concurrence: Blackmun, in part

Concurrence: White, in judgment

Dissent: Burger, joined by Powell, Rehnquist and O'Connor

Dissent: Powell

Dissent: Rehnquist, joined by Burger and Powell

Dissent: O'Connor

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL and JUSTICE STEVENS joined, and in which JUSTICE BLACKMUN joined except for Part II-A-(1).

The principal question presented is whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice President, and the remaining petitioners were Board members. The Board is a state agency charged with responsibility for the operation and administration of the public schools within the Island Trees School District, including the Island Trees High School and Island Trees Memorial Junior High School. Respondents are Steven Pico, Jacqueline Gold, Glenn Yarris, Russell Rieger, and Paul Sochinski. When this suit was brought, Pico, Gold, Yarris, and Rieger were students at the High School, and Sochinski was a student at the Junior High School.

In September, 1975, petitioners Ahrens, Martin, and Hughes attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference, these petitioners obtained lists of books described by Ahrens

as “objectionable,” and by Martin as “improper fare for school students,” ... It was later determined that the High School library contained nine of the listed books, and that another listed book was in the Junior High School library. In February, 1976, at a meeting with the Superintendent of Schools and the Principals of the High School and Junior High School, the Board gave an “unofficial direction” that the listed books be removed from the library shelves and delivered to the Board’s offices so that Board members could read them. When this directive was carried out, it became publicized, and the Board issued a press release justifying its action. It characterized the removed books as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,” and concluded that “[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.” 474 F. Supp. 387, 390 (EDNY 1979).

A short time later, the Board appointed a “Book Review Committee,” consisting of four Island Trees parents and four members of the Island Trees schools staff, to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books’ “educational suitability,” “good taste,” “relevance,” and “appropriateness to age and grade level.” In July, the Committee made its final report to the Board, recommending that five of the listed books be retained and that two others be removed from the school libraries. As for the remaining four books, the Committee could not agree on two, took no position on one, and recommended that the last book be made available to students only with parental approval. The Board substantially rejected the Committee’s report later that month, deciding that only one book should be returned to the High School library without restriction, that another should be made available subject to parental approval but that the remaining nine books should “be removed from elementary and secondary libraries and [from] use in the curriculum.” The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed.

Respondents reacted to the Board’s decision by bringing the present action ... They alleged that petitioners had “ordered the removal of the books from school libraries and proscribed their use in the curriculum because 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.”

Respondents claimed that the Board’s actions denied them their rights under the First Amendment. They asked the court for a declaration that the Board’s actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools’ curricula.

The District Court granted summary judgment in favor of petitioners ... In the court’s view, “the parties substantially agree[d] about the motivation behind the board’s actions,” — namely, 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.”

With this factual premise as its background, the court rejected respondents’ contention that their First Amendment rights had been infringed by the Board’s actions ...

A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, and remanded the action for a trial on respondents' allegations. Each judge on the panel filed a separate opinion. Delivering the judgment of the court, Judge Sifton treated the case as involving "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters," and concluded that petitioners were obliged to demonstrate a reasonable basis for interfering with respondents' First Amendment rights. He then determined that, at least at the summary judgment stage, petitioners had not offered sufficient justification for their action, and concluded that respondents

"should have ... been offered an opportunity to persuade a finder of fact that the ostensible justifications for [petitioners'] actions ... were simply pretexts for the suppression of free speech."

... We granted certiorari.

We emphasize at the outset the limited nature of the substantive question presented by the case before us. Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom ... Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are library books, books that, by their nature, are optional, rather than required, reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the acquisition of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the removal from school libraries of books originally placed there by the school authorities, or without objection from them.

... In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as 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? If we answer either of these questions in the negative, then we must reverse the judgment of the Court of Appeals and reinstate the District Court's summary judgment for petitioners. If we answer both questions in the affirmative, then we must affirm the judgment below. We examine these questions in turn.

The Court has long recognized that local school boards have broad discretion in the management of school affairs. *Meyer v. Nebraska* (1923) [other citations omitted]. We have also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, (1979). We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." ...

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment ...

... In sum, students do not “shed their constitutional rights to freedom of speech or expression at the school-house gate,” ... and therefore local school boards must discharge their “important, delicate, and highly discretionary functions” within the limits and constraints of the First Amendment.

The nature of students’ First Amendment rights in the context of this case requires further examination. *West Virginia Board of Education v. Barnette*, (1943) is instructive. There the Court held that students’ liberty of conscience could not be infringed in the name of “national unity” or “patriotism.” ... Similarly, *Tinker* ... held that students’ rights to freedom of expression of their political views could not be abridged by reliance upon an “undifferentiated fear or apprehension of disturbance” arising from such expression ...

Of course, courts should not “intervene in the resolution of conflicts which arise in the daily operation of school systems” unless “basic constitutional values” are “directly and sharply implicate[d]” in those conflicts ... But we 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 ...

This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution ... the right to receive ideas follows ineluctably from the sender’s First Amendment right to send them ... In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed “in light of the special characteristics of the school environment.” ... But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students ...

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed unfettered discretion to “transmit community values” through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. 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.

In rejecting petitioners’ claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of petitioners to remove books from their libraries. In this inquiry, we enjoy the guidance of several precedents. *West Virginia Board of Education v. Barnette*, (1943) stated:

“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. ... If there are any circumstances which permit an exception, they do not now occur to us.” ...

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, respondents implicitly concede that 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 ... And again, respondents concede that, if it were demonstrated that the removal decision was based solely upon the “educational suitability” of the books in question, then their removal would be “perfectly permissible.” In other words, in respondents’ view, such motivations, if decisive of petitioners’ actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents’ First Amendment rights ...

We now turn to the remaining question presented by this case: do the evidentiary materials that were before the District Court, when construed most favorably to respondents, raise a genuine issue of material fact whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which foreclose summary judgment in favor of petitioners.

Before the District Court, respondents claimed that petitioners’ decision to remove the books “was based on [their] personal values, morals and tastes.” ... Respondents also claimed that petitioners objected to the books in part because excerpts from them were “anti-American.” The accuracy of these claims was partially conceded by petitioners, and petitioners’ own affidavits lent further support to respondents’ claims ... Furthermore, while the Book Review Committee appointed by petitioners was instructed to make its recommendations based upon criteria that appear on their face to be permissible — the books’ “educational suitability,” “good taste,” “relevance,” and “appropriateness to age and grade level,” ... — the Committee’s recommendations that five of the books be retained and that only two be removed were essentially rejected by petitioners, without any statement of reasons for doing so. Finally, while petitioners originally defended their removal decision with the explanation that “these books contain obscenities, blasphemies, brutality, and perversion beyond description,” ... one of the books, *A Reader for Writers*, was removed even though it contained no such language ...

Standing alone, this evidence respecting the substantive motivations behind petitioners’ removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed

established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations ... The record shows that, immediately after petitioners first ordered the books removed from the library shelves, the Superintendent of Schools reminded them that "we already have a policy ... designed expressly to handle such problems," and recommended that the removal decision be approached through this established channel ... But the Board disregarded the Superintendent's advice ... In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc — the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

... Of course, some 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' justifications for their decision: on that issue, it simply cannot be said that there is no genuine issue as to any material fact.

The mandate shall issue forthwith.

Affirmed.

JUSTICE O'CONNOR, dissenting.

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library, so long as it does not also interfere with the right of students to read the material and to discuss it. As JUSTICE REHNQUIST persuasively argues, the plurality's analysis overlooks the fact that, in this case, the government is acting in its special role as educator.

I do not personally agree with the Board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case. I therefore join THE CHIEF JUSTICE's dissent.

Excerpted by Sarah Mason



Bethel School District No. 403 v. Fraser

478 U.S. 675 (1986)

Vote: 7-2

Decision: Reversed

Majority: Burger, joined by White, Powell, Rehnquist and O'Connor

Concurrence: Brennan

Concurrence: Blackmun

Dissent: Marshall

Dissent: Stevens

Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government ... During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's 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 in order to discuss the speech with the class. A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct and

he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech, and sought both injunctive relief and monetary damages ... The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent \$278 in damages, \$12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.* (1969) ...

We granted certiorari. We reverse.

This Court acknowledged in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." ...

The role and purpose of the American public school system were well described by two historians, who stated:

“[P]ublic education must prepare pupils for citizenship in the Republic. ... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”

C. Beard & M. Beard, *New Basic History of the United States* 228 (1968). ...

These fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences ...

The First Amendment guarantees wide freedom in matters of adult public discourse ... It does not follow, however, that, simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school ... As cogently expressed by Judge Newman, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.” *Thomas v. Board of Education, Granville Central School Dist.*, (1979) (opinion concurring in result).

... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers — and indeed the older students — demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students — indeed, to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

This Court’s First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. *Ginsberg v. New York*, (1968).

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language ...

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the 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 towards 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 is wholly inconsistent with the "fundamental values" of public school education ...

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit ...

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

Justice Brennan, concurring in the judgment.

... Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes. To my mind, the most that can be said about respondent's speech — and all that need be said — is that, in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits. Thus, while I concur in the Court's judgment, I write separately to express my understanding of the breadth of the Court's holding.

... If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate. Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that, under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission. Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express ...

... Thus, I concur in the judgment reversing the decision of the Court of Appeals.

Justice Marshall, dissenting.

I agree with the principles that Justice Brennan sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because, in my view, the School District failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied *Tinker v. Des Moines Independent Community School Dist.*, (1969) and concluded that the School District had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment.

... I would affirm the judgment of the Court of Appeals.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Sarah Mason. Licensed under [CC BY-NC-SA](#).



Hazelwood School District v. Kuhlmeier

484 U.S. 260 (1988)

Vote: 5-3

Decision: Reversed

Majority: White, joined by Rehnquist, Stevens, O'Connor and Scalia

Dissent: Brennan, joined by Marshall and Blackmun

Note: At the time of this case, this newspaper still had to be submitted to a printer with sufficient time for printing. Desktop publishing was not yet available or in common use.

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.

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of *Spectrum*, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of *Spectrum*.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

... The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of *Spectrum* was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each *Spectrum* issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred ... The Court of Appeals for the Eighth Circuit reversed ...

We granted certiorari and we now reverse.

... We have nonetheless recognized that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings,” *Bethel School District No. 403 v. Fraser* (1986) and must be “applied in light of the special characteristics of the school environment.” *Tinker*. A school need not tolerate student speech that is inconsistent with its “basic educational mission,” *Fraser*, even though the government could not censor similar speech outside the school ... It is in this context that respondents’ First Amendment claims must be considered.

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO* (1939). Hence, school facilities may be deemed to be public forums only if school authorities have “by policy or by practice” opened those facilities “for indiscriminate use by the general public,” *Perry Education Assn. v. Perry Local Educators’ Assn.* (1983), or by some segment of the public, such as student organizations. *Id.* ... School officials did not evince either “by policy or by practice” any intent to open the pages of Spectrum to “indiscriminate use,” by its student reporters and editors, or by the student body generally. Instead, they “reserve[d] the forum for its intended purpos[e],” as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case.

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 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 ... A school must be able to set high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the “real” world – 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*, or to associate the school with any position other

than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as “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.” *Brown v. Board of Education* (1954).

... [W]e 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.

This standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so “directly and sharply implicate as to require judicial intervention to protect students’ constitutional rights.

We also conclude that 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.” ... 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. These concerns were shared by both of *Spectrum*’s faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student’s name.

... 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.

... Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

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.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a ... forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution. ..." "[A]t the beginning of each school year," the student journalists published a Statement of Policy – tacitly approved each year by school authorities – announcing their expectation that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment. ... Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism."

... In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

... [The Court has never suggested] the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means ...

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrupt[ion of] classwork," *Tinker*. Nor did the censorship fall within the

category that *Tinker* described as necessary to prevent student expression from “inva[ding] the rights of others.” If that term is to have any content, it must be limited to rights that are protected by law.” Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance,” a prospect that would be completely at odds with this Court’s pronouncement that the “undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression.” *Tinker*. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal.

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. Where “[t]he separation of legitimate from illegitimate speech calls for more sensitive tools,” the principal used a paper shredder. 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. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

... Instead of “teach[ing] children to respect the diversity of ideas that is fundamental to the American system,” and “that our Constitution is a living reality, not parchment preserved under glass,” the Court today “teach[es] youth to discount important principles of our government as mere platitudes.” *West Virginia Board of Education v. Barnette* (1943). The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Sarah Mason. Licensed under [CC BY-NC-SA](#).



Morse v. Frederick

551 U.S. 393 (2007)

Vote: 5-4

Decision: Reversed

Majority: Roberts, joined by Scalia, Kennedy, Thomas and Alito

Concurrence: Thomas

Concurrence: Alito, joined by Kennedy

Concur/Dissent: Breyer

Dissent: Stevens, joined by Souter and Ginsburg

Chief Justice Roberts delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal’s actions violated the First Amendment, and that the student could sue the principal for damages.

... We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students’ actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: “BONG HiTS 4 JESUS.” The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No.

5520 states: “The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors. ...” In addition, Juneau School Board Policy No. 5850 subjects “[p]upils who participate in approved social events and class trips” to the same student conduct rules that apply during the regular school program.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner “in the midst of his fellow students, during school hours, at a school-sanctioned activity.” He further explained that Frederick “was not disciplined because the principal of the school ‘disagreed’ with his message, but because his speech appeared to advocate the use of illegal drugs.” The superintendent continued:

“The common-sense understanding of the phrase ‘bong hits’ is that it is a reference to a means of smoking marijuana. Given [Frederick’s] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick’s] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick’s] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school’s educational mission to educate students about the dangers of illegal drugs and to discourage their use.”

Relying on our decision in *Fraser*, the superintendent concluded that the principal’s actions were permissible because Frederick’s banner was “speech or action that intrudes upon the work of the schools.” The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit ... alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney’s fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick’s First Amendment rights ...

The Ninth Circuit reversed. Deciding that Frederick acted during a “school-authorized activit[y],” and “proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use,” the court nonetheless found a violation of Frederick’s First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a “risk of substantial disruption.” ...

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. We resolve the first question against Frederick, and therefore have no occasion to reach the second.

At the outset, we reject Frederick’s argument that this is not a school speech case—as has every other authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse “as an approved social event or class trip,” and the school district’s rules expressly provide that pupils in “approved social events and class trips are subject to district rules for student conduct.” Teachers and administrators were

interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students ... There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

... We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits ..."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." The dissent similarly refers to the sign's message as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid." Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

... Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession.

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

...

... The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black* (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*.

... For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. *Cohen v. California*, (1971). Second, Fraser established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker* ...

...

... The “special characteristics of the school environment,” and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of “undifferentiated fear or apprehension of disturbance” ... The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly “offensive” ... We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing “serious violence to the First Amendment” by authorizing “viewpoint discrimination,” the dissent concludes that “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.” Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting “imminent” lawless action. And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick’s banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent’s contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Stevens, with whom Justice Souter and Justice Ginsburg join, dissenting.

... I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, and second, that deterring drug use by schoolchildren is a valid and terribly important interest. As to the first, I take the Court's point that the message on Frederick's banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS's rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

...

... Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous ...

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use ...

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message ... In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

Original excerpt in Ruthann Robson, *First Amendment: Cases, Controversies, and Contexts*, Published by CALI eLangdell Press. Further excerpted by Sarah Mason. Licensed under [CC BY-NC-SA](#).



Mahanoy Area School District v. B.L.

594 U.S. ____ (2021)

Vote: 8-1

Decision: Affirmed

Majority: Breyer, joined by Roberts, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett

Concurrence: Alito, joined by Gorsuch

Dissent: Thomas

Justice Breyer delivered the opinion of the Court.

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with the reasoning of the Third Circuit panel's majority, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

B. L. (who, together with her parents, is a respondent in this case) was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team.

That weekend, B. L. and a friend visited the Cocoa Hut, a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat “story,” a feature of the application that allows any person in the user’s “friend” group (B. L. had about 250 “friends”) to view the images for a 24 hour period.

The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: “Fuck school fuck softball fuck cheer fuck everything.” ... The second image was blank but for a caption, which read: “Love how me and [another student] get told we need a year of jr before we make varsity but tha[t] doesn’t matter to anyone else?” The caption also contained an upside-down smiley-face emoji.

B.L.’s Snapchat “friends” included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.’s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches “visibly upset” about B. L.’s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.’s subsequent apologies did not move school officials. The school’s athletic director, principal, superintendent, and school board, all affirmed B. L.’s suspension from the team. In response, B. L., together with her parents, filed this lawsuit in Federal District Court.

The District Court found in B. L.’s favor. It first granted a temporary restraining order and a preliminary injunction ordering the school to reinstate B. L. to the cheerleading team. In granting B. L.’s subsequent motion for summary judgment, the District Court found that B. L.’s Snapchats had not caused substantial disruption at the school ... Consequently, the District Court declared that B. L.’s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys’ fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court’s conclusion ... In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of “‘pure speech’” on school property during the school day ... In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would “substantially interfere with the work of the school or impinge upon the rights of other students.” But the Court also said that: “[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantee of freedom of speech.”

Many courts have taken this statement as setting a standard—a standard that allows schools considerable freedom on campus to discipline students for conduct that the First Amendment might otherwise protect. But here,

the panel majority held that this additional freedom did “not apply to off-campus speech,” which it defined as “speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school’s imprimatur.” ... Because B. L.’s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B. L. for engaging in a form of pure speech.

...

The school district filed a petition for certiorari in this Court, asking us to decide “[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.” ... We granted the petition.

We have made clear that students do not “shed their constitutional rights to freedom of speech or expression,” even “at the school house gate.” *Tinker*. But we have also made clear that courts must apply the First Amendment “in light of the special characteristics of the school environment.” *Hazelwood v. Kuhlmeier*, (1988). One such characteristic, which we have stressed, is the fact that schools at times stand in loco parentis, i.e., in the place of parents. *Bethel School Dist. v. Fraser*, (1986).

... Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school’s regulatory interests remain significant in some off-campus circumstances. The parties’ briefs, and those of amici, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B. L. herself and the amici supporting her would redefine the Third Circuit’s off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school’s immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school’s website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones ... And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.’s proposed rule ...

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority’s rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker*’s highly general statement about the nature of a school’s special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student’s age, the nature of the school’s off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as “off campus” speech and whether or how ordinary First Amendment standards must give way off campus to a school’s special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand in loco parentis. The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas."

... Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection ... To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. *Snyder v. Phelps*, (2011).

Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless ... diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community ... The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time ...

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action ... The alleged disturbance here does not meet *Tinker's* demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. One of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school." There is little else, however, that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have previously said, simple "undifferentiated fear or apprehension ... is not enough to overcome the right to freedom of expression." *Tinker*. It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary ...

...

... The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

Excerpted by Sarah Mason



Speech in College

Healy v. James

408 U.S. 169 (1972)

Vote: 9-0

Decision: Reversed

Majority: Powell, joined by Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Rehnquist

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, arising out of a denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), presents this Court with questions requiring the application of well established First Amendment principles ...

We mention briefly at the outset the setting in 1969-1970. A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while, at others, files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period. Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered. Fortunately, with the passage of time, a calmer atmosphere and greater maturity now pervade our campuses. Yet it was in this climate of earlier unrest that this case arose.

Petitioners are students attending Central Connecticut State College (CCSC), a state-supported institution of higher learning. In September, 1969, they undertook to organize what they then referred to as a "local chapter" of SDS. Pursuant to procedures established by the College, petitioners filed a request for official recognition as a campus organization with the Student Affairs Committee, ... The Committee, while satisfied that the statement of purposes was clear and unobjectionable on its face, exhibited concern over the relationship between the proposed local group and the National SDS organization. In response to inquiries, representatives of the proposed organization stated that they would not affiliate with any national organization and that their group would remain "completely independent."

... By a vote of six to two, the Committee ultimately approved the application and recommended to the President of the College, Dr. James, that the organization be accorded official recognition ...

Several days later, the President rejected the Committee's recommendation and issued a statement indicating that petitioners' organization was not to be accorded the benefits of official campus recognition ... He found

that the organization's philosophy was antithetical to the school's policies, and that the group's independence was doubtful. He concluded that approval should not be granted to any group that "openly repudiates" the College's dedication to academic freedom.

Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and — most importantly — nonrecognition barred them from using campus facilities for holding meetings ...

Their efforts to gain recognition having proved ultimately unsuccessful and having been made to feel the burden of nonrecognition, petitioners resorted to the courts. They filed a suit in the United States District Court for the District of Connecticut, seeking declaratory and injunctive relief against the President of the College, other administrators, and the State Board of Trustees. Petitioners' primary complaint centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition ... the judge ruled that petitioners had been denied procedural due process because the President had based his decision on conclusions regarding the applicant's affiliation which were outside the record before him ...

Upon reviewing the hearing transcript and exhibits, the President reaffirmed his prior decision to deny petitioners recognition as a campus organization ...

After the President's second statement issued, the case then returned to the District Court, where it was ordered dismissed ...

Petitioners appealed to the Court of Appeals for the Second Circuit where, by a two-to-one vote, the District Court's judgment was affirmed ... This Court granted certiorari and, for the reasons that follow, we conclude that the judgments of the courts below must be reversed, and the case remanded for reconsideration.

At the outset, we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.

... And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." ... because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large ...

... Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. *Baird v. State Bar of AZ*, (1971) [other citations omitted]. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purpose.

... Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

... The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the College. While petitioners have not challenged the procedural requirement that they file an application in conformity with the rules of the College, they do question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National SDS ... But, apart from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. *Law Students Civil Rights Research Council v. Wadmond*, (1971) [other citations omitted]. It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which, under circumstances requiring the safeguarding of that interest, may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action ...

These fundamental errors — discounting the existence of a cognizable First Amendment interest and misplacing the burden of proof — require that the judgments below be reversed. But we are unable to conclude that no basis exists upon which nonrecognition might be appropriate. Indeed, based on a reasonable reading of the ambiguous facts of this case, there appears to be at least one potentially acceptable ground for a denial of recognition. Because of this ambiguous state of the record, we conclude that the case should be remanded, and, in an effort to provide guidance to the lower courts upon reconsideration, it is appropriate to discuss the several bases of President James' decision. Four possible justifications for nonrecognition, all closely related, might be derived from the record and his statements. Three of those grounds are inadequate to substantiate his decision: a fourth, however, has merit.

...

... Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization ... In these cases, it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *US v. Robel*, (1967). The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.

... Not only did petitioners proclaim their complete independence from this organization, but they also indicated that they shared only some of the beliefs its leaders have expressed. On this record, it is clear that the relationship was not an adequate ground for the denial of recognition ...

Having concluded that petitioners were affiliated with, or at least retained an affinity for, National SDS, President James attributed what he believed to be the philosophy of that organization to the local group ...

... The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition.

As the litigation progressed in the District Court, a third rationale for President James' decision ... began to emerge ... that he based rejection on a conclusion that this particular group would be a "disruptive influence at CCSC." ...

... The "Student Bill of Rights" at CCSC, upon which great emphasis was placed by the President, draws precisely this distinction between advocacy and action. It purports to impose no limitations on the right of college student organizations "to examine and discuss *all* questions of interest to them." (Emphasis supplied.) But it also states that students have no right (1) "to deprive others of the opportunity to speak or be heard," (2) "to invade the privacy of others," (3) "to damage the property of others," (4) "to disrupt the regular and essential operation of the college," or (5) "to interfere with the rights of others." The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command, the President's decision should be affirmed.

The record, however, offers no substantial basis for that conclusion ...

These same references in the record to the group's equivocation regarding how it might respond to "issues of violence" and whether it could ever "envision ... interrupting a class" suggest a fourth possible reason why recognition might have been denied to these petitioners. These remarks might well have been read as announcing petitioners' unwillingness to be bound by reasonable school rules governing conduct ... The regulation, carefully differentiating between advocacy and action, is a reasonable one, and petitioners have not questioned it directly. Yet their statements raise considerable question whether they intend to abide by the prohibitions contained therein.

... Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights ...

We think the above discussion establishes the appropriate framework for consideration of petitioners' request for campus recognition. Because respondents failed to accord due recognition to First Amendment principles, the judgments below approving respondents' denial of recognition must be reversed. Since we cannot conclude from this record that petitioners were willing to abide by reasonable campus rules and regulations, we order the case remanded for reconsideration. We note, in so holding, that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others.

Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.

Reversed and remanded.

Excerpted by Sarah Mason



Papish v. Board of Curators

410 U.S. 667 (1973)

Vote: 6-3

Decision: Reversed

Majority: Douglas, Brennan, Stewart, White, Marshall, Powell

Dissent: Rehnquist, joined by Burger, Blackmun

Per Curiam

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper “containing forms of indecent speech” in violation of a bylaw of the Board of Curators ... The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover, the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: ” ... With Liberty and Justice for All.” Secondly, the issue contained an article entitled “M___f___ Acquitted,” which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as “Up Against the Wall, M___f___.”

Following a hearing, the Student Conduct Committee found that petitioner had violated ... the General Standards of Student Conduct, which requires students “to observe generally accepted standards of conduct,” and specifically prohibits “indecent conduct or speech.” Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester ...

After exhausting her administrative review alternatives within the University, petitioner brought an action for declaratory and injunctive relief ... She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief ... and the Court of Appeals affirmed, one judge dissenting ... Rehearing en banc was denied by an equally divided vote of all the judges in the Eighth Circuit.

... This case was decided several days before we handed down *Healy v. James*, 408 U. S. 169 (1972), in which, while recognizing a state university’s undoubted prerogative to enforce reasonable rules governing student conduct, we reaffirmed that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” *Tinker v. Des Moines Independent School Dist.*, (1969). We think *Healy* makes it clear that the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of “conventions of decency.” Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. *Kois v. Wisconsin*, (1972) [other citations omitted].

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University’s action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly, the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Reversed and remanded.

Excerpted by Sarah Mason



Rosenberger v. Rector and Visitors of the University of Virginia

515 U.S. 819 (1995)

Vote: 5-4

Decision: Reversed

Majority: Kennedy, joined by Rehnquist, O’Connor, Scalia, Kennedy, Thomas

Dissent: Souter, joined by Ginsburg, Breyer, Stevens

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University’s regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

... Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a “Contracted Independent Organization” (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements ... A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO ... CIO’s enjoy access to University facilities, including meeting rooms and computer terminals.

A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO’s “should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations’ contracts or other acts or omissions, or that the University approves of the organizations’ goals or activities.”

All CIO’s may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities ... The Guidelines require that it be administered “in a manner consistent with the educational purpose of the University as well as with state and federal law.” ... The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs ...

... The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses ...

Petitioners’ organization, Wide Awake Productions (WAP) ... Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established “[t]o publish a magazine of philosophical and religious expression,” “[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,” and “[t]o provide a unifying focus for Christians of multicultural backgrounds.” ... WAP publishes *Wide Awake: A Christian Perspective at the University of Virginia*. The paper’s Christian viewpoint was evident from the first issue, in which its editors wrote that the journal “offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia.” ...

WAP had acquired CIO status soon after it was organized.

This is an important consideration in this case, for had it been a “religious organization,” WAP would not have been accorded CIO status ... At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF to pay its printer \$5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP’s request on the ground that *Wide Awake* was a “religious activity” within the meaning of the Guidelines ...

Having no further recourse within the University structure, WAP, Wide Awake, and three of its editors and members filed suit in the United States District Court for the Western District of Virginia, challenging the SAF's action ... They alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law ...

On cross-motions for summary judgment, the District Court ruled for the University, holding that denial of SAF support was not an impermissible content or viewpoint discrimination against petitioners' speech, and that the University's Establishment Clause concern over its "religious activities" was a sufficient justification for denying payment to third-party contractors ...

The United States Court of Appeals for the Fourth Circuit, in disagreement with the District Court, held that the Guidelines did discriminate on the basis of content ... The Court of Appeals affirmed the judgment of the District Court nonetheless, concluding that the discrimination by the University was justified by the "compelling interest in maintaining strict separation of church and state." ... We granted certiorari.

... 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. *Cornelius v. NAACP Legal Defense Fund*, (1985) [other citations omitted]. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," *Cornelius, supra* [other citations omitted]. 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. *Perry Ed Assn. v. Perry Local Educators Assn.*, (1983).

... We conclude, nonetheless, that here, as in *Lamb's Chape. V. Center Moriches Union Free School Dist.*, (1993), viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas ...

... 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 ... 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. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity ...

... Based on the principles we have discussed, 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 ...

... The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. 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.

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Board of Regents of the University of Wisconsin System v. Southworth

529 U.S. 217 (2000)

Vote: 9-0

Decision: Reversed

Majority: Kennedy, joined by Rehnquist, Stevens, O'Connor, Scalia, Souter, Thomas, Ginsburg, Breyer

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

For the second time in recent years we consider constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university. Respondents are a group of students at the University of Wisconsin. They brought a First Amendment challenge to a mandatory student activity fee imposed by petitioner Board of Regents of the University of Wisconsin and used in part by the University to support student organizations engaging in political or ideological speech. Respondents object to the speech and expression of some of the student organizations. Relying upon our precedents which protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. The University contends that its mandatory student activity fee and the speech which it supports are appropriate to further its educational mission.

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, we remand for further proceedings.

It seems that since its founding the University has required full-time students enrolled at its Madison campus to pay a nonrefundable activity fee ... For the 1995-1996 academic year, when this suit was commenced, the activity fee amounted to \$331.50 per year. The fee is segregated from the University's tuition charge. Once collected, the activity fees are deposited by the University into the accounts of the State of Wisconsin ... The fees are drawn upon by the University to support various campus services and extracurricular student activities.

...

The allocable portion of the fee supports extracurricular endeavors pursued by the University's registered student organizations or RSO's. To qualify for RSO status students must organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus.

...

RSO's may obtain a portion of the allocable fees in one of three ways. Most do so by seeking funding from the Student Government Activity Fund (SGAF), administered by the ASM [Associated Students of Madison] ... an RSO can apply for funding from the General Student Services Fund (GSSF), administered through the ASM's finance committee ...

A student referendum provides a third means for an RSO to obtain funding ... While the record is sparse on this feature of the University's program, the parties inform us that the student body can vote either to approve or to disapprove an assessment for a particular RSO.

With respect to [the first two methods], the ASM or its finance committee makes the initial funding decisions ... Approval appears *pro forma* ... the student government "voluntarily views the referendum as binding." ...

...

The University's policy establishes purposes for which fees may not be expended ...

The University's Student Organization Handbook has guidelines for regulating the conduct and activities of RSO's. In addition to obligating RSO's to adhere to the fee program's rules and regulations, the guidelines establish procedures authorizing any student to complain to the University that an RSO is in noncompliance. An extensive investigative process is in place to evaluate and remedy violations. The University's policy includes a range of sanctions for noncompliance, including probation, suspension, or termination of RSO status.

...

In March 1996, respondents, each of whom attended or still attend the University's Madison campus, filed suit ... that imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment. They contended the University must grant them the choice not to fund those RSO's that engage in political and ideological expression offensive to their personal beliefs.

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. *Rust v. Sullivan*, (1991) [other citations omitted]. The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

...

The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who

alone give it purpose and content in the course of their extracurricular endeavors ... This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech.

... If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged ... become implicated. It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her. Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech ...

...

Just as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs ...

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. *Rosenberger v. Rector and Visitors of U of VA.*, (1995). 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 ...

... The judgment of the Court of Appeals is reversed ...

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Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez

561 U.S. 661 ([2010](#))

Vote: 5-4

Decision: Affirmed

Majority: Ginsburg, joined by Stevens, Kennedy, Breyer, Sotomayor

Concurrence: Stevens

Concurrence: Kennedy

Dissent: Alito, joined by Roberts, Scalia, Thomas

Justice Ginsburg delivered the opinion of the Court.

In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints. This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program ...

... Through its "Registered Student Organization" (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status.

... Critical here, all RSOs must undertake to comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students."

... Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." ...

... CLS chapters must adopt bylaws that, inter alia, require members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in "unrepentant homosexual conduct." CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. Several days later, the Law School rejected the application; CLS's bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.

... If CLS instead chose to operate outside the RSO program, Hastings stated, the school "would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities." CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events ...

Refusing to alter its bylaws, CLS did not obtain RSO status. It did, however, operate independently during the 2004-2005 academic year ...

On October 22, 2004, CLS filed suit against various Hastings officers and ... Its complaint alleged that Hastings' refusal to grant the organization RSO status violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief.

On cross-motions for summary judgment, the U. S. District Court for the Northern District of California ruled in favor of Hastings. The Law School's all-comers condition on access to a limited public forum, the court held, was both reasonable and viewpoint neutral, and therefore did not violate CLS's right to free speech.

Nor, in the District Court's view, did the Law School impermissibly impair CLS's right to expressive association ...

The court also rejected CLS's Free Exercise Clause argument ...

On appeal, the Ninth Circuit affirmed [in a brief opinion]. We granted certiorari and now affirm the Ninth Circuit's judgment ...

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Def. Fund*, (1985), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced "through ... significantly less restrictive [means]." *Roberts v. US Jaycees*, (1984). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." ... Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." ...

... First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments, apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked ... When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may “reserv[e] [them] for certain groups.” *Rosenberger v. Rector and Visitors of the University of Virginia*, (1995)

An example sharpens the tip of this point: Schools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents. The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to “confine a [speech] forum to the limited and legitimate purposes for which it was created.”

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out ...

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition ...

... Our inquiry is shaped by the educational context in which it arises: “First Amendment rights,” we have observed, “must be analyzed in light of the special characteristics of the school environment.” *Widmar v. Vincent*, (1981).

A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, (2002).

With appropriate regard for school administrators' judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy “ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students.” ... RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of belief but forbid discrimination due to status ... But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? ...

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." ...

... Finally, CLS asserts (and the dissent repeats) that the Law School lacks any legitimate interest—let alone one reasonably related to the RSO forum's purposes—in urging "religious groups not to favor co-religionists for purposes of their religious activities." CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership.

We next consider whether Hastings' all-comers policy is viewpoint neutral.

... It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers ...

... Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS' free-speech and expressive-association claims.

... For the foregoing reasons, we affirm the Court of Appeals' ruling that the all-comers policy is constitutional and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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Campaign Finance and Speech

Buckley v. Valeo

424 U.S. 1 (1976)

Vote: 8-0

Decision: Reversed in part and affirmed in part

Majority: *Per curiam*, joined by Brennan, Stewart, Powell; Marshall (all but I-C-2); Blackmun (all but I-B); Rehnquist (all but III-B-1); Burger (parts I-C and IV (except as it accords *de facto* validity for the Commission's past acts)); White (part III)

Concur/dissent: Burger

Concur/dissent: White

Concur/dissent: Marshall

Concur/dissent: Blackmun

Concur/dissent: Rehnquist

Not participating: Stevens

PER CURIAM.

These appeals present constitutional challenges to the key provisions of the Federal Election Campaign Act of 1971 (Act), and related provisions of the Internal Revenue Code of 1954, all as amended in 1974 ... The complaint sought both a declaratory judgment that the major provisions of the Act were unconstitutional and an injunction against enforcement of those provisions ...

In this Court, appellants argue that the Court of Appeals failed to give this legislation the critical scrutiny demanded under accepted First Amendment and equal protection principles. In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money. Further, they argue that the reporting and disclosure provisions of the Act unconstitutionally impinge on their right to freedom of association ...

At the outset, we must determine whether the case before us presents a "case or controversy" within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not "cases or controversies." *Aetna Life Ins. Co. v. Haworth*, (1937) ...

The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case. Thus, the critical constitutional questions presented here go not to the basic power

of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment ...

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, (1957) ...

In upholding the constitutional validity of the Act's contribution and expenditure provisions on the ground that those provisions should be viewed as regulating conduct, not speech, the Court of Appeals relied upon *United States v. O'Brien*, (1968) ... We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment. *See Bigelow v. Virginia*, (1975) ...

Nor can the Act's contribution and expenditure limitations be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in such decisions as *Cox v. Louisiana*, *supra*; *Adderley v. Florida*, (1966); and *Kovacs v. Cooper*, (1949). Those cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication ... The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed ...

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor ...

The over-all effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression ...

In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions. ...

Appellants contend that the \$1,000 contribution ceiling unjustifiably burdens First Amendment freedoms, employs overbroad dollar limits, and discriminates against candidates opposing incumbent officeholders and against minor party candidates in violation of the Fifth Amendment. We address each of these claims of invalidity in turn ...

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 ...

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 ... To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one ...

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 ...

The Act's \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions — the narrow aspect of political association where the actuality and potential for corruption have been identified — 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 ...

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 ...

[Another] claim is that the \$1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for state-wide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation ...

Apart from these First Amendment concerns, appellants argue that the contribution limitations work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face ...

There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major party challengers to incumbents ...

In view of these considerations, we conclude that the impact of the Act's \$1,000 contribution limitation on major party challengers and on minor party candidates does not render the provision unconstitutional on its face.

Section 608(b)(2) permits certain committees, designated as "political committees," to contribute up to \$5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee ... for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office. Appellants argue that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of *bona fide* groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees.

The Act excludes from the definition of contribution "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee ..."

If, as we have held, the basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates ...

...

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 ... 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.

Second, quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions ... Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

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 the reasons stated, we conclude that § 608(e)(1)'s independent expenditure limitation is unconstitutional under the First Amendment ...

The Act also sets limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." § 608(a)(1) ...

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 ...

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 campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns ... [T]he mere growth in the cost of federal election campaigns, in and of itself, provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people — individually, as citizens and candidates, and collectively, as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign.

For these reasons, we hold that § 608(c) is constitutionally invalid ...

Unlike the limitations on contributions and expenditures ... the disclosure requirements of the Act ... are not challenged by appellants as *per se* unconstitutional restrictions on the exercise of First Amendment freedoms of speech and association ...

Unlike the over-all limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. *E.g., Gibson v. Florida Legislative Comm.*, (1963) ...

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama*, we have required that the subordinating interests of the State must survive exacting scrutiny ...

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office ...

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return ...

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests. In determining whether these interests are sufficient to justify the requirements, we must look to the extent of the burden that they place on individual rights.

It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute ... [W]e note and agree with appellants’ concession that disclosure requirements — certainly in most applications — appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist. Appellants argue, however, that the balance tips against disclosure when it is required of contributors to certain parties and candidates. We turn now to this contention ...

Appellants contend that the Act’s requirements are overbroad insofar as they apply to contributions to minor parties and independent candidates because the governmental interest in this information is minimal, and the danger of significant infringement on First Amendment rights is greatly increased ...

It is true that the governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent. Major parties encompass candidates of greater diversity. In many situations, the label “Republican” or “Democrat” tells a voter little ...

The Government’s interest in deterring the “buying” of elections and the undue influence of large contributors on officeholders also may be reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious. But a minor party sometimes can play a significant role in an election. Even when a minor party candidate has little or no chance of winning, he may be encouraged by major party interests in order to divert votes from other major party contenders ...

There could well be a case ... where the threat to the exercise of First Amendment rights is so serious, and the state interest furthered by disclosure so insubstantial, that the Act’s requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort ... At best they offer the testimony of several minor party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged ...

...

We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim ...

Where it exists, the type of chill and harassment identified in *NAACP v. Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases. We therefore conclude that a blanket exemption is not required ...

Section 434(e) requires “[e]very person (other than a political committee or candidate) who makes contributions or expenditures” aggregating over \$100 in a calendar year “other than by contribution to a political committee or candidate” to file a statement with the Commission ... Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.

In considering this provision, we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization’s members to advocate their personal points of view in the most effective way.

...

We have found that § 608(e)(1) unconstitutionally infringes upon First Amendment rights. If the sole function of § 434(e) were to aid in the enforcement of that provision, it would no longer serve any governmental purpose.

But the two provisions are not so intimately tied. The legislative history on the function of § 434(e) is bare, but it was clearly intended to stand independently of § 608(e)(1) ... The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act ...

In its effort to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights ...

...

§ 434(e), as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate ...

Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced ...

The Court found the State's interest insufficient to justify the restrictive effect of the statute. The burden imposed by § 434(e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view ...

Appellants' third contention, based on alleged overbreadth, is that the monetary thresholds in the recordkeeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence ...

In summary, we find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act ...

...

In summary, we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. 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 "Officers 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.

In No. 75-436, the judgment of the Court of Appeals is affirmed in part and reversed in part. The judgment of the District Court in No. 75-437 is affirmed. The mandate shall issue forthwith, except that our judgment is stayed, for a period not to exceed 30 days, insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act.

So ordered.

Excerpted by Alexandria Metzdorf



First Nat'l Bank of Boston v. Bellotti

435 U.S. 765 (1978)

Vote: 5-4

Decision: Reversed

Majority: Powell, joined by Burger, Stewart, Blackmun, Stevens

Concurrence: Burger

Dissent: White, joined by Brennan, Marshall

Dissent: Rehnquist

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits ... We now reverse ...

Appellants wanted to spend money to publicize their views on a proposed constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976. The amendment would have permitted the legislature to impose a graduated tax on the income of individuals. After appellee, the Attorney General of Massachusetts, informed appellants that he intended to enforce § 8 against them, they brought this action seeking to have the statute declared unconstitutional ...

Appellants argued that § 8 violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution. They prayed that the statute be declared unconstitutional on its face and as it would be applied to their proposed expenditures ...

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 abridges expression that the First Amendment was meant to protect. We hold that it does ...

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation, rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual ...

The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection. We turn now to that question ...

[A]ppellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves, and the court below apparently accepted the “materially affecting” theory as the conceptual common denominator between appellee’s position and the precedents of this Court. It is true that the “materially affecting” requirement would have been satisfied in the Court’s decisions affording protection to the speech of media corporations and corporations otherwise in the business of communication or entertainment, and to the commercial speech of business corporations ... But the effect on the business of the corporation was not the governing rationale in any of these decisions. None of them mentions, let alone attributes significance to, the fact that the subject of the challenged communication materially affected the corporation’s business ...

We thus find no support in the First or Fourteenth Amendment, 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, to the satisfaction of a court, a material effect on its business or property. The “materially affecting” requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it 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 ...

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. *Police Dept. of Chicago v. Mosley*, (1972). 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 ... Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests ...

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 ...

... Appellee ... advances two principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process, and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation.

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation 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. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating, rather than serving, First Amendment interests, these arguments would merit our consideration. *Cf. Red Lion Broadcasting Co. v. FCC*, (1969). 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. *Cf. Wood v. Georgia*, (1962). Nor 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; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: the Constitution "protects expression which is eloquent no less than that which is unconvincing." *Kingsley Int'l Pictures Corp. v. Regents*, (1959) ...

Because that portion of § 8 challenged by appellants 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.

Excerpted by Alexandria Metzdorf



Citizens Against Rent Control v. Berkeley

454 U.S. 290 (1981)

Vote: 8-1

Decision: Reversed

Majority: Burger, joined by Brennan, Powell, Rehnquist, Stevens

Concurrence: Marshall

Concurrence: Rehnquist

Concurrence: Blackmun, O'Connor

Dissent: White

CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellant Citizens Against Rent Control is an unincorporated association formed to oppose a ballot measure at issue in the April 19, 1977, election ... To make its views on the ballot measure known, Citizens Against Rent Control raised more than \$108,000 from approximately 1,300 contributors. It accepted nine contributions over the \$250 limit. Those nine contributions totaled \$20,850, or \$18,600 more than if none of the contributions exceeded \$250. Pursuant to § 604 of the ordinance, appellee Berkeley Fair Campaign Practices Commission, 20 days before the election, ordered appellant Citizens Against Rent Control to pay \$18,600 into the city treasury.

Two weeks before the election, Citizens Against Rent Control sought and obtained a temporary restraining order prohibiting enforcement of §§ 602 and 604 ...

The California Supreme Court majority announced that it would strictly scrutinize § 602. It concluded that the section furthered compelling governmental interests because it ensured that special interest groups could not “corrupt” the initiative process by spending large amounts to support or oppose a ballot measure. Such corruption, the court found, could produce apathetic voters; these governmental interests were held to outweigh the First Amendment interests infringed upon. Finally, it concluded that § 602 accomplished its goal by the least restrictive means available ...

We noted probable jurisdiction ... and we reverse ...

Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* ...

Federal Courts of Appeals have recognized that *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures* ...

Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is, beyond question, a very significant form of political expression. As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny ... In addition, the record in this case does not

support the California Supreme Court's conclusion that § 602 is needed to preserve voters' confidence in the ballot measure process. It is clear, therefore, that § 602 does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.

Apart from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, § 602 imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees. As we have noted, an individual may make expenditures without limit under § 602 on a ballot measure, but may not contribute beyond the \$250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure.

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees, there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions, which, in turn, limits expenditures, plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.

A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. The restraint imposed by the Berkeley ordinance on rights of association and, in turn, on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment. Accordingly, the judgment of the California Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Excerpted by Alexandria Metzdorf



FEC v. Beaumont

539 U.S. 146 (2003)

Vote: 7-2

Decision: Reversed

Majority: Souter, joined by Rehnquist, Stevens, O'Connor, Ginsburg, Breyer

Concurrence: Kennedy

Dissent: Thomas, joined by Scalia

JUSTICE SOUTER delivered the opinion of the Court.

Since 1907, federal law has barred corporations from contributing directly to candidates for federal office. We hold that applying the prohibition to nonprofit advocacy corporations is consistent with the First Amendment ...

Respondents are a corporation known as North Carolina Right to Life, Inc., three of its officers, and a North Carolina voter (here, together, NCRL), who have sued the Federal Election Commission, the independent agency set up to “administer, seek to obtain compliance with, and formulate policy with respect to” the federal electoral laws. NCRL challenges the constitutionality of § 441b and the FEC’s regulations implementing that section, 11 CFR §§ 114.2(b), 114.10 (2003), but only so far as they apply to NCRL ... NCRL has made contributions and expenditures in connection with state elections, but not federal, owing to 2 U. S. C. § 441b. Instead, it has established a PAC, the North Carolina Right to Life, Inc., Political Action Committee, which has contributed to federal candidates.

Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations’ potentially “deleterious influences on federal elections,” which we have canvassed a number of times before. *US v. Automobile Workers*, (1957) ...

[O]ur cases on campaign finance regulation represent respect for the “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation ...” And we have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages. *Buckley v. Valeo*, (1976) ...

Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of “careful legislative adjustment ...”

NCRL cannot prevail, then, simply by arguing that a ban on an advocacy corporation’s direct contributions is bad tailoring. NCRL would have to demonstrate that the law violated the First Amendment in allowing contributions to be made only through its PAC and subject to a PAC’s administrative burdens ... There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Excerpted by Alexandria Metzdorf

Citizens United v. FEC

558 U.S. 310 (2010)

Vote: 5-4

Decision: Reversed

Majority: Kennedy, joined by Roberts, Scalia, Alito; Thomas (all but Part IV); Stevens, Ginsburg, Breyer, Sotomayor (Part IV)

Concurrence: Roberts, joined by Alito

Concurrence: Scalia, joined by Alito; Thomas (in part)

Concur/dissent: Stevens, joined by Ginsburg, Breyer, Sotomayor

Concur/dissent: Thomas

Justice Kennedy delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. 2 U. S. C. §441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*, (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, (1990). *Austin* had held that political speech may be banned based on the speaker’s corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that “*Austin* was a significant departure from ancient First Amendment principles,” *Federal Election Comm’n v. Wisconsin Right to Life, Inc*, (2007) (*WRTL*) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us ...

Citizens United is a nonprofit corporation [and] has an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie ...* It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton ...

In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. *Id.*, at 26a–27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

[F]ederal law [prohibits] corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U. S. C. §441b (2000 ed.). [The Bipartisan Campaign Reform Act of 2002 (BCRA)] amended §441b to prohibit any "electioneering communication" as well. An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election ... Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes ... The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation ...

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by §441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under §437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) §441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements, BCRA §§201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie ... We noted probable jurisdiction ...

Citizens United contends that §441b does not cover *Hillary*, as a matter of statutory interpretation, because the film does not qualify as an "electioneering communication." Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a "cable ... communication" that "refer[red] to a clearly identified candidate for Federal office" and that was made within 30 days of a primary election. Citizens United, however, argues that *Hillary* was not "publicly distributed," because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household—not 50,000 or more persons ...

The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area ... Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide ... Thus, *Hillary* could have been received by 50,000 persons or more ... Section 441b covers *Hillary*.

Citizens United next argues that §441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that §441b(b)(2)'s definition of an "electioneering communication" was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy" for or against a specific candidate ... *WRTL* then found an unconstitutional application of §441b where the speech was not "express advocacy or its functional equivalent." (opinion of Roberts, C. J.) ...

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency ...

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events ..." We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President ...

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy ...

Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us ... Citizens United's argument that *Austin* should be overruled is ... "a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment ..."

In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of §441b. Any other course of decision would prolong the substantial, nation-wide chilling effect caused by §441b's prohibitions on corporate expenditures ...

[The statute] may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. *Near v. Minnesota ex rel. Olson*, (1931). As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. See 2 U. S. C. §437f; 11 CFR §112.1. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit. See *Thomas v. Chicago Park Dist.*, (2002) [other citations omitted] ...

[T]he FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. *Thornhill v. Alabama*, (1940). For these reasons we find it necessary to reconsider *Austin* ...

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak ... A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations ...

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, (1976) (*per curiam*). Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process ...

[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL* (opinion of Roberts, C. J.) ... [T]he quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here ...

[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each ...

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion ...

The Court has recognized that First Amendment protection extends to corporations ... This protection has been extended by explicit holdings to the context of political speech. *Grosjean v. American Press Co.*, (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection “simply because its source is a corporation.” *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, (1986) (plurality opinion) ...

[T]he *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas ...”

In its defense of the corporate-speech restrictions in §441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*’s holding that corporate expenditure restrictions are constitutional: an anticorruption interest (Stevens, J., concurring), and a shareholder-protection interest (Brennan, J., concurring). We consider the three points in turn ...

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form ... This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure ...

The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity ... Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” This does not suffice, however, to allow laws prohibiting speech.” It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.” (Scalia, J., dissenting) ...

Austin’s antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations ... Media corporations are now exempt from §441b’s ban on corporate expenditures ... Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public’s support” for those views. Thus, under the Government’s reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media cor-

porations and those which are not ... With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views ... This differential treatment cannot be squared with the First Amendment ...

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves ...

For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits ...

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo*," and that "the scope of such pernicious practices can never be reliably ascertained." The practices *Buckley* noted would be covered by bribery laws ... if a *quid pro quo* arrangement were proved ...

The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States ... For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption ...

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption ...

[I]t must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on "the *quid pro quo* interest, the corruption interest or the shareholder interest," and not *Austin's* expressed antidistortion rationale ... When neither party defends the reasoning of a precedent, the principle

of adhering to that precedent through *stare decisis* is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that traces back to the *Automobile Workers* Court's flawed historical account of campaign finance laws ...

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws ... Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials ...

Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations ...

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203's extension of §441b's restrictions on corporate independent expenditures ... The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin* ... and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled ...

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell*, (opinion of Kennedy, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U. S. C. §441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



McCutcheon v. FEC

572 U.S. 185 (2010)

Vote: 5-4

Decision: Reversed

Plurality: Roberts, joined by Scalia, Kennedy, Alito

Concurrence: Thomas (in judgment)

Dissent: Breyer, joined by Ginsburg, Sotomayor, Kagan

Chief Justice Roberts announced the judgment of the Court and delivered an opinion, in which Justice Scalia, Justice Kennedy, and Justice Alito join.

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign. This case is about the last of those options ...

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access ... are not corruption.” *Citizens United v. Federal Election Comm’n*, (2010). They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns ...

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. 2 U. S. C. §441a(a)(1). The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. §441a(a)(3).

This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment ...

[The amended FECA act contains base contribution limits for various types of donors including individuals and PACs.]

The base limits apply with equal force to contributions that are “in any way earmarked or otherwise directed through an intermediary or conduit” to a candidate. §441a(a)(8). If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate ...

The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits ...

In the 2011–2012 election cycle, appellant Shaun McCutcheon contributed a total of \$33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute \$1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of \$27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including \$25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future ...

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U. S. District Court for the District of Columbia ... The three-judge District Court denied appellants’ motion for a preliminary injunction and granted the Government’s motion to dismiss. Assuming that the base limits appropriately served the Government’s anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits ...

McCutcheon and the RNC appealed directly to this Court, as authorized by law. 28 U. S. C. §1253. In such a case, “we ha[ve] no discretion to refuse adjudication of the case on its merits,” *Hicks v. Miranda*, (1975), and accordingly we noted probable jurisdiction ...

The First Amendment “is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” *Cohen v. California*, (1971). As relevant here, the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association ... When an individual contributes money to a candidate, he exercises both of those rights: The contribution “serves as a general expression of support for the candidate and his views” and “serves to affiliate a person with a candidate.”

Buckley acknowledged that aggregate limits at least diminish an individual’s right of political association ... But the Court characterized that restriction as a “quite modest restraint upon protected political activity ...” We cannot agree with that characterization. An aggregate limit on how many candidates and committees an individual may support through contributions is not a “modest restraint” at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption ... [T]he limits deny the individual all ability to exercise

his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.

It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for “robustly exercis[ing]” his First Amendment rights. *Davis v. Federal Election Comm’n*, (2008).

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate ... Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening ...

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to “level the playing field,” or to “level electoral opportunities,” or to “equaliz[e] the financial resources of candidates ...” The First Amendment prohibits such legislative attempts to “fine-tun[e]” the electoral process, no matter how well intentioned ...

[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—“quid pro quo” corruption. As *Buckley* explained, Congress may permissibly seek to rein in “large contributions [that] are given to secure a political quid pro quo from current and potential office holders ...”

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner “influence over or access to” elected officials or political parties. *McConnell v. Federal Election Comm’n*, (2003) (Kennedy, J., concurring in judgment in part and dissenting in part). And because the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access ...

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entertainment Group, Inc.*, (1996). Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing quid pro quo corruption.

The difficulty is that once the aggregate limits kick in, they ban all contributions of any amount. But Congress's selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits ...

[T]he aggregate limits violate the First Amendment because they are not “closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley*. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ ... that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.” *Board of Trustees of State Univ. of N. Y. v. Fox*, (1989) (quoting *In re R. M. J.*, (1982)). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process ...

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently recontribute a donation. After all, only recontributed funds can conceivably give rise to circumvention of the base limits. Yet all indications are that many types of recipients have scant interest in regifting donations they receive ...

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his “mature judgment,” but judgment informed by “the strictest union, the closest correspondence, and the most unreserved communication with his constituents ...” Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—quid pro quo corruption—in order to ensure that the Government's efforts do not have the effect of restricting the

First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." *Buckley*.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

It is so ordered.

Excerpted by Alexandria Metzdorf



Privacy

Case List

Building a Right

[*Olmstead v. U.S.*](#) (1928)

[*Mass v. Jacobsen*](#) (1905)

[*Meyer v. Nebraska*](#) (1923)

[*Pierce v. Society of Sisters*](#) (1925)

[*Buck v. Bell*](#) (1927)

[*Skinner v. Oklahoma*](#) (1942)

[*Rochin v. California*](#) (1952)

The Right to Privacy

[*Griswold v. Connecticut*](#) (1965)

[*Eisenstadt v. Baird*](#) (1972)

[*Carey v. Population Services International*](#) (1977)

Reproductive Rights: A Fundamental Right

[*Roe v. Wade*](#) (1972)

[*Planned Parenthood v. Danforth*](#) (1986)

[*Bellotti v. Baird \(Bellotti II\)*](#) (1977)

[*Akron v. Akron Health Center*](#) (1986)

The Undue Burden Standard

[*Planned Parenthood v. Casey*](#) (1992)

[*Mazurek v. Armstrong*](#) (1997)

[*Whole Women's Health v. Hellerstedt*](#) (2016)

[*June Medical Services v. Russo*](#) (2020)

[*Dobbs v. Jackson Women's Health Organization*](#) (2022)

The Right to Die

[*Washington v. Glucksberg*](#) (1997)

Marriage and Family

[*Bowers v. Hardwick*](#) (1986)

[*Lawrence v. Texas*](#) (2003)

[*U.S. v. Windsor*](#) (2013)

[*Obergefell v. Hodges*](#) (2015)

[*Pavan v. Smith*](#) (2017)

Building a Right

Olmstead v. U.S.

277 U.S. 438 (1928)

Vote: 5-4

Decision: Affirmed

Majority: Taft, joined by McReynolds, Sanford, Sutherland, Van Devanter

Dissent: Brandeis

Mr. Justice Brandeis, dissenting.

...

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.

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 someday 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.

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctities of a man’s home and the privacies of life.

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property ...

Excerpted by Rorie Solberg



Mass v. Jacobsen

197 U.S. 11 (1905)

Vote: 7-2

Decision: Reversed

Majority: Harlan, joined by, Fuller, Brown, White, McKenna, Holmes, Day

Dissent: Brewer

Mr. JUSTICE HARLAN, delivered the opinion of the Court.

...

The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person “to. live and work where he will ...”

The authority of the State to enact this statute [compulsory vaccination law] is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and “health laws of every description;” indeed, all laws that relate to matters completely within its territory and which do not by their, necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

It is equally true that the State may invest local bodies called into existence ‘for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental, agency acting under the sanction of state legislation, shall contravene the Constitution ... or infringe any right granted or secured by that. instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures ...

We come, then, to inquire whether any right given, or secured by' the Constitution, is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the' execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned. ..."

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted, smallpox, according to the recitals in the regulation adopted by the Board of Health, was prevalent to some extent in the city of Cambridge and the disease was increasing ...

We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. In *Railroad Company v. Husen*, this court recognized the right of a State to pass sanitary laws, laws for the protection of life, liberty, health or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But as the laws there involved went beyond the necessity of the case and under the guise of exerting a police power invaded the domain of Federal authority and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the Commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient or objectionable to some-if nothing

more could be reasonably affirmed of the statute in question—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand ... Nearly every State of the Union has statutes to encourage, or directly or indirectly to require, vaccination, and this is true of most nations of Europe.

If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

The judgment of the court below must be affirmed.

It is so ordered.

Excerpted by Kimberly Clairmont



Meyer v. Nebraska

262 U.S. 390 (1923)

Vote: 7-2

Decision: Reversed

Majority: McReynolds, Taft, McKenna, Van Devanter, Brandeis, Butler, Sanford

Dissent: Holmes

Mr. Justice McReynolds delivered the opinion of the Court.

...

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School, he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows [Laws 1919, c. 249.]:

"Sec. 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language."

Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides."

Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense."

The Supreme Court of the State affirmed the judgment of conviction. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power ...

To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state ...

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff ... by the Fourteenth Amendment .”No State shall ... deprive any person of life, liberty, or property, without due process of law ...”

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.

The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts ...

Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment ...

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means ...

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Excerpted by Kimberly Clairmont



Pierce v. Society of Sisters

68 U.S. 510 (1925)

Vote: 9-0

Decision: Affirmed

Majority: Taft, joined by, Holmes, Van Devanter, McReynolds, Brandies, Sutherland, Butler, Sanford, Stone

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act 1 adopted November 7, 1922 *** by the voters of Oregon.

They present the same points of law; there are no controverted questions of fact ... The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor. There are exemptions-not specially important here-for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many 545 children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided.

The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined ... [T]he Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. ***

The {three judge} court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. * * *

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education. Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. * * *

The decrees below are affirmed.

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Buck v. Bell

274 U.S. 200 ([1927](#))

Vote: 8-1

Decision: Affirmed

Majority: Holmes, joined by Taft, Van Devanter, McReynolds, Brandeis, Sutherland, Sanford, Stone

Dissent: Butler

Mr. Justice Holmes delivered the opinion of the Court.

The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court, in the latter part of 1924. An Act of Virginia, approved March 20, 1924, recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the sterilization may be effected in males by vasectomy and in females, by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective *persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. The statute then enacts that whenever the superintendent of certain institutions including the above named State Colony shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, &c., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. -The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. 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. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.

Excerpted by Kimberly Clairmont



Skinner v. Oklahoma

316 U.S. 535 (1942)

Vote: 9-0

Decision: Reversed

Opinion: J. Douglas

Majority: Douglas, Roberts, Black, Reed, Frankfurter, Murphy, Byrnes

Concurring: J. Jackson, J. Stone

MR. JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari. The statute involved is Oklahoma’s Habitual Criminal Sterilization Act. Okl.St. Ann. Tit. 57, §171, et seq. That Act defines an ‘habitual criminal’ as a person who, having been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude’ either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile.

Notice, an opportunity to be heard, and the right to a jury trial are provided. The issues triable in such a proceeding are narrow and confined. If the court or jury finds that the defendant is an ‘habitual criminal’ and that he ‘may be rendered sexually sterile without detriment to his or her general health’, then the court ‘shall render judgment to the effect that said defendant be rendered sexually sterile’ by the operation of vasectomy in case of a male and of salpingectomy in case of a female. Only one other provision of the Act is material here and that is §195 which provides that ‘offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.’ Petitioner was convicted in 1926 of the crime of stealing chickens and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with fire arms and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed ... [T]he Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision.

Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise of the police power in view of the state of scientific authorities respecting inheritability of criminal traits. It is argued that due process is lacking because under this Act, unlike the act upheld in *Buck v. Bell* (1927), the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative of the Fourteenth Amendment. We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment. We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma grand larceny is a felony. Larceny is grand larceny when the property taken exceeds \$20 in value. Embezzlement is punishable 'in the manner prescribed for feloniously stealing property of the value of that embezzled.' Hence he who embezzles property worth more than \$20 is guilty of a felony. A clerk who appropriates over \$20 from his employer's till and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. * * *

Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose—a question for the jury under appropriate instructions. It was stated in *Buck v. Bell* that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is 'the usual last resort of constitutional arguments.' Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry'. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co. v. Pinson* (1931) stated, 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing 'degrees of evil' * * * {and} that 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'

Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining 'its restrictions to those classes of cases where the need is deemed to be clearest'. * * *

But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. 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 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 guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo v. Hopkins* (1886).

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. *Yick Wo v. Hopkins* (1886); *Gaines v. Canada* (1938). Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, 'with reference to the time when the fraudulent intent to convert the property to the taker's own use' arises. We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those 625 two offenses. In terms of fines and imprisonment the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

In *Buck v. Bell*, the Virginia statute was upheld though it applied only to feebleminded persons in institutions of the State. But it was pointed out that 'so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.' Here there is no such saving feature ... We have therefore a situation where the Act as construed and applied to petitioner is allowed to perpetuate the discrimination which we have found to be fatal.

Reversed.

Mr. Chief Justice Stone concurring.

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause. If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none. Moreover, if we must presume that the legislature knows-what science has been unable to ascertain-that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question

we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process. * * *

And so, while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

MR. JUSTICE JACKSON, concurring.

...

I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. *Buck v. Bell* (1927). 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. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.

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Rochin v. California

342 U.S. 165 (1952)

Vote: 8-0

Decision: Reversed

Majority: Frankfurter, joined by Reed, Jackson, Burton, Vinson, Clark

Concurrence: Black, joined by Douglas

Not participating: Minton

MR. JUSTICE FRANKFURTER DELIVERED THE OPINION OF THE COURT.

...

Having “some information that the petitioner was selling narcotics,” three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin’s room, on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a “night stand” beside the bed the deputies spied two capsules. When asked “Whose stuff is this?” Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers “jumped upon him” and attempted to extract the capsules. The force they applied proved unavailing against Rochin’s resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin’s stomach against his will. This “stomach pumping” produced vomiting. In the vomited matter were found two capsules which proved to contain morphine ...

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing “a preparation of morphine” in violation of the California Health and Safety Code, 1947, § 11,500. Rochin was convicted and sentenced to sixty days’ imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner’s objection, although the means of obtaining them was frankly set forth in the testimony by one of, the deputies, substantially as here narrated ...

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. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. 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 combatting 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 ...

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause.

The judgment below must be

Reversed.

Excerpted by Kimberly Clairmont



The Right to Privacy

Griswold v. Connecticut

381 U.S. 479 (1965)

Vote: 7-2

Opinion: J. Douglas

Decision: Reversed

Majority: Douglas, Warren, Clark, Brennan, Goldberg

Concurrence: Goldberg, joined by Warren, Brennan

Concurrence: Harlan

Concurrence: White

Dissent: Black, Stewart

MR. JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT.

...

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven – a center open and operating from November 1 to November 10, 1961, when appellants were arrested. They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free. The statutes whose constitutionality is involved in this appeal are 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Section 54-196 provides: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. We noted probable jurisdiction. We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. * * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* (1905) should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* (1937); *Williamson v. Lee Optical Co.* (1955). We do not sit as a super legislature to determine the wisdom, need, and propriety of laws

that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. By *Pierce v. Society of Sisters* (1925), the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska* (1923), the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach – indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.

And so we reaffirm the principle of the *Pierce* and the *Meyer* cases. In *NAACP v. Alabama* (1958) we protected the “freedom to associate and privacy in one's associations,” noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid “as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.” *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of “association” that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.

In *Schwartz v. Board of Bar Examiners* (1957) we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's “association with that Party” was not shown to be “anything more than a political faith in a political party” and was not action of a kind proving bad moral character. Those cases involved more than the “right of assembly” – a right that extends to all irrespective of their race or ideology. The right of “association,” like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. 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* (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 (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.” We have had many controversies over these penumbral rights of “privacy and repose.” These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” 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 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 incorporates all of the first eight Amendments I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it 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. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court’s holding. * * *

While this Court has had little occasion to interpret the Ninth Amendment,”[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison* (1803). In interpreting the Constitution, “real effect should be given to all the words it uses.” The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. 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 or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (Emphasis added.) * * * {t}he 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. * * * The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights. * * *

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. I agree with the Court that petitioners’ convictions must therefore be reversed.

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. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights. * * * 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. Connecticut* (1937). * * *

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.” * * *

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 reversing these convictions under Connecticut’s aiding and abetting statute. * * *

Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting, {omitted} and Mr. Justice Stewart, whom Mr. 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. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. 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. We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. *Lochner v. New York* (1905). * * *

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. At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And, like him, I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise, or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg, who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and

eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe — except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. But speech is one thing; conduct and physical activities are quite another ... Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law ... The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities.

...

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.

...

The due process argument which my Brothers Harlan and White adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and

justifiable purpose. While I completely subscribe to the holding of *Marbury v. Madison*, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of “civilized standards of conduct.” Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

...

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates “fundamental principles of liberty and justice,” or is contrary to the “traditions and [collective] conscience of our people.” ... That Amendment was passed not to broaden the powers of this Court or any other department of “the General Government,” but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.

...

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. New York*. 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. Parish*, ; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, and many other opinions.

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Eisenstadt v. Baird

405 U.S. 438 (1972)

Vote: 6-1

Decision: Affirmed

Majority: Brennan, joined by Douglas, Stewart, Marshall

Concurrence: Douglas, White joined by Blackmun

Dissent: Burger

Not participating: Powell and Rehnquist

MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

...

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. (1971). We affirm. Massachusetts General Laws Ann., c. 272, 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever ... gives away ... any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in 21A. Under 21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." As interpreted by the State Supreme Judicial Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of 21A, to dispense any article with the intention that it be used for the prevention of conception.

The statutory scheme distinguishes among three distinct classes of distributees – first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us. The legislative purposes that the statute is meant to serve are not altogether clear. In *Commonwealth v. Baird*, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens ... In a subsequent decision, *Sturgis v. Attorney General* (1863), the court, however, found "a second and more compelling ground for upholding the statute" – namely, to protect morals through "regulating the private sexual lives of single persons." The Court of Appeals ... concluded that the statutory goal

was to limit contraception in and of itself – a purpose that the court held conflicted “with fundamental human rights” under *Griswold v. Connecticut* (1965), where this Court struck down Connecticut’s prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy. We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment. * * *

For the foregoing reasons we hold that Baird, who is now in a position, and plainly has an adequate incentive, to assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As the Chief Justice only recently explained in *Reed v. Reed* (1971): “In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Railway Express Agency v. New York* (1949). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute ... The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, 21 and 21A. For the reasons that follow, we conclude that no such ground exists.

First. Section 21 stems from Mass. Stat. 1879, c. 159, 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth v. Allison* (1917), the Massachusetts Supreme Judicial Court explained that the law’s “plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.” Although the State clearly abandoned that purpose with the enactment of 21A, at least insofar as the illicit sexual activities of married persons are concerned, the court reiterated in *Sturgis v. Attorney General*, that the object of the legislation is to discourage premarital sexual intercourse ... What Mr. Justice Goldberg said in *Griswold v. Connecticut*, (concurring opinion), concerning the effect of Connecticut’s prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. “The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth control devices for the prevention of disease, as distinguished from the prevention of conception.” Like Connecticut’s laws, 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons.

Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim ... If health were the rationale of 21A, the statute would be both discriminatory and overbroad. * * *

We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations. Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral – to the extent that *Griswold* will permit such a declaration." * * *

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia* (1969). See also *Skinner v. Oklahoma* (1942); *Jacobson v. Massachusetts* (1905). On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious ...

We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann., c. 272, 21 and 21A, violate the Equal Protection Clause.

The judgment of the Court of Appeals is

Affirmed.

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Carey v. Population Services International

431 U.S. 678 (1977)

Vote: 7-2

Decision: Affirmed

Majority: Brennan, joined by Stewart, Marshall, Blackmun, Stevens (Parts I, II, III, V); White (Parts I, III, V); Powell (Part I)

Plurality: Brennan, joined by Stewart, Marshall, Blackmun (Part IV)

Concurrence: White, joined by Powell, Stevens

Dissent: Burger, Rehnquist

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

...

Under New York Educ. Law § 6811 (8) (McKinney 1972) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.’ A three-judge District Court for the Southern District of New York declared § 6811 (8) unconstitutional in its entirety under the First and Fourteenth Amendments of the Federal Constitution insofar as it applies to nonprescription contraceptives, and enjoined its enforcement as so applied ...

PSI is a corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices from its offices in North Carolina. PSI regularly advertises its products in periodicals published or circulated in New York, accepts orders from New York residents, and fills orders by mailing contraceptives to New York purchasers. Neither the advertisements nor the order forms accompanying them limit availability of PPA’s products to persons of any particular age.

Various New York officials have advised PSI that its activities violate New York law ... notified ... that a PSI advertisement ... violated § 6811(8) ... requested “future compliance” with the law. A second letter ... notifying PSI that PSI’s magazine advertisements of contraceptives violated the statute, referred particularly to the provisions prohibiting sales to minors and sales by nonpharmacists, and threatened: “In the event you fail to comply, the matter will be referred to our Attorney General for legal action.” Finally, PPA was served with a copy of a report of inspectors of the State Board of Pharmacy ... which recorded that PPA advertised male contraceptives, and had been advised to cease selling contraceptives in violation of the state law ...

Although “[t]he Constitution does not explicitly mention any right of privacy,” the Court has recognized that one aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment is “a right of personal privacy, or a guarantee of certain areas or zones of privacy” *Roe v Wade*, (1973). This right of personal privacy includes “the interest in independence in making certain kinds of important decisions.” *Whalen v Roe*, (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear

that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, procreation, contraception, family relationships, and child rearing and education ... The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, *Griswold v Connecticut*, supra, and most prominently vindicated in recent years in the contexts of contraception ...

That the constitutionally protected right of privacy extends to an individual’s liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be validated by a sufficiently compelling state interest. “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. With these principles in mind, we turn to the question whether the District Court was correct in holding valid the provisions of § 6811 (8) as applied to the distribution of non-prescription contraceptives ...

Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception ...

Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so. The burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase and lessens the possibility of price competition. Insofar as § 6811 (8) applies to nonhazardous contraceptives, it bears no relation to the State’s interest in protecting health, the statute is obviously not substantially related to any goal of preventing young people from selling contraceptives. Nor is the statute designed to serve as a quality control device. Nothing in the record suggests that pharmacists are particularly qualified to give advice on the merits of different nonmedical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items. Why pharmacists are better able or more inclined than other retailers to prevent tampering with prepackaged products, or, if they are, why contraceptives are singled out for this special protection, is also unexplained.

Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed. The State’s interests in protection of the mental and physical

health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive. Moreover, there is substantial reason for doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior ...

These arguments therefore do not justify the total suppression of advertising concerning contraceptives.

Affirmed.

Excerpted by Kimberly Clairmont and Rorie Solberg



Reproductive Rights: A Fundamental Right

Roe v. Wade

410 U.S. 113 (1972)

Vote: 7-2

Decision: Affirmed

Majority: Blackmun, joined by Burger, Douglas, Brennan, Stewart, Marshall, Powell

Concurrence: Burger, joined by Douglas

Dissent: White, Rehnquist

Mr. Justice Blackmun delivered the opinion of the Court.

...

The Texas statutes that concern us here are Arts. Sec. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States ...

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint *Roe* purported to sue "on behalf of herself and all other women" similarly situated ...

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in *Roe's* action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments ...

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination

makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be “capable of repetition, yet evading review ...”

The principal thrust of appellant’s attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal “liberty” embodied in the Fourteenth Amendment’s Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras ...

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 ...

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.” Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal “abortion mills” strengthens, rather than weakens, the State’s interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman’s own health and safety when an abortion is proposed at a late stage of pregnancy.

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 right to be attached to them, that this case is concerned ...

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 all factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant 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. Appellant's 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, are 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. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions ...

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 may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like ...

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

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

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a 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. This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness ...

To summarize and to repeat: 1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment. (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother ...

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

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

In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

Excerpted by Kimberly Clairmont and Rorie Solberg



Planned Parenthood v. Danforth

428 U.S. 52 (1986)

Vote: 5-4

Decision: Affirmed (in part) and Reversed (in part)

Majority: Blackmun joined by Brennan, Stewart, Marshall, and Powell; Stevens (in all but Parts IV-D and IV-E); and Burger, White, and Rehnquist

Concurrence: Stewart, joined by Powell and White, joined by Burger, Rehnquist

Concurrence/Dissent: Stevens

Mr. Justice Blackmun delivered the opinion of the Court.

...

The woman's consent. Under § 3(2) of the Act, a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and “that her consent is informed and freely given and is not the result of coercion.” Appellants argue that this requirement is violative of *Roe v. Wade*, by imposing an extra layer and burden of regulation on the abortion decision ... Appellants also claim that the provision is overbroad and vague ... Despite the fact that apparently no other Missouri statute ... requires a patient’s prior written consent to a surgical procedure, the imposition by § 3(2) of such a requirement for termination of pregnancy even during the first stage, in our view, is not, in itself, an unconstitutional requirement.

The spouse's consent. Section 3(3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless “the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.” ...

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. Cf. *Roe v. Wade* ... We conclude that § 3(3) of the Missouri Act is inconsistent with the standards enunciated in *Roe v. Wade*, and is unconstitutional.

Parental consent. Section 3(4) requires, with respect to the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person *In loco parentis* unless, again, “the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.” It is to be observed that only one parent need consent ...

We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as § 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution, and possess constitutional rights ...

... Any independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

We emphasize that our holding that § 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy ... The fault with § 3(4) is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor’s termination of her pregnancy, and does so without a sufficient justification for the restriction. It violates the strictures of *Roe* and *Doe*.

Affirmed in part, reversed in part, and remanded.

Excerpted by Kimberly Clairmont and Rorie Solberg



Bellotti v. Baird (Bellotti II)

443 U.S. 622 (1977)

Vote: 9-1

Decision: Vacated and remanded

Plurality: Powell, joined by Burger, Stewart, Rehnquist

Concurrence: Rehnquist and Stevens (in judgment only), joined by Brennan, Marshall, Blackmun

Dissent: White

MR. JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST joined.

...

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in *Planned Parenthood of Central Missouri v. Danforth*, (1976) ...

Mary Moe was permitted to represent the “class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents.” *Baird v. Bellotti*, 393 F. Supp. 847, 850 (Mass. 1975) (*Baird I*). ...

In its analysis of the relevant constitutional principles, the [lower] court stated that “there can be no doubt but that a female’s constitutional right to an abortion in the first trimester does not depend upon her calendar age.” *Id.*, at 855-856. The court found no justification for the parental consent limitation placed on that right by § 12S, since it concluded that the statute was “cast not in terms of protecting the minor, ... but in recognizing independent rights of parents.” *Id.*, at 856. The “independent” parental rights protected by § 12S, as the court understood them, were wholly distinct from the best interests of the minor ...

A child, merely on account of his minority, is not beyond the protection of the Constitution. As the Court said in *In re Gault*, (1967), “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” This observation, of course, is but the beginning of the analysis. The Court long has recognized that the status of minors under the law is unique in many respects ...

The Court’s concern for the vulnerability of children is demonstrated in its decisions dealing with minors’ claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child’s right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment’s guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings ...

These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults ...

Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, ... sympathy, and... paternal attention ..."

Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them ...

Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations ..."

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility ..."

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy ... the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences ...

There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most. We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity-if she so desires-to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must

authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion ...

If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation. There is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, as we have observed above, parents naturally take an interest in the welfare of their children's interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests. If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required. For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court ...

Accordingly, we affirm the judgment of the District Court insofar as it invalidates this statute and enjoins its enforcement.

Affirmed.

Excerpted by Kimberly Clairmont



Akron v. Akron Health Center

462 U.S. 416 (1986)

Vote: 6-3

Opinion: J. Powell

Decision: Affirmed in part and reversed in part

Majority: Powell, Burger, Brennan, Marshall, Blackmun, Stevens

Dissent: O'Connor, joined by White, Rehnquist

JUSTICE POWELL delivered the opinion of the Court.

...

These cases come to us a decade after we held in *Roe v. Wade*, (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to

terminate her pregnancy. Legislative responses to the Court’s decision have required us on several occasions, and again today, to define the limits of a State’s authority to regulate the performance of abortions. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.’ We respect it today, and reaffirm *Roe v. Wade* ...

The ordinance sets forth 17 provisions that regulate the performance of abortions, see Akron Codified Ordinances, ch. 1870, 5 of which are at issue in this case: (i) Section 1870.03 requires that all abortions performed after the first trimester of pregnancy be performed in a hospital.³ (ii) Section 1870.05 sets forth requirements for notification of and consent by parents before abortions may be performed on unmarried minors. (iii) Section 1870.06 requires that the attending physician make certain specified statements to the patient “to insure that the consent for an abortion is truly informed consent.” (iv) Section 1870.07 requires a 24-hour waiting period between the time the woman signs a consent form and the time the abortion is performed.’ (v) Section 1870.16 requires that fetal remains be “disposed of in a humane and sanitary manner ...”

In *Roe v. Wade*, the Court held that the “right of privacy, ... founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Although the Constitution does not specifically identify this right, the history of this Court’s constitutional adjudication leaves no doubt that “the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” *Poe v. Ullman*, (1961) (Harlan, J., dissenting from dismissal of appeal). Central among these protected liberties is an individual’s “freedom of personal choice in matters of marriage and family life.” The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman’s fundamental right necessarily requires that her physician be given “the room he needs to make his best medical judgment ...”

First, a State has an “important and legitimate interest in protecting the potentiality of human life.” *Id.*, at 162. Although this interest exists “throughout the course of the woman’s pregnancy,” *Beal v. Doe*, (1977), it becomes compelling only at viability, the point at which the fetus “has the capability of meaningful life outside the mother’s womb ... At viability this interest in protecting the potential life of the unborn child is so important that the State may proscribe abortions altogether, “except when it is necessary to preserve the life or health of the mother ...”

Second, because a State has a legitimate concern with the health of women who undergo abortions, “a State may properly assert important interests in safeguarding health [and] in maintaining medical standards.” *Id.*, at 154. We held in *Roe*, however, that this health interest does not become compelling until “approximately the end of the first trimester” of pregnancy ...

This does not mean that a State never may enact a regulation touching on the woman’s abortion right during the first weeks of pregnancy. Certain regulations that have no significant impact on the woman’s exercise of her right may be permissible where justified by important state health objectives ...

We have rejected a State's attempt to ban a particular second-trimester abortion procedure, where the ban would have increased the costs and limited the availability of abortions without promoting important health benefits. If a State requires licensing or undertakes to regulate the performance of abortions during this period, the health standards adopted must be "legitimately related to the objective the State seeks to accomplish ..."

Section 1870.03 of the Akron ordinance requires that any abortion performed "upon a pregnant woman subsequent to the end of the first trimester of her pregnancy" must be "performed in a hospital." A "hospital" is "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." § 1870.01(B). Accreditation by these organizations requires compliance with comprehensive standards governing a wide variety of health and surgical services." The ordinance thus prevents the performance of abortions in outpatient facilities that are not part of an acute-care, full-service hospital ...

There can be no doubt that § 1870.03's second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. A primary burden created by the requirement is additional cost to the woman. The Court of Appeals noted that there was testimony that a second-trimester abortion costs more than twice as much in a hospital as in a clinic. See 651 F. 2d, at 1209 (in-hospital abortion costs \$850-\$900, whereas a dilatation-and-evacuation (D&E) abortion performed in a clinic costs \$350-\$400). Moreover, the court indicated that second-trimester abortions were rarely performed in Akron hospitals. *Ibid.* (only nine second-trimester abortions performed in Akron hospitals in the year before trial).²¹ Thus, a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk. It therefore is apparent that a second trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion ...

It is true that a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn in a state regulation must be reasonable, and this cannot be said of § 1870.03. By preventing the performance of D&E abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." Section 1870.03 has "the effect of inhibiting ... the vast majority of abortions after the first 12 weeks," Danforth, 428 U. S., at 79, and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion ...

...

We turn next to § 1870.05(B), the provision prohibiting a physician from performing an abortion on a minor pregnant woman under the age of 15 unless he obtains "the informed written consent of one of her parents or her legal guardian" or unless the minor obtains "an order from a court having jurisdiction over her that the abortion be performed or induced."

... Akron's ordinance does not create expressly the alternative procedure required by *Bellotti II*. ...

The Akron ordinance provides that no abortion shall be performed except "with the informed written consent of the pregnant woman, ... given freely and without coercion." § 1879.06(A). Furthermore, "in order to insure

that the consent for an abortion is truly informed consent,” the woman must be “orally informed by her attending physician” of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth. § 1879.06(B). In addition, the attending physician must inform her

“of the particular risks associated with her own pregnancy and the abortion technique to be employed ... [and] other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.”

... The validity of an informed consent requirement thus rests on the State’s interest in protecting the health of the pregnant woman ... We rejected the view that “informed consent” was too vague a term, construing it to mean “the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.” ... This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth’s* recognition of the State’s interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman’s informed choice between abortion or childbirth. ...

Viewing the city’s regulations in this light, we believe that § 1879.06(B) attempts to extend the State’s interest in ensuring “informed consent” beyond permissible limits.

...

The Akron ordinance prohibits a physician from performing an abortion until 24 hours after the pregnant woman signs a consent form. § 1879.07.

We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State’s legitimate concern that the woman’s decision be informed is reasonably served by requiring a 24-hour delay as a matter of course. The decision whether to proceed with an abortion is one as to which it is important to “affor[d] the physician adequate discretion in the exercise of his medical judgment.” *Colautti v. Franklin* ... In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. But if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.

...

Section 1870.16 of the Akron ordinance requires physicians performing abortions to “insure that the remains of the unborn child are disposed of in a humane and sanitary manner.” ... [w]e agree that it violates the Due Process Clause.

...

We affirm the judgment of the Court of Appeals invalidating those sections of Akron’s “Regulations of Abortions” ordinance that deal with parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains. The remaining portion of the judgment, sustaining Akron’s requirement that all second-trimester abortions be performed in a hospital, is reversed.

It is so ordered.

Excerpted by Kimberly Clairmont and Rorie Solberg



The Undue Burden Standard

Planned Parenthood v. Casey

505 U.S. 833 (1992)

Vote: 5- 4

Decision: Affirmed in part and reversed in part

Majority: O'Connor, Kennedy, and Souter (Parts I, II, III, V-A, V-C, and VI), joined by Blackmun and Stevens

Plurality: O'Connor, Kennedy, and Souter joined by Stevens

Concurrence/ Dissent: Stevens, Blackmun, Rehnquist, Thomas, White

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court.

...

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the 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. These principles do not contradict one another; and we adhere to each ...

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas* (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them ..."

We have seen how 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, see *Akron I* 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 sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened 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, with whatever degree of personal reluctance any of us may have, not for overruling it.

...

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. *Roe, supra*, at 163-166. Most of our cases since *Roe* have involved the application of rules derived from the trimester framework. See, e. g., *Thornburgh v. American College of Obstetricians and Gynecologists, supra*; *Akron I, supra*.

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.

...

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe* ...

... 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.

We give this summary:

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

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

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. ... [T]he 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 ..."

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden ... Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it ...

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 ...

A woman in a shelter or a safe house unknown to her husband is not 'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances." ... Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them ..." ...

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. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases ...

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking ...

We next consider the parental consent provision. 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 ...

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the 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 ...

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 ... Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester ...

We think that under this standard, all 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 ...

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.

We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty ...

It is so ordered.

Excerpted by Kimberly Clairmont and Rorie Solberg



Mazurek v. Armstrong

520 U.S. 968 (1997)

PER CURIAM.

In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians. 1995 Mont. Laws, ch. 321, § 2 (codified at Mont. Code Ann. § 50-20-109 (1995)). Similar rules exist in 40 other States in the Nation. The Montana law was challenged almost immediately by respondents, who are a group of licensed physicians and one physician-assistant practicing in Montana ...

The Court of Appeals never contested this District Court conclusion that there was “insufficient evidence” in the record that the requirement posed a “substantial obstacle to a woman seeking an abortion.” Instead, it held that the physician-only requirement was arguably invalid because its *purpose*, according to the Court of Appeals, may have been to create a substantial obstacle to women seeking abortions. 94 F. 3d, at 567. But even assuming the correctness of the Court of Appeals’ implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a “substantial obstacle” to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, e. g., *Washington v. Davis* (1976); much less do we assume it when the results are harmless.

...

Respondents claim in this Court that the Montana law must have had an invalid purpose because “all health evidence contradicts the claim that there is any health basis” for the law. Brief in Opposition 7. Respondents contend that “the only extant study comparing the complication rates for first-trimester abortions performed by [physician assistants] with those for first-trimester abortions performed by physicians found no significant difference.” *Ibid.* But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that “[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed

professionals, *even if an objective assessment might suggest that those same tasks could be performed by others,*” (emphasis added). Respondents fall back on the fact that an antiabortion group drafted the Montana law. But that says nothing significant about the legislature’s purpose in passing it.

It is so ordered.

Excerpted by Rorie Solberg



Whole Women’s Health v. Hellerstedt

579 U.S. 742 (2016)

Vote: 5-3

Decision: Reversed

Majority: Breyer joined by Kennedy, Ginsburg, Sotomayor, Kagan

Dissent: Alito joined by Thomas, Roberts

JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.

...

In *Planned Parenthood of Southeastern Pa. v. Casey* (1992), a plurality of the Court concluded that there “exists” an “undue burden” on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the “purpose or effect” of the provision “is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” (Emphasis added.) The plurality added that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the “admitting-privileges requirement,” says that “[a] physician performing or inducing an abortion ... must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that ... is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. § 171.0031(a) (West Cum. Supp. 2015). This provision amended Texas law that had previously required an abortion facility to maintain a written protocol “for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.” 38 Tex. Reg. 6546 (2013). The second provision, which we shall call the “surgical-center requirement,” says that “the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” Tex. Health & Safety Code Ann. § 245.010(a). We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes.

Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey* (plurality opinion), and each violates the Federal Constitution.

In July 2013, the Texas Legislature enacted House Bill 2 (H.B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect. The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would "'screen out' untrained or incompetent abortion providers." (Abbott). The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." The Abbott plaintiffs did not file a petition for certiorari in this Court.

On April 6, one week after the Fifth Circuit's decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court.

They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey* ...

...

[T]he District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, ... in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities." On August 29, 2014, the court enjoined the enforcement of the two provisions ...

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey*. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade* (1973). But, we added, "a statute which, while furthering [a] 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.” *Casey* (plurality opinion). Moreover, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

...

Undue Burden-Admitting Privileges Requirement

We have found nothing in Texas’ record evidence that shows that, compared to prior law (which required a “working arrangement” with a doctor with admitting privileges), the new law advanced Texas’ legitimate interest in protecting women’s health. We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. See Tr. of Oral Arg. 47. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States’ similar admitting-privileges laws.

At the same time, the record evidence indicates that the admitting-privileges requirement places a “substantial obstacle in the path of a woman’s choice.” *Casey* (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement’s effective date. Cf. Brief for Planned Parenthood Federation of America et al. as Amici Curiae (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is “unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face”). Eleven more closed on the day the admitting privileges requirement took effect. Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine.

... In our view, the record contains sufficient evidence that the admitting privileges requirement led to the closure of half of Texas’ clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the “number of women of reproductive age living in a county ... more than 150 miles from a provider 614 increased from approximately 86,000 to 400,000 ... and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.” We recognize that increased driving distances do not always constitute an “undue burden.” See *Casey* (joint opinion of O’Connor, Kennedy, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court’s “undue burden” conclusion.

Undue Burden—Surgical—Center Requirement

The second challenged provision of Texas’ new law sets forth the surgical center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements.

Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements; a quality assurance program; personnel policies and staffing requirements; physical and environmental requirements; infection control standards; disclosure requirements; patient rights standards; and medical- and clinical-services standards, including anesthesia standards. These requirements are policed by random and announced inspections, at least annually, as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations.

H.B. 2 added the requirement that an “abortion facility” meet the “minimum standards ... for ambulatory surgical centers” under Texas law. The surgical center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least “an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed,” as well as “a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility” for facilities that provide moderate sedation, such as most abortion facilities. Facilities must include a full surgical suite with an operating room that has “a clear floor area of at least 240 square feet” in which “[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.” There must be a preoperative patient holding room and a postoperative recovery suite. The former “shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite,” and the latter “shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge.” Surgical centers must meet numerous other spatial requirements, including specific corridor widths. Surgical centers must also have an advanced heating, ventilation, and air conditioning system, and must satisfy particular piping system and plumbing requirements. Dozens of other sections list additional requirements that apply to surgical centers.

There is considerable evidence in the record supporting the District Court’s findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary ...

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements ... These facts indicate that the surgical-center provision imposes “a requirement that simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women’s health, the asserted “purpos[e] of the Act in which it is found.” *Doe* (quoting *Morey v. Doud*, (1957); internal quotation marks omitted).

... Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions ... [A]bortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court’s conclusion that “[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.” That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement “will not [provide] better care or ... more frequent positive outcomes.” *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court’s conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. In the District Court’s view, the proposition that these “seven or eight providers could meet the demand of the entire State stretches credulity.” We take this statement as a finding that these few facilities could not “meet” that “demand.”

... [C]ommon sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence ...

...

More fundamentally, in the face of no threat to women’s health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women’s health.

We consider three additional arguments that Texas makes and deem none persuasive.

...

For these reasons 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 Ginsburg, concurring

* * * When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as Amici Curiae. So long as this Court adheres to *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), Targeted Regulation of Abortion Providers laws like H. B. 2 that “do little or nothing for health, but rather strew impediments to abortion,” cannot survive judicial inspection.

Justice Thomas, dissenting [omitted], Justice Alito, with whom the Chief Justice and Justice Thomas join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by *res judicata*. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules. The Court has not done so here * * * and will undermine public confidence in the Court as a fair and neutral arbiter. * * *

Even if *res judicata* did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success ...

Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve. Thus, what matters for present purposes is not the effect of the H.B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an “undue burden” on women seeking abortions. *Gonzales v. Carhart* (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a “large fraction” of Texas women of reproductive age. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a “large fraction” of the women in question. Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H.B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H.B. 2

took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. * * *

I therefore respectfully dissent.

Excerpted by Kimberly Clairmont and Rorie Solberg



June Medical Services v. Russo

591 U.S. ____ (2020)

Vote: 5-4

Decision: Reversed

Plurality: Breyer, joined by Ginsburg, Sotomayor, Kagan

Concurrence: Roberts

Dissent: Alito, Gorsuch, Kavanaugh, Thomas

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join.

...

In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas’ admitting-privileges law. See La. Rev. Stat. Ann. §40:1061.10(A)(2)(a) (West 2020). As in *Whole Woman’s Health*, the District Court found that the statute offers no significant health benefit. It found that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State’s asserted interests in promoting women’s health and safety. And it found that this inability places a substantial obstacle in the path of women seeking an abortion. As in *Whole Woman’s Health*, the substantial obstacle the Act imposes, and the absence of any health-related benefit, led the District Court to conclude that the law imposes an undue burden and is therefore unconstitutional ...

The statute defines “active admitting privileges” to mean that the doctor must be “a member in good standing” of the hospital’s “medical staff ... with the ability to admit a patient and to provide diagnostic and surgical services to such patient.” *Ibid.*; La. Admin. Code, tit. 48, pt. I, §4401. Failure to comply may lead to fines of up to \$4,000 per violation, license revocation, and civil liability ...

...

The State’s unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs’ undue-burden claims bars our consideration of it here. See *Wood v. Milyard*, (2012); cf. *post*, at 24–25 (Alito, J., dissenting) (addressing the Court’s approach to claims forfeited, rather than waived); *post*, at 7–8 (Gorsuch, J., dissenting) (addressing waiver of structural rather than prudential objections) ... In any event, the rule the State invokes is hardly absolute. We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations ... And we have generally permitted plaintiffs to assert third-party rights in cases where the “ ‘enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties’ rights.’ ” *Kowalski*, (quoting *Warth*) ...

Turning to the merits, we apply the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman’s Health*. ... In *Whole Woman’s Health*, we quoted *Casey* in explaining that “ ‘a statute which, while furthering [a] 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 ... ’ ” We added that “ ‘[u]nnecessary health regulations’ ” impose an unconstitutional “ ‘undue burden’ ” if they have “ ‘the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion,’ ” (quoting *Casey*, emphasis added).

The evidence on which the District Court relied in this case is even stronger and more detailed.

The District Court found that enforcing the admitting-privileges requirement would “ ‘result in a drastic reduction in the number and geographic distribution of abortion providers.’ ” *Id.*, at 87. In light of demographic, economic, and other evidence, the court concluded that this reduction would make it impossible for “ ‘many women seeking a safe, legal abortion in Louisiana ... to obtain one’ ” and that it would impose “ ‘substantial obstacles’ ” on those who could. *Id.*, at 88.

Just as in *Whole Woman’s Health*, the experiences of the individual doctors in this case support the District Court’s factual finding that Louisiana’s admitting-privileges requirement, like that in Texas’ law, serves no “ ‘relevant credentialing function.’ ” (quoting *Whole Woman’s Health*).

... would leave Louisiana with just one clinic with one provider to serve the 10,000 women annually who seek abortions in the State.

... As in *Whole Woman’s Health*, the reduction in abortion providers caused by Act 620 would inevitably mean “ ‘longer waiting times, and increased crowding.’ ”

... Even if they obtain an appointment at a clinic, women who might previously have gone to a clinic in Baton Rouge or Shreveport would face increased driving distances. New Orleans is nearly a five hour drive from Shreveport; it is over an hour from Baton Rouge; and Baton Rouge is more than four hours from Shreveport. The impact of those increases would be magnified by Louisiana’s requirement that every woman undergo an ultrasound and receive mandatory counseling at least 24 hours before an abortion. La. Rev. Stat. Ann.

§40:1061.10(D). A Shreveport resident seeking an abortion who might previously have obtained care at one of that city's local clinics would either have to spend nearly 20 hours driving back and forth to Doe 5's clinic twice, or else find overnight lodging in New Orleans.

We turn finally to the law's asserted benefits. The District Court found that there was "no significant health-related problem that the new law helped to cure." (quoting *Whole Woman's Health*). It found that the admitting-privileges requirement "[d]oes [n]ot [p]rotect [w]omen's [h]ealth," provides "no significant health benefits," and makes no improvement to women's health "compared to prior law." Our examination of the record convinces us that these findings are not "clearly erroneous."

Taken together, we think that these findings and the evidence that underlies them are sufficient to support the District Court's conclusion that Act 620 would place substantial obstacles in the path of women seeking an abortion in Louisiana ...

This case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion. Act 620 is unconstitutional. The Court of Appeals' judgment is erroneous.

It is Reversed.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

...

The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other ...

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent with *Casey* ..."

The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional. To be sure, the Court at times discussed the benefits of the regulations, including when it distinguished spousal notification from parental consent ...

So long as that showing is made, the only question for a court is whether a law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus ..."

Mazurek v. Armstrong places this understanding of *Casey*'s undue burden standard beyond doubt. *Mazurek* involved a challenge to a Montana law restricting the performance of abortions to licensed physicians. It was "uncontested that there was insufficient evidence of a 'substantial obstacle' to abortion." Therefore, once the Court found that the Montana Legislature had not acted with an "unlawful motive," the Court's work was complete. *Ibid.* In fact, the Court found the challengers' argument—that the law was invalid because "all health evidence contradicts the [State's] claim that there is any health basis for the law"—to be "squarely foreclosed by *Casey* itself ..."

The question is not whether we would reach the same findings from the same record ...

We accordingly will not disturb the factual conclusions of the trial court unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, (1948). In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. *Ante*, at 19–35. The District Court findings therefore bind us in this case. * * *

Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous.

For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

Excerpted by Kimberly Clairmont



Dobbs v. Jackson Women's Health Organization

597 U.S. ____ (2022)

Vote: 6-3

Opinion: Alito

Decision: Reversed

Majority: Alito, joined by Gorsuch, Roberts, Barrett, Thomas, Kavanaugh

Concurrence: Thomas

Concurrence: Kavanaugh

Concurrence: Roberts (in judgment)

Dissent: Breyer, Sotomayor, Kagan (jointly authored)

JUSTICE ALITO delivered the opinion of the Court.

...

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed ...

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," and it sparked a national controversy that has embittered our political culture for a half century ...

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled in toto, and *Roe* itself was overruled in part. *Casey* threw out *Roe's* trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion ...

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly.

Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions ...

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as “viable” outside the womb. In defending this law, the State’s primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, “would be no different than overruling *Casey* and *Roe* entirely.” Brief for Respondents 43. They contend that “no half-measures” are available and that we must either reaffirm or overrule *Roe* and *Casey* ...

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, (1997) ...

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being” ...

Stare decisis, the doctrine on which *Casey*’s controlling opinion was based, does not compel unending adherence to *Roe*’s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division ...

It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. “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.” *Casey*, (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand ...

In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are

not mentioned in the Constitution. *Collins v. Harker Heights*, (1992).” Substantive due process has at times been a treacherous field for this Court,” *Moore v. East Cleveland*, (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people’s elected representatives. As the Court cautioned in *Glucksberg*, “[w]e must ... 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.” ...

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe* ...

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow ...

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*’s faulty historical analysis. It is therefore important to set the record straight ...

We begin with the common law, under which abortion was a crime at least after “quickening”—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy ...

English cases dating all the way back to the 13th century corroborate the treatises’ statements that abortion was a crime ...

That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman “with child” a “potion” to cause an abortion, and the woman died, it was “murder” because the potion was given “unlawfully to destroy her child within her.” 1 *Hale* 429– 430 (emphasis added) ...

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages, and thus, as one court put it in 1872: “[U]ntil the period of quickening there is no evidence of life; and whatever may be said of the fetus, the law has fixed upon this period of gestation as the time when the child is endowed with life” because “fetal movements

are the first clearly marked and well defined evidences of life.” *Evans v. People* (emphasis added); *Cooper* (“In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it” (emphasis added)) ...

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as “neither in accordance with the result of medical experience, nor with the principles of the common law.” F. Wharton, *Criminal Law* §1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, *Researches in Medicine and Medical Jurisprudence* 26–28 (2d ed. 1835) (describing the quickening distinction as “absurd” and “injurious”) ...

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order). By 1868, the year when the Fourteenth Amendment was ratified, threequarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. See *ibid.* Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. See *ibid.* ...

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court’s own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *id.*, at 118, and n. 2 (listing States). And though *Roe* discerned a “trend toward liberalization” in about “one third of the States,” those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. *Id.*, at 140, and n. 37; Tribe 2. In short, the “Court’s opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people.” ...

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

...

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that “due process of law” merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property ... Other sources, by contrast, suggest that “due process of law” prohibited legislatures “from authorizing the deprivation of a person’s life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England.” *United States v. Vaello*

Madero, (2022) (THOMAS, J., concurring). Either way, the Due Process Clause at most guarantees process. It does not, as the Court’s substantive due process cases suppose, “forbi[d] the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided.” *Reno v. Flores*, (1993) ...

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine’s application in other, specific contexts. Cases like *Griswold v. Connecticut*, (1965) (right of married persons to obtain contraceptives)*; *Lawrence v. Texas*, (2003) (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges*, (2015) (right to same-sex marriage), are not at issue. The Court’s abortion cases are unique, see ante, at 31–32, 66, 71–72, and no party has asked us to decide “whether our entire Fourteenth Amendment jurisprudence must be preserved or revised,” *McDonald*, at 813 (opinion of THOMAS, J.). Thus, I agree that “[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.” Ante, at 66.

For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is “demonstrably erroneous,” *Ramos v. Louisiana*, (2020) (THOMAS, J., concurring in judgment) (slip op., at 7), we have a duty to “correct the error” established in those precedents, *Gamble v. United States*, (2019) (THOMAS, J., concurring) (slip op., at 9). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. Amdt. 14, §1 ... To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights ... That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach ...

Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity ...

JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

...

For half a century, *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pa. v. Casey* (1992) have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be. See *Casey*, at 853; *Gonzales v. Carhart*, 171–172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions ...

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child ...

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. *Ante*, at 79. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. *Ante*, at 1. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto. *Ante*, at 4 (KAVANAUGH, J., concurring) ...

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, at 856. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or child-care or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but

at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all ...

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, (1965); *Eisenstadt v. Baird*, (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, (2003); *Obergefell v. Hodges*, (2015). They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does “cast[s] doubt on precedents that do not concern abortion.” Ante, at 66; cf. ante, at 3 (THOMAS, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”: Not until *Roe*, the majority argues, did people think abortion fell within the Constitution’s guarantee of liberty. Ante, at 32. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” Ante, at 15. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other ...

In sum, none of the cases the majority cites is analogous to today’s decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

Excerpted by Kimberly Clairmont



The Right to Die

Washington v. Glucksberg

521 U.S. 702 (1997)

Vote: 9-0

Decision: Reversed

Majority: Rehnquist joined by O'Connor, Scalia, Kennedy, Thomas

Concurrence: O'Conner joined by Ginsburg, Breyer,

Concurrence: Souter

Concurrence: Stevens

Concurrence: Ginsburg

Concurrence: Breyer

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.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a \$10,000 fine. At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide."

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A. Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted suicide ban. In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician assisted suicide, sued in the United States District Court, seeking a declaration that Wash Rev. Code 9A.36.060(1) (1994) is, on its face, unconstitutional.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide."

Relying primarily on *Planned Parenthood v. Casey* (1992), and *Cruzan v. Director, Missouri Dept. of Health* (1990), the District Court agreed, and concluded that Washington’s assisted suicide ban is unconstitutional because it “places an undue burden on the exercise of [that] constitutionally protected liberty interest.” ***

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that “[i]n the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.” The Ninth Circuit reheard the case en banc, reversed the panel’s decision, and affirmed the District Court. Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. The court also discussed what it described as “historical” and “current societal attitudes” toward suicide and assisted suicide, and concluded that “the Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death—that there is, in short, a constitutionally recognized ‘right to die.’” After “[w]eighing and then balancing” this interest against Washington’s various interests, the court held that the State’s assisted suicide ban was unconstitutional “as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians.” *** We granted certiorari and now reverse.

We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.

More specifically, for over 700 years, the Anglo American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide. In the 13th century ... “[t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was ... introduced into English common law.” Centuries later, Sir William Blackstone, whose *COMMENTARIES ON THE LAWS OF ENGLAND* not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers, referred to suicide as “self murder” and “the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure. ...” Blackstone emphasized that “the law has ... ranked [suicide] among the highest crimes,” although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide “borde[r] a little upon severity.”

For the most part, the early American colonies adopted the common law approach. *** Over time, however, the American colonies abolished these harsh common law penalties. ***

Nonetheless, although States moved away from Blackstone’s treatment of suicide, courts continued to condemn it as a grave public wrong.

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, and many of the new States and Territories followed New York’s example. Between 1857 and 1865, a New York commis-

sion ... drafted a criminal code that prohibited “aiding” a suicide and, specifically, “furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life.” By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. * * * In this century, the Model Penal Code also prohibited “aiding” suicide, prompting many States to enact or revise their assisted suicide bans ...

Though deeply rooted, the States’ assisted suicide bans have in recent years been reexamined and, generally, reaffirmed. 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. * * *

Thus, the States are currently engaged in serious, thoughtful examinations of physician assisted suicide and other similar issues. For example, New York State’s Task Force on Life and the Law—an ongoing, blue ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen ... unanimously concluded that “[l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. ... [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved.”

... [O]ur 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. Against this backdrop of history, tradition, and practice, we now turn to respondents’ constitutional claim.

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. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia* (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson* (1942); to direct the education and upbringing of one’s children, *Meyer v. Nebraska* (1923); *Pierce v. Society of Sisters* (1925); to marital privacy, *Griswold v. Connecticut* (1965); to use contraception, *Griswold, Eisenstadt v. Baird* (1972); to bodily integrity, *Rochin v. California* (1952), and to abortion, *Casey*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*.

But we “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of pub-

lic 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,” *Palko v. Connecticut* (1937). Second, we have required in substantive due process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause. As we stated recently, the Fourteenth Amendment “forbids the government to infringe ...” fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”

*** Turning to the claim at issue here, the Court of Appeals stated that “[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one’s death,” or, in other words, “[i]s there a right to die?” Similarly, respondents assert a “liberty to choose how to die” and a right to “control of one’s final days,” and describe the asserted liberty as “the right to choose a humane, dignified death,” and “the liberty to shape death.” As noted above, we have a tradition of carefully formulating the interest at stake in substantive due process cases. For example, although *Cruzan* is often described as a “right to die” case, we were, in fact, more precise: we assumed that the Constitution granted competent persons a “constitutionally protected right to refuse lifesaving hydration and nutrition.” *Cruzan*. The Washington statute at issue in this case prohibits “aid[ing] another person to attempt suicide” and, thus, the question before us is whether the “liberty” specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

We now inquire whether this asserted right has any place in our Nation’s traditions. Here *** 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.

Respondents contend, however, that the liberty interest they assert is consistent with this Court’s substantive due process line of cases, if not with this Nation’s history and practice. 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,” see *Casey* (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter”). 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 question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another’s assistance. With this “careful description” of respondents’ claim in mind, we turn to *Casey* and *Cruzan*.

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistent vegetative state, “ha[d] a right under the United States Constitution which would require the hospital to withdraw life sustaining treatment” at her parents’ request. ... We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient’s wishes concerning the withdrawal of life sustaining treatment.

*** 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. Indeed, the two acts are widely and reasonably regarded as quite distinct. In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide.

Respondents also rely on *Casey*. There, the Court’s opinion concluded that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” We held, first, that a woman has a right, before her fetus is viable, to an abortion “without undue interference from the State”; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman’s life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. In reaching this conclusion, the opinion discussed in some detail this Court’s substantive due process tradition of interpreting the Due Process Clause to protect certain fundamental rights and “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” and noted that many of those rights and liberties “involv[e] the most intimate and personal choices a person may make in a lifetime.”

*** 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, *San Antonio Independent School Dist. v. Rodriguez* (1973), 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. As the court below recognized, Washington’s assisted suicide ban implicates a number of state interests.

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. This interest is symbolic and aspirational as well as practical *** As we have previously affirmed, the States “may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy.” This remains true, as *Cruzan* makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public health problem, especially among persons in otherwise vulnerable groups. 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. See New York Task Force (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a “risk factor” because it contributes to depression). *

** The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients’ needs. 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.” 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 Court of Appeals dismissed the State’s concern that disadvantaged persons might be pressured into physician assisted suicide as “ludicrous on its face.” We have recognized, however, the real risk of subtle coercion and undue influence in end of life situations. *Cruzan*. ... If physician assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end of life health care costs.

The State’s interest here goes beyond protecting the vulnerable from coercion; it 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. The Court of Appeals struck down Washington’s assisted suicide ban only “as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.” Washington insists, however, that the impact of the court’s decision will not and cannot be so limited. 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 exactly 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 Wash. Rev. Code §9A.36.060(1) (1994) 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.”

* * *

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. 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. *

{JUSTICE GINSBURG concurs in the Court's judgments substantially for the reasons stated in this opinion. JUSTICE BREYER joins this opinion except insofar as it joins the opinions of the Court.}

...

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in this case as whether the Due Process Clause of the Constitution protects a “right to commit suicide which itself includes a right to assistance in doing so,” and concludes that “our Nation's history, legal traditions, and practices do not support the existence of such a right.” 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 ... The parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician assisted suicide.

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. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician assisted suicide and other related issues. In such cir-

cumstances, “the ... challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the ‘laboratory’ of the States ... in the first instance.” *Cruzan* (O’Connor, J., concurring) (citing *New State Ice Co. v. Liebmann* (1932)).

In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient’s request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.

Justice Stevens, concurring in the judgment.

...

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the “morality, legality, and practicality of physician assisted suicide” in a democratic society. I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice. * * *

Today, the Court decides that Washington’s statute prohibiting assisted suicide is not invalid “on its face,” that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid. * * *

Original excerpt in Ruthann Robson, *Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law*, Published by CALI eLangdell Press. Further excerpted by Rorie Solberg. Licensed under [CC BY-NC-SA](#).



Marriage and Family

Bowers v. Hardwick

478 U.S. 186 ([1986](#))

Vote: 5-4

Decision: Reversed

Majority: White joined by Burger, Powell, Rehnquist, O'Connor

Concurrence: Burger

Concurrence: Powell

Dissent: Blackmun joined by Brennan, Marshall, Stevens

Dissent: Stevens, joined by Brennan and Marshall

...

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution 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. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International*, (1977). *Pierce v. Society of Sisters*, (1925), and *Meyer v. Nebraska*, (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, (1942), with procreation; *Loving v. Virginia*, (1967), with marriage; *Griswold v. Connecticut*, supra, and *Eisenstadt v. Baird*, supra, with contraception; and *Roe v. Wade*, (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child ...

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of

those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance ...

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis..

Accordingly, the judgment of the Court of Appeals is

Reversed.

Excerpted by Kimberly Clairmont



Lawrence v. Texas

539 U.S. 558 ([2003](#))

Vote: 6-3

Decision: Reversed

Majority: Kennedy joined by Stevens, Breyer, Ginsburg, Souter

Concurrence: O' Connor

Dissent: Scalia joined by Thomas and Rehnquist

Dissent: Thomas

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

...

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

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.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “[d]eviate sexual intercourse” as follows:

“(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

“(B) the penetration of the genitals or the anus of another person with an object.” § 21.01(1).

The petitioners ... challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art.1, § 3a. Those contentions were rejected.

The petitioners, having entered a plea of *nolo contendere*, were each fined \$200 and assessed court costs of \$141.25 ...

We granted certiorari to consider three questions:

“1. Whether Petitioners’ criminal convictions under the Texas “Homosexual Conduct” law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?

“2. Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

“3. Whether *Bowers v. Hardwick* (1986) should be overruled?”

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court’s holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters* (1925), and *Meyer v. Nebraska* (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut* (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird* (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights. It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

“It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. ... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child ...”

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men ...

Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a

minor, and therefore incapable of consent. The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

...

Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing “ancient roots,” American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place ...

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court’s decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades ... 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. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

...

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

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions ... The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.

...

The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. * * * *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

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

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

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

It is so ordered.

Justice O'Connor, concurring in the judgment.

...

The Court today overrules *Bowers v. Hardwick* (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.* (1985) *** When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

*** Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. This case shows, however, that prosecutions under § 21.06 do occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. ***

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."

*** A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional ...

Justice Scalia, with whom the Chief Justice and Justice Thomas join, dissenting.

...

“Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Southeastern Pa. v. Casey* (1992). That was the Court’s sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade* (1973). The Court’s response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick* (1986) is very different. The need for stability and certainty presents no barrier.

Most of the rest of today’s opinion has no relevance to its actual holding—that the Texas statute “furthers no legitimate state interest which can justify” its application to petitioners under rational-basis review. Though there is discussion of “fundamental proposition[s],” and “fundamental decisions,” nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case ...

I begin with the Court’s surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*. I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to stare decisis coauthored by three Members of today’s majority in *Planned Parenthood v. Casey*. There, when stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it:

Today’s approach to stare decisis invites us to overrule an erroneously decided precedent (including an “intensely divisive” decision) if: (1) its foundations have been “eroded” by subsequent decisions; (2) it has been subject to “substantial and continuing” criticism.; and (3) it has not induced “individual or societal reliance” that counsels against overturning. The problem is that *Roe* itself—which today’s majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*. * * *

I do not quarrel with the Court’s claim that *Romer v. Evans* (1996) “eroded” the “foundations” of *Bowers*’ rational-basis holding. But *Roe* and *Casey* have been equally “eroded” by *Washington v. Glucksberg* (1997) which held that only fundamental rights which are “deeply rooted in this Nation’s history and tradition” qualify for anything other than rational basis scrutiny under the doctrine of “substantive due process.” *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation’s tradition. * * *

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in *Casey*. It has thereby exposed *Casey*’s extraordinary deference to precedent for the result-oriented expedient that it is ...

Having decided that it need not adhere to stare decisis, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. § 21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim. The Fourteenth Amendment expressly allows States to deprive their citizens of “liberty,” so long as “due process of law” is provided ...

Our opinions applying the doctrine known as “substantive due process” hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*. We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called “heightened scrutiny” protection—that is, rights which are “deeply rooted in this Nation’s history and tradition.” All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a “fundamental right” under the Due Process Clause. Noting that “[p]roscriptions against that conduct have ancient roots,” that “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights,” and that many States had retained their bans on sodomy, *Bowers* concluded that a right to engage in homosexual sodomy was not “deeply rooted in this Nation’s history and tradition.”

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a “fundamental right” or a “fundamental liberty interest,” nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is “deeply rooted in this Nation’s history and tradition,” the Court concludes that the application of Texas’s statute to petitioners’ conduct fails the rational-basis test, and overrules *Bowers*’ holding to the contrary. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual ...”

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were “directed at homosexual conduct as a distinct matter.” Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized—which suffices to establish that homosexual sodomy is not a right “deeply rooted in our Nation’s history and tradition.” The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers* actually relied.

*** *Bowers*’ conclusion that homosexual sodomy is not a fundamental right “deeply rooted in this Nation’s history and tradition” is utterly unassailable.

...

In any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional 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. * * *

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer*.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. 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. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

...

The matters appropriate for this Court’s resolution are only three: Texas’s prohibition of sodomy neither infringes a “fundamental right” (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Excerpted by Kimberly Clairmont



U.S. v. Windsor

570 U.S. 744 (2013)

Vote: 5-4

Decision: Affirmed

Majority: Kennedy joined by Ginsburg, Breyer, Sotomayor, Kagan

Dissent: Roberts

Dissent: Alito joined by Thomas (parts II and III)

Dissent: Scalia joined by Thomas and Roberts (Part I)

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

...

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA).

DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows: “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 a 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.” 1 U. S. C. §7. The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other 635 regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex

spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment. While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s §3. * * *

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest ... Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. * *

*

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion. Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at N. Y. Dom. Rel. Law Ann. §§10–a, 10–b, 13 (West 2013)). Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.

By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. * * *

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is 637 directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., *Loving v. Virginia* (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. * * *

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. * * * In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. * * *

[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.” “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer v. Evans* (1996). The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. * * *

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas* (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relation-

ship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U. S. Const., Amdt. 5; *Bolling v. Sharpe* (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture v. Moreno* (1973). In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States. The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. ... H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' "The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104-664, pp. 12-13 (1996).

The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage ... This raises a most serious question under the Constitution's Fifth Amendment. DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.

Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsi-

bilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways.

By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries. For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] ... a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," with the intent to influence or retaliate against that official. Although a "spouse" qualifies as a member of the officer's "immediate family," DOMA makes this protection inapplicable to same-sex spouses. DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses. * * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment. What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of

the liberty of the person protected by the Fifth Amendment of the Constitution ... The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

Original excerpt in Ruthann Robson, *Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law*, Published by CALI eLangdell Press. Further excerpted by Rorie Solberg. Licensed under [CC BY-NC-SA](#).



Obergefell v. Hodges

576 U.S. 644 (2015)

Vote: 5-4

Decision: Reversed

Majority: Kennedy joined by Ginsburg, Breyer, Sotomayor, Kagan

Dissent: Roberts joined by Scalia and Thomas

Dissent: Scalia joined by Thomas

Dissent: Thomas joined by Scalia

Dissent: Alito joined by Scalia and Thomas

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

...

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose

same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition. Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State. The petitioners sought certiorari. This Court granted review, limited to two questions.

The first ... is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second ... is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms.

Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems “hurtful for the rest of time.” He brought suit to be shown as the surviving spouse on Arthur’s death certificate. ...

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time. For example, marriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman ...

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process. This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as Amicus Curiae 5–28. For much of the 20th century, moreover, homosexuality was treated as an illness. * * *

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law. This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans* (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*. Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry ...

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, (1972); *Griswold v. Connecticut* (1965). The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however,

“has not been reduced to any formula.” *Poe v. Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed. Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge v. Department of Public Health* (Ma. 2003). The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving* (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. Suggesting that marriage is a right “older than the Bill of Rights,” *Griswold* described marriage this way: “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.” ...

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that “[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.” But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters* (1925); *Meyer*. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, (quoting *Meyer*). Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Windsor*. Marriage also affords the permanency and stability important to children’s best interests. See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae. As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*. That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State.

In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one. Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order ...

Marriage remains a building block of our national community. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules. There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.

As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

...

Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. Yet there has been far more deliberation than this argument acknowledges.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN* (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as Schuette also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decision making. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right ...

A ruling against same-sex couples would have the same effect—and, like Bowers, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage ...

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate ...

The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples. Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. *Williams v. North Carolina* (1942). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse’s hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing. As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. * * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be con-

demned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Excerpted by Kimberly Clairmont



Pavan v. Smith

576 US ____ (2017)

Per Curiam.

...

As this Court explained in *Obergefell v. Hodges*, (2015), the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples ...” In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State’s rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother’s male spouse to appear on the child’s birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*’s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage ...” we reverse the state court’s judgment.

The petitioners here are two married same-sex couples who conceived children through anonymous sperm donation. Leigh and Jana Jacobs were married in Iowa in 2010, and Terrah and Marisa Pavan were married in New Hampshire in 2011. Leigh and Terrah each gave birth to a child in Arkansas in 2015. When it came time to secure birth certificates for the newborns, each couple filled out paperwork listing both spouses as parents—Leigh and Jana in one case, Terrah and Marisa in the other. Both times, however, the Arkansas Department of Health issued certificates bearing only the birth mother’s name.

The department’s decision rested on a provision of Arkansas law, Ark. Code §20–18–401 (2014), that specifies which individuals will appear as parents on a child’s state-issued birth certificate. “For the purposes of birth registration,” that statute says, “the mother is deemed to be the woman who gives birth to the child.” §20–18–401(e). And “[i]f the mother was married at the time of either conception or birth,” the statute instructs that “the name of [her] husband shall be entered on the certificate as the father of the child.” §20–18–401(f)(1). There are some limited exceptions to the latter rule—for example, another man may appear on the birth certificate if the “mother” and “husband” and “putative father” all file affidavits vouching for the putative father’s paternity. *Ibid.*

But as all parties agree, the requirement that a married woman’s husband appear on her child’s birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor ... (“Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination”).

The Jacobses and Pavans brought this suit in Arkansas state court against the director of the Arkansas Department of Health—seeking, among other things, a declaration that the State’s birth-certificate law violates the Constitution. The trial court agreed, holding that the relevant portions of §20–18–401 are inconsistent with *Obergefell* because they “categorically prohibi[t] every same-sex married couple ... from enjoying the same spousal benefits which are available to every opposite-sex married couple ...” But a divided Arkansas Supreme Court reversed that judgment, concluding that the statute “pass[es] constitutional muster ...” In that court’s view, “the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife,” and so it “does not run afoul of *Obergefell* ...” Two justices dissented from that view, maintaining that under *Obergefell* “a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple ...”

The Arkansas Supreme Court’s decision, we conclude, denied married same-sex couples access to the “constellation of benefits that the Stat[e] ha[s] linked to marriage.” *Obergefell*, 576 U. S., at ___ (slip op., at 17). As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child’s birth certificate ... And yet state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman’s female spouse from her child’s birth certificate ... As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school ...

Echoing the court below, the State defends its birth-certificate law on the ground that being named on a child’s birth certificate is not a benefit that attends marriage. Instead, the State insists, a birth certificate is simply a device for recording biological parentage—regardless of whether the child’s parents are married. But Arkansas law makes birth certificates about more than just genetics. As already discussed, when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother’s husband on the child’s birth certificate ... And that is so even though (as the State concedes) the husband “is definitively not the biological father” in those circumstances ...

Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.

The petition for a writ of certiorari and the pending motions for leave to file briefs as *amici curiae* are granted. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Second Amendment

Case List

Historical Cases

[*Presser v. Illinois*](#) (1886)

[*United States v. Miller*](#) (1934)

[*United States v. Cruikshank*](#) (1876)

The Debate Emerges

[*United States v. Emerson*](#) (2001)

A Standard Emerges

[*District of Columbia v. Heller*](#) (2008)

[*McDonald v. Chicago*](#) (2010)

[*Caetano v. Massachusetts*](#) (2016)

[*New York State Rifle & Pistol Association, Inc. et al. v. Bruen, Superintendent of New York State Police, et al.*](#)
(2022)

Historical Cases

Presser v. Illinois

116 U.S. 252 (1886)

Vote: 9-0

Decision: Affirmed

Majority: Waite, joined by Woods, Miller, Field, Bradley, Harlan, Matthews, Gray, and Batchford

MR. JUSTICE WOODS DELIVERED THE OPINION OF THE COURT.

Herman Presser, the plaintiff in error, was indicted on September 24, 1879, in the Criminal Court of Cook County, Illinois, for a violation of the following sections of Art. XI of the Military Code of that state, Act of May 28, 1879, Laws of 1879, 192 ...

The indictment charged in substance that Presser, on September 24, 1879, in the County of Cook, in the State of Illinois, “did unlawfully belong to and did parade and drill in the City of Chicago with an unauthorized body of men with arms who had associated themselves together as a military company and organization without having a license from the governor, and not being a part of or belonging to ‘the regular organized volunteer militia’ of the State of Illinois or the troops of the United States.” ...

The position of the plaintiff in error in this Court was that the entire statute under which he was convicted was invalid and void because its enactment was the exercise of a power by the Legislature of Illinois forbidden to the states by the Constitution of the United States ...

We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the act were invalid. For it is a settled rule “that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable ...” *Packet Co. V. Keokuk* (1877); *Penniman’s Case* (1880); *Unity v. Burrage* (1881) ...

We are of opinion that this rule is applicable in this case. The first two sections of Article I of the Military Code provide that all able-bodied male citizens of the State between the ages of eighteen and forty-five years, except those exempted, shall be subject to military duty, and be designated the “Illinois State Militia,” and declare how they shall be enrolled and under what circumstances. The residue of the Code, except the two sections on which the indictment against the plaintiff in error is based, provides for a volunteer active militia, to consist of not more than eight thousand officers and men, declares how it shall be enlisted and brigaded, and the term of service of its officers and men; provides for brigade generals and their staffs, for the organization of the requisite battalions

and companies and the election of company officers; provides for inspections, parades, and encampments, arms and armories, rifle practice, and courts martial; provides for the pay of the officers and men, for medical service, regimental bands, books of instruction and maps; contains provisions for levying and collecting a military fund by taxation, and directs how it shall be expended; and appropriates \$25,000 out of the treasury, in advance of the collection of the military fund, to be used for the purposes specified in the Military Code ...

It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is, therefore, pertinent, what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of Article XL of the Military Code of Illinois? ...

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is therefore had he a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company and to drill and parade with arms in the towns and cities of the state? If the plaintiff in error has any such privilege, he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred ...

The right voluntarily to associate together as a military company or organization or to drill or parade with arms without and independent of an act of Congress or law of the state authorizing the same is not an attribute of national citizenship ... Under our political system, they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the State governments, unless restrained by their own Constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine ...

In respect to these points, we have to say that they present no Federal question. It is not, therefore, our province to consider or decide them ... All the Federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.

Excerpted by Kimberly Clairmont



United States v. Miller

307 U.S. 174 (1934)

Vote: 8-0

Decision: Reversed

Majority: McReynolds, joined by Hughes, Butler, Stone, Roberts, Black, Reed, and Frankfurter

Not participating: Douglas

MR. JUSTICE MCREYNOLDS DELIVERED THE OPINION OF THE COURT.

...

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton “did unlawfully, knowingly, willfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, bearing identification number 76230, said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934, c. 737, Sec. 4 [§ 5], 48 Stat. 1237), and not having in their possession a stamp-affixed written order for said firearm as provided by Section 1132c, Title 26, United States Code (June 26, 1934, c. 737, Sec. 4, 48 Stat. 1237) and the regulations issued under authority of the said Act of Congress known as the ‘National Firearms Act’ approved June 26, 1934, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States ...”

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. *Aymette v. State* (1840) ...

The Constitution as originally adopted granted to the Congress power-“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; 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.” 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 ...

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense.” A body of citizens enrolled for military discipline.” And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time ...

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below ...

We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

Excerpted by Kimberly Clairmont



United States v. Cruikshank

92 U.S. 542 (1876)

Vote: 5-4

Decision: Affirm

Majority: Waite, joined by Swayne, Miller, Field, and Strong

Concurrence (in part)/ Dissent (in part): Clifford, joined by Davis, Bradley, and Hunt

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

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:

“That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, -the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States.”

...

The offences provided for by the statute in question do not consist in the mere “banding” or “conspiring” of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not appear, the criminal matter charged has not been made indictable by any act of Congress.

...

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, “in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty” to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action. The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction ...

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States ...

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States ...

The second and tenth counts are equally defective. The right there specified is that of ‘bearing arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the ‘powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,’ ‘not surrendered or restrained’ by the Constitution of the United States.

If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this ...

... The statute provides for the punishment of those who conspire “to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.”

These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of “every, each, all, and singular” the rights granted them by the Constitution ... There is no specification of any particular right. The language is broad enough to cover all ...

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law.

They are so defective that no judgment of conviction should be pronounced upon them. The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

Excerpted by Kimberly Clairmont



The Debate Emerges

United States v. Emerson

270 F.3d 203 ([2001](#))

Vote: 9-0

Decision: Reversed

Majority: Garwood, joined by DeMoss, and Parker (Parts I-IV)

Concurrence: Parker

Justice Garwood delivered the opinion of the Court.

...

On December 8, 1998, the grand jury for the Northern District of Texas, San Angelo division, returned a five-count indictment against Emerson. The government moved to dismiss counts 2 through 5, which motion the district court subsequently granted. Count 1, the only remaining count and the count here at issue, alleged that Emerson on November 16, 1998, unlawfully possessed “in and affecting interstate commerce” a firearm, a Beretta pistol, while subject to the above-mentioned September 14, 1998 order, in violation of 18 U.S.C. § 922(g) (8). It appears that Emerson had purchased the pistol on October 10, 1997, in San Angelo, Texas, from a licensed firearms dealer. Emerson does not claim that the pistol had not previously traveled in interstate or foreign commerce. It is not disputed that the September 14, 1998 order was in effect at least through November 16, 1998.

Emerson moved pretrial to dismiss the indictment, asserting that section 922(g) (8), facially and as applied to him, violates the Second Amendment and the Due Process Clause of the Fifth Amendment. He also moved to dismiss on the basis that section 922(g) (8) was an improper exertion of federal power under the Commerce Clause and that, in any case, the law unconstitutionally usurps powers reserved to the states by the Tenth Amendment. An evidentiary hearing was held on Emerson’s motion to dismiss.

The district court granted Emerson’s motions to dismiss. Subsequently, the district court issued an amended memorandum opinion ... The district court held that dismissal of the indictment was proper on Second or Fifth Amendment grounds, but rejected Emerson’s Tenth Amendment and Commerce Clause arguments.

The government appealed. Emerson filed a notice of cross-appeal, which was dismissed by this Court. The government challenges the district court’s dismissal on Second and Fifth Amendment grounds. Emerson defends the district court’s dismissal on those grounds and also urges that dismissal was in any event proper under the Commerce Clause and on statutory grounds.

We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans ...

We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training ...

We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller* [*U.S. v. Miller* (1939)]. However, because of our holding that section 922(g) (8), as applied to Emerson, does not infringe his individual rights under the Second Amendment we will not now further elaborate as to the exact scope of all Second Amendment rights.

...

Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. Indeed, Emerson does not contend, and the district court did not hold, otherwise. As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms. Emerson's argument that his Second Amendment rights have been violated is grounded on the propositions that the September 14, 1998 order contains no express finding that he represents a credible threat to the physical safety of his wife (or child), that the evidence before the court issuing the order would not sustain such a finding and that the provisions of the order bringing it within clause (C) (ii) of section 922(g) (8) were no more than uncontested boiler-plate. In essence, Emerson, and the district court, concede that had the order contained an express finding, on the basis of adequate evidence, that Emerson actually posed a credible threat to the physical safety of his wife, and had that been a genuinely contested matter at the hearing, with the parties and the court aware of section 922(g) (8), then Emerson could, consistent with the Second Amendment, be precluded from possessing a firearm while he remained subject to the order ...

We agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller*, regardless of whether the particular individual is then actually a member of a militia. However, for the reasons stated, we also conclude that the predicate order in question here is sufficient, albeit likely minimally so, to support the deprivation, while it remains in effect, of the defendant's Second Amendment rights. Accordingly, we reverse the district court's dismissal of the indictment on Second Amendment grounds.

We remand the cause for further proceedings not inconsistent herewith.

Reversed and remanded.

Excerpted by Kimberly Clairmont

Note, take a listen: <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/gun-show>



A Standard Emerges

District of Columbia v. Heller

554 U.S. 570 (2008)

Vote: 5-4

Decision: Affirmed

Majority: Scalia, joined by Roberts, Kennedy, Thomas, and Alito

Dissent: Stevens, joined by Souter, Ginsburg, Breyer

Justice Scalia delivered the opinion of the Court.

...

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D. C. Code §§7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§22–4504(a), 22–4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities ...

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of “functional firearms within the home.” App. 59a. The District Court dismissed respondent’s complaint, see *Parker v. District of Columbia* (2004). The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense, reversed, see *Parker v. District of Columbia* (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city’s total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right ...

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “Because a well-regulated Militia is necessary to the security of a free State, the right of the people to

keep and bear Arms shall not be infringed.” Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose ...

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.” That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause (“The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.” The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause ...

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that “have some reasonable relationship to the preservation or efficiency of a well-regulated militia”). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen ...

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near v. Minnesota ex rel. Olson* (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, see *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.* (1948). ...”[F]or most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.” For most of our history the question did not present itself ...”

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g., *US v. Sheldon* (1940) ... Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons ...”

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

...

In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home ...

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns ... But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

Excerpted by Kimberly Clairmont



McDonald v. Chicago

561 U.S. 742 (2010)

Vote: 5-4

Decision: Reversed

Majority: Alito, Roberts, Scalia, Kennedy; and Thomas (all except parts II-C, IV and V)

Concurrence: Thomas (in part)

Concurrence: Scalia

Dissent: Stevens

Dissent: Breyer, joined by Ginsburg, Sotomayor

MR. JUSTICE ALITO ANNOUNCED THE JUDGEMENT OF THE COURT AND DELIVERED THE OPINION OF THE COURT.

...

Two years ago, in *District of Columbia v. Heller*, (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

...

After our decision in *Heller*, the Chicago petitioners and two groups filed suit against the City in the United States District Court for the Northern District of Illinois. They sought a declaration that the handgun ban and several related Chicago ordinances violate the Second and Fourteenth Amendments to the United States Constitution. Another action challenging the Oak Park law was filed in the same District Court by the National Rifle Association (NRA) and two Oak Park residents. In addition, the NRA and others filed a third action challenging the Chicago ordinances.

The District Court rejected plaintiffs' argument that the Chicago and Oak Park laws are unconstitutional. ...

The Seventh Circuit affirmed, relying on three 19th-century cases—*United States v. Cruikshank*, (1876), *Presser v. Illinois*, (1886), and *Miller v. Texas*, (1894)—that were decided in the wake of this Court's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House*

Cases, (1873) ... Nevertheless, the Seventh Circuit observed that it was obligated to follow Supreme Court precedents that have “direct application,” and it declined to predict how the Second Amendment would fare under this Court’s modern “selective incorporation” ... We granted certiorari.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v. Mayor of Baltimore*, (1833) ...

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country’s federal system ...

As previously noted, the Seventh Circuit concluded that *Cruikshank*, *Presser*, and *Miller* doomed petitioners’ claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the “privileges or immunities of citizens of the United States.” In petitioners’ view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others ...

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.

At the same time, however, this Court’s decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States ... As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of “selective incorporation” under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory ...

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, *Duncan* [*Louisiana* (1968)] ... or as we have said in a related context, whether this right is “deeply rooted in this Nation’s history and tradition ...” *Heller* makes it clear that this right is “deeply rooted in this Nation’s history and tradition ...” Founding-era legal commentators confirmed the importance of the right to early Americans ...

In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan* ... We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Excerpted by Kimberly Clairmont



Caetano v. Massachusetts

577 U. S. ____ (2016)

Vote: 9-0

Per curiam

Decision: Vacated and remanded

Concurrence: Alito, joined by, Thomas

PER CURIAM.

...

The Court has held that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” *District of Columbia v. Heller*, (2008), and that this “Second Amendment right is fully applicable to the States,” *McDonald v. Chicago*, (2010). In this case, the Supreme Judicial Court of Massachusetts upheld a Massachusetts law prohibiting the possession of stun guns after examining “whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment.” 470 Mass. 774, 777, 26 N. E. 3d 688, 691 (2015).

The court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they “were not in common use at the time of the Second Amendment’s enactment.” This is inconsistent with *Heller*’s clear statement that the Second Amendment “extends ... to ... arms ... that were not in existence at the time of the founding.” ... The court next asked whether stun guns are “dangerous *per se* at common law and unusual,” ... in an attempt to apply one “important limitation on the right to keep and carry arms,” *Heller*. (referring to “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’”). In so doing, the court concluded that stun guns are “unusual” because they are “a thoroughly modern invention.” By equating “unusual” with “in common use at the time of the Second Amendment’s enactment,” the court’s second explanation is the same as the first; it is inconsistent with *Heller* for the same reason.

Finally, the court used “a contemporary lens” and found “nothing in the record to suggest that [stun guns] are readily adaptable to use in the military.” But *Heller* rejected the proposition “that only those weapons useful in warfare are protected.” For these three reasons, the explanation the Massachusetts court offered for upholding

the law contradicts this Court's precedent. Consequently, the petition for a writ of certiorari and the motion for leave to proceed in forma pauperis are granted. The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in the judgment.

...

It is settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the Federal Government and the States. *District of Columbia v. Heller* (2008); *McDonald v. Chicago* (2010) ... That right vindicates the "basic right" of "individual self-defense." ... Caetano's encounter with her violent ex-boyfriend illustrates the connection between those fundamental rights: By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent. And, commendably, she did so by using a weapon that posed little, if any, danger of permanently harming either herself or the father of her children ...

The Supreme Judicial Court's conclusion that stun guns are "unusual" rested largely on its premise that one must ask whether a weapon was commonly used in 1789. As already discussed, that is simply wrong ...

... Instead, *Miller* and *Heller* recognized that militia members traditionally reported for duty carrying "the sorts of lawful weapons that they possessed at home," and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use ...

As the foregoing makes clear, the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today. The Supreme Judicial Court offered only a cursory discussion of that question, noting that the "number of Tasers and stun guns is dwarfed by the number of firearms." This observation may be true, but it is beside the point. Otherwise, a State would be free to ban all weapons except handguns, because "handguns are the most popular weapon chosen by Americans for self-defense in the home." *Heller* ...

If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.

Excerpted by Kimberly Clairmont



New York State Rifle & Pistol Association, Inc. et al. v. Bruen, Superintendent of New York State Police, et al.

597 U.S. ____ (2022)

Vote: 6-3

Decision: Reversed and remanded

Majority: Thomas, joined by Roberts, Alito, Gorsuch, Kavanaugh and Barrett

Concurrence: Alito

Concurrence: Kavanaugh, joined by Roberts

Concurrence: Barrett

Dissent: Breyer, joined by Sotomayor and Kagan

JUSTICE THOMAS delivered the opinion of the Court.

In *District of Columbia v. Heller*, (2008), and *McDonald v. Chicago*, (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a hand- gun for self-defense outside the home.

The parties nevertheless dispute whether New York’s licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen’s showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.

New York State has regulated the public carry of hand- guns at least since the early 20th century ... Today’s licensing scheme largely tracks that of the early

1900s. It is a crime in New York to possess “any firearm” without a license, whether inside or outside the home, punishable by up to four years in prison or a \$5,000 fine for a felony offense, and one year in prison or a \$1,000 fine for a misdemeanor. See N. Y. Penal Law Ann. §§265.01–b (West 2017), 261.01(1) (West Cum. Supp. 2022), 70.00(2)(e) and (3)(b), 80.00(1)(a) (West 2021), 70.15(1), 80.05(1). Meanwhile, possessing a loaded firearm outside one’s home or place of business without a license is a felony punishable by up to 15 years in prison. §§265.03(3) (West 2017), 70.00(2)(c) and (3)(b), 80.00(1)(a).

A license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a “licensing officer”—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that “no good cause exists for the denial of the license.” §§400.00(1)(a)–(n) (West Cum. Supp. 2022). If he wants to carry a firearm *outside* his home or place of busi-

ness for self-defense, the applicant must obtain an unrestricted license to “have and carry” a concealed “pistol or revolver.” §400.00(2)(f). To secure that license, the applicant must prove that “proper cause exists” to issue it. *Ibid.* If an applicant cannot make that showing, he can receive only a “restricted” license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines “proper cause.” But New York courts have held that an applicant shows proper cause only if he can “demonstrate a special need for self-protection distinguishable from that of the general community.” *E.g., In re Klenosky* (1980) ... When a licensing officer denies an application, judicial re- view is limited ...

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are “shall issue” jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. Meanwhile, only six States and the District of Columbia have “may issue” licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license. Aside from New York, then, only California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey have analogues to the “proper cause” standard. All of these “proper cause” analogues have been upheld by the Courts of Appeals, save for the District of Columbia’s, which has been permanently enjoined since 2017 ...

... Brandon Koch and Robert Nash are law-abiding, adult citizens of Rensselaer County, New York ...

In 2014, Nash applied for an unrestricted license to carry a handgun in public. Nash did not claim any unique danger to his personal safety; he simply wanted to carry a handgun for self-defense. In early 2015, the State denied Nash’s application for an unrestricted license but granted him a restricted license for hunting and target shooting only. In late 2016, Nash asked a licensing officer to remove the restrictions, citing a string of recent robberies in his neighborhood. After an informal hearing, the licensing officer denied the request ... Between 2008 and 2017, Koch was in the same position as Nash ... In late 2017, Koch applied to ... remove the restrictions on his license ... Like Nash’s application, Koch’s was denied, except that the officer permitted Koch to “carry to and from work.” App., at 114.

... Petitioners sued respondents for declaratory and injunctive relief under Rev. Stat. 1979, 42 U. S. C. §1983, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications on the basis that they had failed to show “proper cause,” *i.e.*, had failed to demonstrate a unique need for self-defense.

The District Court dismissed petitioners’ complaint and the Court of Appeals affirmed. See 818 Fed. Appx. 99, 100 (CA2 2020).

We granted certiorari to decide whether New York’s denial of petitioners’ license applications violated the Constitution. (2021).

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a “two-step” framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.

Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” *Konigsberg v. State Bar of Cal.*, (1961).

...

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

To show why *Heller* does not support applying means-end scrutiny, we first summarize *Heller*’s methodological approach to the Second Amendment.

In *Heller*, we began with a “textual analysis” focused on the “normal and ordinary” meaning of the Second Amendment’s language, at 576–577, 578.. That analysis suggested that the Amendment’s operative clause—“the right of the people to keep and bear Arms shall not be infringed”—“guarantee[s] the individual right to possess and carry weapons in case of confrontation” that does not depend on service in the militia. *Id.*, at 592.

From there, we assessed whether our initial conclusion was “confirmed by the historical background of the Second Amendment.” *Ibid.* We looked to history because “it has always been widely understood that the Second Amendment ... codified a *pre-existing* right.” *Ibid.* ... After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found “no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.” *Id.*, at 595.

We then canvassed the historical record and found yet further confirmation ...

In assessing the postratification history, we looked to four different types of sources. First, we reviewed “[t]hree important founding-era legal scholars [who] interpreted the Second Amendment in published writings.” *Ibid.* Second, we looked to “19th-century cases that interpreted the Second Amendment” and found that they “universally support an individual right” to keep and bear arms. *Id.*, at 610. Third, we examined the “discussion of

the Second Amendment in Congress and in public discourse” after the Civil War, “as people debated whether and how to secure constitutional rights for newly freed slaves.” *Id.*, at 614. Fourth, we considered how post-Civil War commentators understood the right. See *id.*, at 616–619.

After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.*, at 626 ...

As the foregoing shows, *Heller*’s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny ...

In sum, the Courts of Appeals’ second step is inconsistent with *Heller*’s historical approach and its rejection of means-end scrutiny. We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” *Konigsberg*, at 50, n. 10.

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment ... In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. See *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 620, n. 9 (2003). And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment’s protections ...

And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims ... To be sure, “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” *McDonald*, at 803–804 (Scalia, J., concurring). But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to “make difficult empirical judgments” about “the costs and benefits of firearms restrictions,” especially given their “lack [of] expertise” in the field. *Id.*, at 790–791 (plurality opinion).

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment “is the very *product* of an interest balancing by the people” and it “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense. *Heller*, at 635. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding. In some cases, that inquiry will be fairly straightforward ...

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, (1819). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. See, e.g., *United States v. Jones*, 404–405 (2012).

We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to “arms” does not apply “only [to] those arms in existence in the 18th century.” at 582 ... Thus, even though the Second Amendment’s definition of “arms” is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. Cf. *Caetano v. Massachusetts* (2016) ...

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge ...

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” *Drummond v. Robinson* (CA3 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster ...

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York’s proper-cause requirement.

It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of “the people” whom the Second Amendment protects. See *Heller*, at 580. Nor does any party dispute that handguns are weapons “in common use” today for self-defense. See *id.*, at 627; see also *Caetano*, at 411–412. We therefore turn to whether the plain text of the Second Amendment protects Koch’s and Nash’s proposed course of conduct—carrying handguns publicly for self-defense.

We have little difficulty concluding that it does ... Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the “textual ele-

ments” of the Second Amendment’s operative clause— “the right of the people to keep and bear Arms, shall not be infringed”—“guarantee the individual right to possess and carry weapons in case of confrontation.” at 592. *Heller* further confirmed that the right to “bear arms” refers to the right to “wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.” *Id.*, at 584 ... This definition of “bear” naturally encompasses public carry ... To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.

Moreover, confining the right to “bear” arms to the home would make little sense given that self-defense is “the *central component* of the [Second Amendment] right itself.” *Heller*, at 599; see also *McDonald*, at 767. After all, the Second Amendment guarantees an “in- dividual right to possess and carry weapons in case of confrontation,” *Heller*, at 592, and confrontation can surely take place outside the home ...

The Second Amendment’s plain text thus presumptively guarantees petitioners Koch and Nash a right to “bear” arms in public for self-defense.

Conceding that the Second Amendment guarantees a general right to public carry, contra, *Young*, 992 F. 3d, at 813, respondents instead claim that the Amendment “permits a State to condition handgun carrying in areas ‘frequented by the general public’ on a showing of a non- speculative need for armed self-defense in those areas,” Brief for Respondents ... To support that claim, the burden falls on respondents to show that New York’s proper-cause requirement is consistent with this Nation’s historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners’ proposed course of conduct ...

Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense. We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York’s proper- cause requirement. Under *Heller*’s text-and-history standard, the proper-cause requirement is therefore unconstitutional ...

We interpret the English history that respondents and the United States muster in light of these interpretive principles. We find that history ambiguous at best and see little reason to think that the Framers would have thought it applicable in the New World. It is not sufficiently probative to defend New York’s proper-cause requirement ...

At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

Respondents next point us to the history of the Colonies and early Republic, but there is little evidence of an early American practice of regulating public carry by the general public. This should come as no surprise—English subjects founded the Colonies at about the time England had itself begun to eliminate restrictions on the ownership and use of handguns ...

Regardless, even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of “dangerous and unusual weapons”—a fact we already acknowledged in *Heller*. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those “in common use at the time,” as opposed to those that “are highly unusual in society at large.” *Ibid* ... Thus, even if these colonial laws prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today ... Thus, all told, in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry ...

Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and “surety” statutes. None of these restrictions imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime. *Common-Law Offenses* ...

To summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose ...

Evidence from around the adoption of the Fourteenth Amendment also fails to support respondents' position ...

In the end, while we recognize the support that postbellum Texas provides for respondents' view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not “stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense” in public. At 632.

Finally, respondents point to the slight uptick in gun regulation during the late-19th century—principally in the Western Territories. As we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. See *id.*, at 614 ...

At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State’s proper-cause requirement. The Second Amendment guaranteed to “all Americans” the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to “demonstrate a special need for self-protection distinguishable from that of the general community” in order to carry arms in public. *Klenosky*.

The constitutional right to bear arms in public for self-defense is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *McDonald*, at 780. We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Breyer, with whom Justice Sotomayor and Justice Kagan join, dissenting.

In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), <https://www.cdc.gov/violenceprevention/firearms/fastfact.html>. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), <https://www.gunviolencearchive.org>. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. J. Goldstick, R. Cunningham, & P. Carter, Current Causes of Death in Children and Adolescents in the United States, 386 *New England J. Med.* 1955 (May 19, 2022) (Goldstick).

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States’ efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes ...

First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York’s law operates in practice. Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York’s law, the Court fails to correctly identify and analyze the relevant historical facts. Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York’s law is not “consistent with the Nation’s historical tradition of firearm regulation.” See *ante*, at 15.

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The Second Circuit has done so and has held that New York’s law does not violate the Second Amendment. See *Kachalsky v. County of Westchester* (2012). I would affirm that holding. At a minimum, I would not strike down the law based only on the pleadings, as the Court does today—without first allowing for the development of an evidentiary record and without considering the State’s compelling interest in preventing gun violence. I respectfully dissent.

...

How does the Court justify striking down New York’s law without first considering how it actually works on the ground and what purposes it serves? The Court does so by purporting to rely nearly exclusively on history. It requires “the government [to] affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of ‘the right to keep and bear arms.’” *Ante*, at 10. Beyond this historical inquiry, the Court refuses to employ what it calls “means-end scrutiny.” *Ibid.* That is, it refuses to consider whether New York has a compelling interest in regulating the concealed carriage of handguns or whether New York’s law is narrowly tailored to achieve that interest. Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court’s near-exclusive reliance on that single tool today goes much too far.

The Court concedes that no Court of Appeals has adopted its rigid history-only approach. See *ante*, at 8. To the contrary, every Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment. *Ibid.*; *ante*, at 10, n. 4 (majority opinion) (listing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D. C. Circuits) ...

The Court today replaces the Courts of Appeals’ consensus framework with its own history-only approach. That is unusual. We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade. See Brief for Second Amendment Law Professors as *Amici Curiae* 4, 13–15; see also this Court’s Rule 10. The Court attempts to justify

its deviation from our normal practice by claiming that the Courts of Appeals' approach is inconsistent with *Heller*. See *ante*, at 10. In doing so, the Court implies that all 11 Courts of Appeals that have considered this question misread *Heller* ...

To the contrary, it is this Court that misreads *Heller*. The opinion in *Heller* did focus primarily on “constitutional text and history,” *ante*, at 13 (majority opinion), but it did *not* “rejec[t] ... means-end scrutiny,” as the Court claims, *ante*, at 15. Consider what the *Heller* Court actually said ... The *Heller* Court concluded that the Second Amendment’s text and history were sufficiently clear to resolve that question: The Second Amendment, it said, does include such an individual right. *Id.*, at 579–619. There was thus no need for the Court to go further—to look beyond text and history, or to suggest what analysis would be appropriate in other cases where the text and history are not clear.

But the *Heller* Court did not end its opinion with that preliminary question. After concluding that the Second Amendment protects an individual right to possess a firearm for self-defense, the *Heller* Court added that that right is “not unlimited.” *Id.*, at 626. It thus had to determine whether the District of Columbia’s law, which banned handgun possession in the home, was a permissible regulation of the right. *Id.*, at 628–630. In answering that second question, it said: “Under *any of the standards of scrutiny that we have applied to enumerated constitutional rights*, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family’ would fail constitutional muster.” *Id.*, at 628–629 (emphasis added; footnote and citation omitted). That language makes clear that the *Heller* Court understood some form of means-end scrutiny to apply. It did not need to specify whether that scrutiny should be intermediate or strict because, in its view, the District’s handgun ban was so “severe” that it would have failed either level of scrutiny. *Id.*, at 628–629; see also *id.*, at 628, n. 27 (clarifying that rational-basis review was not the proper level of scrutiny).

Despite *Heller*’s express invocation of means-end scrutiny, the Court today claims that the majority in *Heller* rejected means-end scrutiny because it rejected my dissent in that case. But that argument misreads both my dissent and the majority opinion. My dissent in *Heller* proposed directly weighing “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.” *Id.*, at 689. I would have asked “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *Id.*, at 689–690 ...

As *Heller*’s First Amendment example illustrates, the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history “ac- cords with how we protect other constitutional rights.” *Ante*, at 15. As the Court points out, we do look to history in the First Amendment context to determine “whether the expressive conduct falls outside of the category of protected speech.” *Ibid.* But, if conduct falls within a category of protected speech, we then use means-end scrutiny to deter- mine whether a challenged reg- ulation unconstitutionally burdens that speech ...

The Court’s near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law’s objectives (its “ends”) against the methods used to achieve those objectives (its “means”). Judges are far less accustomed to

resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians ... The Court's past experience with historical analysis should serve as a warning against relying exclusively, or nearly exclusively, on this mode of analysis in the future.

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. The Court's historical analysis in this case is over 30 pages long and reviews numerous original sources from over 600 years of English and American history. *Ante*, at 30–62. Lower courts—especially district courts—typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court's approach requires ... Second, the Court's opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history ... Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions ... Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems ... This problem is all the more acute when it comes to “modern-day circumstances that [the Framers] could not have anticipated.” *Heller*, at 721–722 (BREYER, J., dissenting) ...

Although I hope—fervently—that future courts will be able to identify historical analogues supporting the validity of regulations that address new technologies, I fear that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified. Laws addressing repeating crossbows, lancegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems. And as technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at “analogical reasoning” will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable ...

We are bound by *Heller* insofar as *Heller* interpreted the Second Amendment to protect an individual right to possess a firearm for self-defense. But *Heller* recognized that that right was not without limits and could appropriately be subject to government regulation. at 626–627. *Heller* therefore does not require holding that New York's law violates the Second Amendment. In so holding, the Court goes beyond *Heller*.

It bases its decision to strike down New York's law almost exclusively on its application of what it calls historical “analogical reasoning.” *Ante*, at 19–20. As I have admitted above, I am not a historian, and neither is the Court. But the history, as it appears to me, seems to establish a robust tradition of regulations restricting the public carriage of concealed firearms. To the extent that any uncertainty remains between the Court's view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny.

Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.

The Second Circuit has previously done just that, and it held that New York's law does not violate the Second Amendment.



Equal Protection: Race

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From Separate but Equal to Desegregation

Strauder v. W. Va.

100 U.S. 303 (1880)

Vote: 7-2

Opinion: Strong

Decision: Reversed

Majority: Strong, joined by Waite, Swayne, Miller, Bradley, Hunt, and Harlan

Dissent: Field and Clifford

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then 'removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

...

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

The questions are important, for they demand a construction of the recent amendments of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments, and the legislation of Congress under them. The Fourteenth Amendment ordains that '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 laws 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.’

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, (1873), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, “No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested, we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.” So again: “The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the Fourteenth Amendment] such laws were forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation.” ...

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was

primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they 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 discriminations, 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 right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds ...

... it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former ... We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this ...

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

...

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio county; and it is

So ordered.

Excerpted by Kimberly Clairmont



Yick Wo v. Hopkins

118 U.S. 356 (1886)

Vote: 9-0

Decision: Reversed and remanded

Majority: Matthews, joined by Waite, Miller, Field, Bradley, Harlan, Woods, Gray and Blatchford

Opinion: Matthews

{Herein is the ordinance referenced, which is listed later in the opinion but should probably be here:

“SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish [...] a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

SEC. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

SEC. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.”}

Mr. JUSTICE MATTHEWS delivered the opinion of the court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States ...

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction, for the determination of the question whether the pro-

ceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinance, which, for that purpose, we are required to ascertain and adjudge ...

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case with a view to the protection of the public against the dangers of fire ...

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone, but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because, in such cases, the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China ...

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says:

“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.”

These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws ...

The questions we have to consider and decide in these cases, therefore, are to be treated as invoking the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face as being within the prohibitions of the Fourteenth Amendment, and, in the alternative, if not so, that they are void by reason of their administration, operating unequally so as to

punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government ... and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power ... It is ... true that there must always be ... in some person or body, the authority of final decision, and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness ... are secured by those maxims of constitutional law which are the monuments showing the ... blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth “may be a government of laws, and not of men.” For the very idea that one man may be compelled to hold ... any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails ...

...

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual ... of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration ... with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners ...

... It appears that both petitioners have complied with every requisite deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in ... their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

Excerpted by Alexandria Metzdorf



Plessy v. Ferguson

163 U.S. 537 (1896)

Vote: 7-1

Decision: Affirmed

Opinion: Brown

Majority: Brown, joined by Fuller, Field, Gray, Shiras, White, Peckham

Dissent: Harlan

Not participating: Brewer

Mr. Justice Brown, after stating the case, delivered the opinion of the Court.

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

...

The 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.

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. ..it was said [in the *Civil Rights Cases*] that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury ...

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

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. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres 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.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan, dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons

“by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.”

Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons, nor any white person to occupy a seat in a coach assigned to colored persons ... If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act.

...

Thus, the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

...

Indeed, such legislation as that 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 everyone 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 ...

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship ...

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. They had, as this court has said, a common purpose, namely to secure to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road or street? [...] if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

...

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But 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 guaranteed 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 arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

Excerpted by Alexandria Metzdorf



Missouri ex rel. Gaines v. Canada

305 U.S. 337 (1938)

Vote: 6-2

Decision: Reversed

Majority: Hughes, joined by Brandeis, Stone, Roberts, Black, and Reed

Dissent: McReynolds, joined by Butler

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law at the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution ... We granted certiorari, October 10, 1938.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University, and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri (1929), providing as follows:

“Sec. 9622. [...]. — Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided* that, whenever the board of curators deem it advisable, they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)”

[...] It was admitted on the trial that petitioner's

“work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible.”

He was refused admission upon the ground that it was “contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.” It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators ... must be regarded as state action.

While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court ... held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear

“that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education — the whites at the University of Missouri, and the negroes at Lincoln University.”

Further, the court concluded that the provisions of § 9622 to the effect that negro residents “may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University,” made it evident “that the Legislature did not intend that negroes and whites should attend the same university in this State.” In that view, it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner’s contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools ...

... It is said that Missouri ... is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination ... would constitute a denial of equal protection ...

The Supreme Court of Missouri in the instant case has distinguished ... (1) that, in Missouri ... there is “a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical”, and (2) that,

“pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State.”

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough ...

... In the light of its ruling, we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States — Kansas, Nebraska, Iowa and Illinois — which admit nonresident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get “as sound, comprehensive, valuable legal education” as in the University of Missouri [...].

[...]

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color ... The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

... Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction ... It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do ...

... We must conclude that, in so doing, the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

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

Reversed.

Excerpted by Alexandria Metzdorf



Sweatt v. Painter

339 U.S. 629 (1950)

Vote: 9-0

Decision: Reversed

Majority: Vinson, joined by Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton

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

This case and *McLaurin v. Oklahoma State Regents* (1950), present different aspects of this general question: to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to dis-

tinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court ...

... Petitioner filed an application for admission to the University of Texas Law School for the February, 1946, term. His application was rejected solely because he is a Negro. Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February.

Finding that the new school offered petitioner

“privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas,”

the trial court denied mandamus. The Court of Civil Appeals affirmed. Petitioner’s application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, because of the manifest importance of the constitutional issues involved.

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 ... 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.

... [R]espondents 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 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.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner.

...

In *Missouri ex rel. Gaines v. Canada*, (1938), the Court, speaking through Chief Justice Hughes, declared that

“petitioner’s right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.”

These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state supported graduate and professional education.

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson*, (1896), requires affirmance of the judgment below. Nor need we reach petitioner’s contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.

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.

Excerpted by Alexandria Metzdorf



McLaurin v. Oklahoma State Regents

339 U.S. 637 (1950)

Vote: 9-0

Decision: Reversed

Majority: Vinson, joined by Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton

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

In this case, we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race.

...

Appellant is a Negro citizen of Oklahoma. Possessing a Master's degree, he applied for admission to the University of Oklahoma in order to pursue studies and courses leading to a Doctorate in Education. At that time, his application was denied, solely because of his race. The school authorities were required to exclude him by the Oklahoma statutes, 70 Okl.Stat. (1941) §§ 455, 456, 457, which made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught. Appellant filed a complaint requesting injunctive relief, alleging that the action of the school authorities and the statutes upon which their action was based were unconstitutional and deprived him of the equal protection of the laws ... a ... three-judge District Court held ... that the State had a constitutional duty to provide him with the education he sought ... further held that to the extent the Oklahoma statutes denied him admission they were unconstitutional and void

...

Following this decision, the Oklahoma legislature amended these statutes to permit the admission of Negroes to institutions of higher learning attended by white students, in cases where such institutions offered courses not available in the Negro schools. The amendment provided, however, that, in such cases the program of instruction "shall be given at such colleges or institutions of higher education upon a segregated basis." ... Appellant was

thereupon admitted ... he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room, and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

...

In the interval between the decision of the court below and the hearing in this Court, the treatment afforded appellant was altered. For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, 'Reserved for Colored,' but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor, and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.

These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

...

It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar ...

We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. *See Sweatt v. Painter, ante*, p. 339 U. S. 629. We hold that, under these circumstances, the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. The judgment is

Reversed.

Excerpted by Alexandria Metzdorf



Brown v. Board of Education of Topeka

347 U.S. 483 (1954)

Argued December 9, 1952

Reargued December 8, 1953

Decided May 17, 1954*

Vote: 9-0

Decision: Remanded

Majority: Warren, joined by Black, Reed, Frankfurter, Douglas, Jackson, Clark, Burton and Minton

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 had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson*. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate ...

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.

...

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*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the “separate but equal” doctrine in the field of public education ... In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff ...

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*, *supra*, 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.” ... 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 ... 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.

It is so ordered.

Excerpted by Alexandria Metzdorf



Brown v. Board of Education of Topeka

349 U.S. 294 (1955)

Vote: 9-0

Decision: Reversed and remanded

Majority: Warren, joined by Black, Reed, Frankfurter, Douglas, Jackson, Clark, Burton and Minton

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

[...]

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question.

[...]

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility 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 conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

[...]

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. [...] 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 nondiscriminatory 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 previously attended only by white children — is affirmed on the basis of the principles stated in our May 17, 1954, 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.

Excerpted by Alexandria Metzdorf



Green v. County Sch. Bd. of New Kent County

391 U.S. 430 (1968)

Vote: 9-0

Decision: Reversed and remanded

Majority: Brennan, joined by Warren, Black, Douglas, Harlan II, Stewart, White, Fortas and Marshall

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

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom of choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis. ..." *Brown v. Board of Education (Brown II)*.

Petitioners brought this action in March, 1965, seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia ... In a memorandum filed May 17, 1966, the District Court found that the

“school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire County.”

...

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education ... These provisions were held to violate the Federal Constitution in *Davis v. County School Board of Prince Edward County*, decided with *Brown v. Board of Education (Brown I)*. The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied. One statute, the Pupil Placement Act, Va.Code § 22-232.1 *et seq.* (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act, children were each year automatically reassigned to the school previously attended unless, upon their application, the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

... on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a “freedom of choice” plan for desegregating the schools. Under that plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioners’ prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 2, 1966, the District Court approved the “freedom of choice” plan as so amended.

The pattern of separate “white” and “Negro” schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system’s schools was complete, extending not just to the composition of student bodies at the two schools, but to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part “white” and part “Negro.”

It was such dual systems that, 14 years ago, *Brown I* held unconstitutional, and, a year later, *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* “to effectuate a transition to a racially nondiscriminatory school system.” It is, of course, true that, for the time immediately after *Brown II*, the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the “white” schools. *See, e.g., Cooper v. Aaron*. Under *Brown II*, that

immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the “complexities arising from the transition to a system of public education freed of racial discrimination” that we provided for “all deliberate speed” in the implementation of the principles of *Brown I*.

...

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board’s “freedom of choice” plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may “freely” choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its “freedom of choice” plan may be faulted only by reading the Fourteenth Amendment as universally requiring “compulsory integration,” a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the “racially nondiscriminatory school system” *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that, in 1965, the Board opened the doors of the former “white” school to Negro children and of the “Negro” school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution.

...

In determining whether respondent School Board met that command by adopting its “freedom of choice” plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a “prompt and reasonable start.” This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system ... Moreover, a plan that, at this late date, fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable.

...

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case ... Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system “at the earliest practicable date,” then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith, and, at the least, it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

...

We do not hold that “freedom of choice” can have no place in such a plan. We do not hold that a “freedom of choice” plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that, in desegregating a dual system, a plan utilizing “freedom of choice” is not an end in itself.

The New Kent School Board’s “freedom of choice” plan cannot be accepted as a sufficient step to “effectuate a transition” to a unitary system. In three years of operation, not a single white child has chosen to attend Watkins school, and, although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning,] fashion steps which promise realistically to convert promptly to a system without a “white” school and a “Negro” school, but just schools.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf

Note, what is the big deal about busing? Listen or read: <https://www.npr.org/2019/06/30/737393607/a-history-of-school-busing>

Note, read: <https://www.latimes.com/local/lanow/la-me-busing-schools-los-angeles-harris-biden-20190628-story.html>

Note: <https://www.theatlantic.com/politics/archive/2016/03/the-boston-busing-crisis-was-never-intended-to-work/474264/>



Swann v. Charlotte-Mecklenburg Bd. of Educ.

402 U.S. 1 (1971)

Vote: 9-0

Decision: Affirmed

Majority: Burger, joined by Black, Douglas, Harlan II, Brennan, Stewart, White, Marshall and Blackmun

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

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown v. Board of Education (Brown I)*.

This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about ... This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina ... As of June, 1969, there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000 — approximately 14,000 Negro students — attended 21 schools which were either totally Negro or more than 99% Negro.

The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

In April, 1969, the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August, 1969, on an interim basis only, and the board was ordered to file a third plan by November, 1969 ... In December, 1969, the District Court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan. Thereafter in February, 1970, the District Court was presented with two alternative pupil assignment plans- the finalized "board plan" and the "Finger plan."

As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures ... The plan created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free-transfer plan into an optional majority-to-minority transfer system.

...

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white.

The Finger Plan. The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

...

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.

[...]

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this Court declined to disturb the Fourth Circuit's order, (1970).

On appeal, the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. [...] The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari, 399 U.S. 926, and directed reinstatement of the District Court's order pending further proceedings in that court.

[...]

After a lengthy evidentiary hearing, the District Court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or, in the alternative, to come forward with a new, equally effective plan of its own; the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

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. [...]

Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

[...]

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. [...]

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 affirmative 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. § 2000c. 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. ... 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. [...]

[...] 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.

[...]

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. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. 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 reestablish 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.*

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task, and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

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.

As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans. [...]

We see therefore that the 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. As we said in *Green*, 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) *One-race Schools.*

The record in this case reveals the familiar phenomenon that, in metropolitan areas, minority groups are often found concentrated in one part of the city. In some circumstances, certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

[...] 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.

(3) *Remedial Altering of Attendance Zones.*

[...]

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, 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.

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. [...]

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 15 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. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets, but fundamentally no more so than remedial measures courts of equity have traditionally employed.

The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." [...] 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" in the sense required by our decisions in *Green* and *Alexander*.

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.

For the reasons herein set forth, the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court, dated August 7, 1970, is also affirmed.

It is so ordered.

Excerpted by Alexandria Metzdorf



Keyes v. School Dist. No. 1

413 U.S. 189 (1973)

Vote: 7-1

Decision: Vacated and remanded

Majority: Brennan, joined by Douglas, Stewart, Marshall and Blackmun

Concurrence: Burger

Concurrence: Douglas

Concurrence/Dissent: Powell

Dissent: Rehnquist

Not participating: White

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. Rather, the gravamen of this action, brought in June, 1969, in the District Court for the District of Colorado by parents of Denver schoolchildren, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

The boundaries of the school district are coterminous with the boundaries of the city and county of Denver. There were, in 1969, 119 schools with 96,580 pupils in the school system. In early 1969, the respondent School Board adopted three resolutions ... designed to desegregate the schools in the Park Hill area in the northeast portion of the city. Following an election which produced a Board majority opposed to the resolutions, the resolutions were rescinded and replaced with a voluntary student transfer program. Petitioners then filed this action, requesting an injunction against the rescission of the resolutions and an order directing that the respondent School Board desegregate ... The District Court found that, by the construction of a new, relatively small elementary school, Barrett, in the middle of the Negro community west of Park Hill, by the gerrymandering of student attendance zones, by the use of so-called “optional zones,” and by the excessive use of mobile classroom units, among other things, the respondent School Board had engaged over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools. The court therefore ordered the Board to desegregate those schools through the implementation of the three rescinded resolutions.

Segregation in Denver schools is not limited, however, to the schools in the Park Hill area ... petitioners pressed their prayer that the District Court order desegregation of all segregated schools in the city of Denver, particularly the heavily segregated schools in the core city area. But that court concluded that its finding of a purposeful and systematic program of racial segregation affecting thousands of students in the Park Hill area did not, in itself, impose on the School Board an affirmative duty to eliminate segregation throughout the school district. Instead, the court fractionated the district and held that petitioners had to make a fresh showing of *de jure* segregation in each area of the city for which they sought relief. Moreover, the District Court held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city. Under this restrictive approach, the District Court concluded that petitioners’ evidence of intentionally discriminatory School Board action in areas of the district other than Park Hill was insufficient ...

Nevertheless, the District Court went on to hold that the proofs established that the segregated core city schools were educationally inferior to the predominantly “white” or “Anglo” schools in other parts of the district ... Thus, the court held that, under the doctrine of *Plessy v. Ferguson* (1896), respondent School Board constitutionally “must at a minimum ... offer an equal educational opportunity,” 313 F. Supp. at 83, and, therefore, although all-out desegregation “could not be decreed, ... the only feasible and constitutionally acceptable program — the only program which furnishes anything approaching substantial equality — is a system of desegregation and integration which provides compensatory education in an integrated environment.”

Respondent School Board appealed, and petitioners cross-appealed, to the Court of Appeals for the Tenth Circuit. That court sustained the District Court’s finding that the Board had engaged in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools, and ... As to the core city schools ... reversed the legal determination of the District Court that those schools were maintained in violation of the Fourteenth Amendment ...

We granted petitioners’ petition for certiorari to review the Court of Appeals’ judgment insofar as it reversed that part of the District Court’s Final Decree as pertained to the core city schools.

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano. The District Court, in assessing the question of *de jure* segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school ...

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment ... This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

In our view, the only other question that requires our decision at this time is ... whether the District Court and the Court of Appeals applied an incorrect legal standard in addressing petitioners' contention that respondent School Board engaged in an unconstitutional policy of deliberate segregation in the core city schools. Our conclusion is that those courts did not apply the correct standard in addressing that contention.

Petitioners apparently concede for the purposes of this case that, in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action. Petitioners proved that, for almost a decade after 1960, respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill schools. ... We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that, where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education* (1954) (*Brown I*), the State automatically assumes an affirmative duty ... to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education* (1971).

This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system ...

In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district

will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty “to effectuate a transition to a racially nondiscriminatory school system.” *Brown II* ...

The District Court proceeded on the premise that the finding as to the Park Hill schools was irrelevant to the consideration of the rest of the district, and began its examination of the core city schools by requiring that petitioners prove all of the essential elements of *de jure* segregation — that is, stated simply, a current condition of segregation resulting from intentional state action directed specifically to the core city schools. The segregated character of the core city schools could not be and is not denied. Petitioners’ proof showed that, at the time of trial 22 of the schools in the core city area were less than 30% in Anglo enrollment and 11 of the schools were less than 10% Anglo. Petitioners also introduced substantial evidence demonstrating the existence of a disproportionate racial and ethnic composition of faculty and staff at these schools. On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools ...

Although petitioners had already proved the existence of intentional school segregation in the Park Hill schools, this crucial finding was totally ignored when attention turned to the core city schools. Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities’ intent with respect to other parts of the same school system. On the contrary, where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board’s intent with respect to other segregated schools in the system. This is merely an application of the well-settled evidentiary principle that

“the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.” ...

Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions ...

...

Thus, respondent School Board having been found to have practiced deliberate racial segregation in schools attended by over one-third of the Negro school population, that crucial finding establishes a *prima facie* case of intentional segregation in the core city schools. In such case, respondent’s neighborhood school policy is not to be determinative “simply because it appears to be neutral.”

In summary, the District Court on remand, first, will afford respondent School Board the opportunity to prove its contention that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. If respondent School Board fails to prove that con-

tention, the District Court, second, will determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual school system.

The judgment of the Court of Appeals is modified to vacate, instead of reverse, the parts of the Final Decree that concern the core city schools, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Rorie Solberg



Milliken v. Bradley

418 U.S. 717 (1974)

Vote: 5-4

Decision: Reversed and remanded

Majority: Burger, joined by Stewart, Blackmun, Powell and Rehnquist

Concurrence: Stewart

Dissent: Douglas

Dissent: White, joined by Douglas, Brennan and Marshall

Dissent: Marshall, joined by Douglas, Brennan and White

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 multi-district, area-wide remedy to a single-district *de jure* segregation problem absent any finding that the other included school district 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 multi-district remedy or on the question of constitutional violations by those neighboring districts.

...

Ever since *Brown v. Board of Education* (1954), judicial consideration of school desegregation cases has begun with the standard:

“[I]n the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

This has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.

The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution in the cases subsequent to 1954. ...

Proceeding from these basic principles, we first note that, in the District Court, the complainants sought a remedy aimed at the condition alleged to offend the Constitution — the segregation within the Detroit City School District.

...

... [H]owever, the District Court abruptly rejected the proposed Detroit-only plans on the ground that,

“while [they] would provide a racial mix more in keeping with the Black-White proportions of the student population [they] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation.”

...

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. That this was the approach the District Court expressly and frankly employed is shown by the order which expressed the court’s view of the constitutional standard:

“Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described ... so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, *no school, grade or classroom* [will be] substantially disproportionate to the overall pupil racial composition.”

In *Swann*, which arose in the context of a single independent school district, the Court held:

“If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.”

402 U.S. at 402 U. S. 24. The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each “school, grade or classroom.”

Here, the District Court’s approach to what constituted “actual desegregation” raises the fundamental question, not presented in *Swann*, as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district. The court’s analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn “for political convenience.” Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process ...

... The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district. Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system ...

... [I]t is obvious from the scope of the inter-district remedy itself that, absent a complete restructuring of the laws of Michigan relating to school districts, the District Court will become first, a *de facto* “legislative authority” to resolve these complex questions, and then the “school superintendent” for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.

... School district lines and the present laws with respect to local control are not sacrosanct, and, if they conflict with the Fourteenth Amendment, federal courts have a duty to prescribe appropriate remedies. But our prior holdings have been confined to violations and remedies within a single school district. We therefore turn to address, for the first time, the validity of a remedy mandating cross-district or inter-district consolidation to remedy a condition of segregation found to exist in only one district.

... 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.

... *Brown, supra; Green, supra; Swann, supra; Scotland Neck, supra; and Emporia* ... each addressed the issue of constitutional wrong in terms of an established geographic and administrative school system populated by both Negro and white children. In such a context, terms such as “unitary” and “dual” systems, and “racially identifiable schools,” have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But 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. 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.

...

... In light of our holding that, absent an inter-district violation, there is no basis for an inter-district remedy ... It is clear, however, that the District Court, with the approval of the Court of Appeals, has provided an inter-district remedy in the face of a record which shows no constitutional violations that would call for equitable relief except within the city of Detroit. In these circumstances, there was no occasion for the parties to address, or for the District Court to consider, whether there were racially discriminatory acts for which any of the 53 outlying districts were responsible and which had direct and significant segregative effect on schools of more than one district.

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 effected the discrimination found to exist in the schools of Detroit.

Accordingly, the judgment of the Court of Appeals is reversed 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.

It is so ordered.

Excerpted by Alexandria Metzdorf

Note, listen: <https://www.npr.org/2019/07/24/744884767/milliken-v-bradley>



Pasadena City Bd. of Educ. v. Spangler

427 U.S. 424 (1976)

Vote: 6-2

Decision: Vacated and remanded

Majority: Rehnquist, joined by Burger, Stewart, White, Blackmun, Powell

Dissent: Marshall, joined by Brennan

No participation: Stevens

Justice Rehnquist delivered the opinion of the Court.

In 1968, several students in the public schools of Pasadena, Cal., joined by their parents, instituted an action in the United States District Court for the Central District of California seeking injunctive relief from allegedly unconstitutional segregation of the high schools of the Pasadena Unified School District (PUSD). This action named as defendants the Pasadena City Board of Education, which operates the PUSD, and several of its officials. Before the defendants had filed an answer, the United States moved to intervene in the case pursuant to Title IX ... The District Court granted this motion. Later ... the court granted defendant Board's motion to strike those portions of the United States' complaint ... which sought to include in the case other areas of the Pasadena public school system: the elementary schools, the junior high schools, and the special schools. This ruling was the subject of an interlocutory appeal¹ to the Court of Appeals for the Ninth Circuit ... that court reversed the District Court and ordered the United States' demand for systemwide relief reinstated ... No further review of this decision was sought.

Following remand from this decision, the District Court held a trial on the allegations that the Pasadena school system was unconstitutionally segregated. On January 23, 1970, the court entered a judgment in which it concluded that the defendants' educational policies and procedures were violative of the Fourteenth Amendment. The court ordered the defendants "enjoined from failing to prepare and adopt a plan to correct racial imbalance at all levels in the Pasadena Unified School District." The defendants were further ordered to submit to the District Court a plan for desegregating the Pasadena schools ... The District Court ordered that

"[t]he plan shall provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September of 1970, there shall be no school in the District, elementary or junior high or senior high school, with a majority of any minority students."

In February, the defendants submitted their proposed plan, the "Pasadena Plan," and on March 10, 1970, the District Court approved the plan ... The "Pasadena Plan" was implemented the following September, and the Pasadena schools have been under its terms ever since.

1. Defined as a party's application to an appellate court challenging a non-final trial court order that decides an issue but does not result in final judgment.

... Petitioners, successors to the original defendants in this action, filed a motion with the District Court seeking relief from the court's 1970 order. Petitioners sought four changes: to have the judgment modified so as to eliminate the requirement that there be "no school in the District, elementary or junior high or senior high school, with a majority of any minority students"; to have the District Court's injunction dissolved; to have the District Court terminate its "retained jurisdiction" over the actions of the Board; or, as an alternative, to obtain approval of petitioners' proposed modifications of the "Pasadena Plan."

The District Court held hearings on these motions and, on March 1, 1974, denied them in their entirety ... Because the case seemed to present issues of importance regarding the extent of a district court's authority in imposing a plan designed to achieve a unitary school system, we granted certiorari. 423 U.S. 945 (1975). We vacate the judgment of the Court of Appeals and remand the case to that court for further proceedings.

Petitioners requested the District Court to dissolve its injunctive order requiring that there be no school in the PUSD with a majority of any minority students enrolled. The District Court refused this request, and ordered the injunction continued ... It was apparently the view of the majority of the Court of Appeals' panel that this failure to maintain literal compliance with the 1970 injunction indicated that the District Court had not abused its discretion in refusing to grant so much of petitioner's motion for modification as pertained to this aspect of the order. We think this view was wrong.

...

All that is now before us are the questions of whether the District Court was correct in denying relief when petitioners, in 1974, sought to modify the "no majority" requirement as then interpreted by the District Court.

The meaning of this requirement, as originally established by the District Court, was apparently unclear even to the parties. In opposing the petitioners' request for relief in 1974, counsel for the original individual plaintiffs and counsel for the Government jointly stipulated that they were aware "of no violations of the Pasadena Plan up to and including the present." These parties were, of course, aware that some of the Pasadena schools had "slipped out of compliance" with the literal terms of the order.

...

When the District Court's order in this case, as interpreted and applied by that court, is measured against what this Court said in its intervening decision in *Swann v. Board of Education* (1971), regarding the scope of the judicially created relief which might be available to remedy violations of the Fourteenth Amendment, we think the inconsistency between the two is clear. The District Court's interpretation of the order appears to contemplate the "substantive constitutional right [to a] particular degree of racial balance or mixing" which the Court in *Swann* expressly disapproved.

The District Court apparently believed it had authority to impose this requirement even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible ... While the District Court found such a violation in 1970, and while this unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segre-

gation, its adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in the PUSD. Having done that, we think that, in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority.

...

The fact that black student enrollment at 5 out of 32 of the regular Pasadena schools came to exceed 50% during the 4-year period from 1970 to 1974 apparently resulted from people's randomly moving into, out of, and around the PUSD area. This quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But, as these shifts were not attributed to any segregative actions on the part of the petitioners, we think this case comes squarely within the sort of situation foreseen in *Swann*:

“It does not follow that the communities served by [unitary] 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.”

...

No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

...

Even had the District Court's decree been unambiguous and clearly understood by the parties to mean what that court declared it to mean in 1974, the “no majority of any minority” provision would, as we have indicated previously, be contrary to the intervening decision of this Court in *Swann, supra*.

...

Petitioners have plainly established that they were entitled to relief from the District Court's injunction insofar as it required them to alter school attendance zones in response to shifts in demographics within the PUSD. The order of the District Court which was affirmed by the Court of Appeals equally plainly envisioned the continuation of such a requirement. We do not think petitioners must be satisfied with what may have been the implicit assumption of the Court of Appeals that the District Court would heed the “disapproval” expressed by each member of the panel of that court in his opinion. Instead, we think petitioners were entitled on this phase of the case to a judgment of the Court of Appeals reversing the District Court with respect to its treatment of that portion of the order.

Because the case is to be returned to the Court of Appeals, that court will have an opportunity to reconsider its decision in light of our observations regarding the appropriate scope of equitable relief in this case. We thus think it unnecessary for us to consider petitioners' other contentions. ... Accordingly the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Excerpted by Alexandria Metzdorf



Freeman v. Pitts

503 U.S. 467 (1992)

Vote: 8-0

Decision: Reversed and remanded

Majority: Kennedy, joined by Rehnquist, White, Scalia and Souter

Concurrence: Scalia

Concurrence: Souter

Concurrence: Blackmun, joined by Stevens and O'Connor

Not participating: Thomas

Justice Kennedy delivered the opinion of the Court.

DeKalb County, Georgia, is a major suburban area of Atlanta. This case involves a court-ordered desegregation decree for the DeKalb County School System (DCSS) ...

DCSS has been subject to the supervision and jurisdiction of the United States District Court for the Northern District of Georgia since 1969, when it was ordered to dismantle its dual school system. In 1986, petitioners filed a motion for final dismissal. The District Court ruled that DCSS had not achieved unitary status in all respects but had done so in student attendance and three other categories. In its order the District Court relinquished remedial control as to those aspects of the system in which unitary status had been achieved, and retained supervisory authority only for those aspects of the school system in which the district was not in full compliance. The Court of Appeals for the Eleventh Circuit reversed, holding that a district court should retain full remedial authority over a school system until it achieves unitary status in six categories at the same time for several years. We now reverse the judgment of the Court of Appeals and remand, holding that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.

...

For decades before our decision in *Brown v. Board of Education* (1954) (*Brown I*), and our mandate in *Brown v. Board of Education* (1955) (*Brown II*), which ordered school districts to desegregate with “all deliberate speed,” DCSS was segregated by law. DCSS’ initial response to the mandate of *Brown II* was an all too familiar one. Interpreting “all deliberate speed” as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966-1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former *de jure* white schools, but the plan had no significant effect on the former *de jure* black schools.

In 1968, we decided *Green v. School Bd. of New Kent County*. We held that adoption of a freedom of choice plan does not, by itself, satisfy a school district’s mandatory responsibility to eliminate all vestiges of a dual system. *Green* was a turning point in our law in a further respect. Concerned by more than a decade of inaction, we stated that “[t]he time for mere “deliberate speed” has run out.” ... We said that the obligation of school districts once segregated by law was to come forward with a plan that “promises realistically to work, and promises realistically to work *now*.” ... (emphasis in original) ...

Within two months of our ruling in *Green*, respondents, who are black schoolchildren and their parents, instituted this class action in the United States District Court for the Northern District of Georgia. After the suit was filed, DCSS voluntarily began working with the Department of Health, Education, and Welfare to devise a comprehensive and final plan of desegregation. The District Court, in June 1969, entered a consent order approving the proposed plan, which was to be implemented in the 1969-1970 school year. The order abolished the freedom of choice plan and adopted a neighborhood school attendance plan that had been proposed by DCSS and accepted by the Department of Health, Education, and Welfare subject to a minor modification. Under the plan all of the former *de jure* black schools were closed, and their students were reassigned among the remaining neighborhood schools. The District Court retained jurisdiction.

...

In 1986, petitioners filed a motion for final dismissal of the litigation. They sought a declaration that DCSS had satisfied its duty to eliminate the dual education system, that is to say a declaration that the school system had achieved unitary status ... The District Court approached the question whether DCSS had achieved unitary status by asking whether DCSS was unitary with respect to each of the factors identified in *Green*. The court considered an additional factor that is not named in *Green*: the quality of education being offered to the white and black student populations. The District Court found DCSS to be “an innovative school system that has travelled the often long road to unitary status almost to its end,” noting that “the court has continually been impressed by the successes of the DCSS and its dedication to providing a quality education for all students within that system.” ... It found that DCSS is a unitary system with regard to student assignments, transportation, physical facilities, and extracurricular activities, and ruled that it would order no further relief in those areas. The District Court stopped short of dismissing the case, however, because it found that DCSS was not unitary in every respect. The court said that vestiges of the dual system remain in the areas of teacher and principal assignments, resource allocation, and quality of education. DCSS was ordered to take measures to address the remaining problems.

...

Both parties appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the District Court's ultimate conclusion that DCSS has not yet achieved unitary status, but reversed the District Court's ruling that DCSS has no further duties in the area of student assignment ... held that the District Court erred by considering the six *Green* factors as separate categories. The Court of Appeals rejected the District Court's incremental approach, an approach that has also been adopted by the Court of Appeals for the First Circuit ... and held that a school system achieves unitary status only after it has satisfied all six factors at the same time for several years ... We granted certiorari ...

Two principal questions are presented. The first is whether a district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance. As we answer this question in the affirmative, the second question is whether the Court of Appeals erred in reversing the District Court's order providing for incremental withdrawal of supervision in all the circumstances of this case.

...

We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree. That is to say, 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 traceable, in a proximate way, to constitutional violations.

We reach now the question whether the Court of Appeals erred in prohibiting the District Court from returning to DCSS partial control over some of its affairs. We decide that the Court of Appeals did err in holding that, as a matter of law, the District Court had no discretion to permit DCSS to regain control over student assignment, transportation, physical facilities, and extracurricular activities, while retaining court supervision over the areas of faculty and administrative assignments and the quality of education, where full compliance had not been demonstrated.

...

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 ...

To say, as did the Court of Appeals, that a school district must meet all six *Green* factors before the trial court can declare the system unitary and relinquish its control over school attendance zones, and to hold further that

racial balancing by all necessary means is required in the interim, is simply to vindicate a legal phrase. The law is not so formalistic. A proper rule must be based on the necessity to find a feasible remedy that ensures system-wide compliance with the court decree and that is directed to curing the effects of the specific violation.

...

The judgment is reversed, and the case is remanded to the Court of Appeals. It should determine what issues are open for its further consideration in light of the previous briefs and arguments of the parties and in light of the principles set forth in this opinion. Thereupon it should order further proceedings as necessary or order an appropriate remand to the District Court ...

It is so ordered.

Excerpted by Alexandria Metzdorf



Parents Involved in Community Schools v. Seattle School District No. 1

551 U.S. 701 (2007)

Vote: 5-4

Decision: Reversed and remanded

Plurality: Roberts, joined by Scalia, Thomas, and Alito

Concurrence: Thomas

Concurrence: Kennedy (in part)

Dissent: Stevens

Dissent: Breyer, joined by Stevens, Ginsburg, and Souter

Chief Justice Roberts announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justices Scalia, Thomas, and Alito join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or non-white; the Jefferson County school district as black or “other.” In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student’s race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assign-

ment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. The plan allows incoming ninth graders to choose from among any of the district’s high schools, ranking however many schools they wish in order of preference.

... If too many students list the same school as their first choice, the district employs a series of “tiebreakers” to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district’s public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. If an oversubscribed school is not within 10 percentage points of the district’s overall white/nonwhite racial balance, it is what the district calls “integration positive,” and the district employs a tiebreaker that selects for assignment students whose race “will serve to bring the school into balance.” If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student’s residence.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. Four of Seattle’s high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle.

For the 2000–2001 school year, five of these schools were oversubscribed ... so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. Three of the oversubscribed schools were “integration positive” because the school’s white enrollment the previous school year was greater than 51 percent ... Thus, more nonwhite students ... who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker ...

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her

ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit initially reversed ... The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests. The Ninth Circuit granted rehearing en banc, and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest. We granted certiorari.

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, and in 1975 the District Court entered a desegregation decree. Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation.

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first-graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district."Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." If a school has reached the "extremes of the racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. After assignment, students at all grade levels are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines.

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his

new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. Space was available at Bloom, and intercluster transfers are allowed, but Joshua’s transfer was nonetheless denied because, in the words of Jefferson County, “[t]he transfer would have an adverse effect on desegregation compliance” of Young.

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. The Sixth Circuit affirmed in a per curiam opinion relying upon the reasoning of the District Court, concluding that a written opinion “would serve no useful purpose.” We granted certiorari.

...

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. *Grutter v. Bollinger* (2003) ... As the Court recently reaffirmed, “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” *Gratz v. Bollinger* (2003) ... School districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is “narrowly tailored” to achieve a “compelling” government interest.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases ... have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman v. Pitts* (1992). Yet the Seattle public schools have not shown that they were ever segregated by law ... The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree ... In 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had “eliminated the vestiges associated with the former policy of segregation and its pernicious effects ... Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students.

Nor could it ... Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. The specific interest found compelling in *Grutter* was student body diversity “in the context of higher education.” The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” ...

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 ... was only as part of a “highly individualized, holistic review.” As the Court explained, “[t]he impor-

tance of this individualized consideration in the context of a race-conscious admissions program is paramount.” 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 broader assessment of diversity, and not simply an effort to achieve racial balance, which the 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 ... Like the University of Michigan undergraduate plan struck down in *Gratz* ... the plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way.

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. The Seattle “Board Statement Reaffirming Diversity Rationale” speaks of the “inherent educational value” in “[p]roviding students the opportunity to attend schools with diverse student enrollment.” But 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 can be viewed as being concerned with achieving enrollment that is “broadly diverse,” *Grutter* ...

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” ... The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter*, to justify their race-based assignments. In briefing and argument before this Court, 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.

... 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.” Allowing racial balancing as a compelling end in itself would “effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.” *Croson v. Richmond* (1989) [quoting *Wygant v. Jackson Bd. Of Ed.* (1986)]

...

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.” While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance ...

However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled “racial diversity” or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

...

While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications ... Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation’s history of using race in public schools, and requires more than such an amorphous end to justify it ...

Justice Breyer’s dissent takes a different approach to these cases, one that fails to ground the result it would reach in law ... Justice Breyer’s dissent candidly dismisses the significance of this Court’s repeated holdings that all racial classifications must be reviewed under strict scrutiny, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes.

... Justice Breyer nonetheless relies on the good intentions and motives of the school districts, stating that he has found “no case that ... repudiated this constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races.” We have found many ...

This argument that different rules should govern racial classifications designed to include rather than exclude is not new ... and has been repeatedly rejected.

... Our established strict scrutiny test for racial classifications, however, insists on “detailed examination, both as to ends and as to means.” *Adarand Constructors v. Pena*, at 236 (1995) ... Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

...

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable ... Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Crosby* ... "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno* (1993) ... and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting v. FCC* (1990) (O'Connor, J., dissenting) ...

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education* (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954 ... What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis? Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II*, is to stop assigning students 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.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race-conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to

substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

Facts

The historical and factual context in which these cases arise is critical. In Brown, this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection ... In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with Brown's constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers ...

Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution *permitted*, but did not *require* (measures similar to those at issue here) ...

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation ... Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South) ... As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99–100% minority ... In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.

[The opinion then provides a long history of both school districts ...]

The histories I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

...

Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons ...

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in Swann. Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.” *Swann v. Charlotte-Mecklenburg Bd. Of Ed.* (1971), 16 ...

This Court has also held that school districts may be required by federal statute to undertake race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown ...

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together ...

The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is “fatal in fact” only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

...

The upshot is that these plans’ specific features—(1) their limited and historically-diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts’ plans are “narrowly tailored” to achieve their “compelling” goals. In sum, the districts’ race-conscious plans satisfy “strict scrutiny” and are therefore lawful.

...

Consequences

...

The districts’ past and current plans are not unique ...

At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board’s desegregation plans.

...

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of “race-conscious” criteria from among their available options ... Today,

however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

...

Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.

...

The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.

Excerpted by Alexandria Metzdorf



How Courts Review Racial Discrimination

Hirabayashi v. United States

320 U.S. 81 (1943)

Vote: 9-0

Decision: Affirmed

Majority: Stone, joined by Roberts, Black, Reed, Frankfurter and Jackson

Concurrence: Douglas

Concurrence: Murphy

Concurrence: Rutledge

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

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, 18 U.S.C. § 97a, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

...

[The evidence showed that] appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that for like reason he was away from his place of residence after 8:00 p.m. on May 9, 1942. The jury returned a verdict of guilty on both counts and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently ...

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority.

...

[We therefore conclude that] Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution ...

In the critical days of March, 1942, the danger to our war production by sabotage and espionage in this area seems obvious ... Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because [they were] born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population ... The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country ...

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions ...

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection ... We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others ...

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant ...

Affirmed.

Excerpted by Alexandria Metzdorf



Korematsu v. United States

323 U.S. 214 (1944)

Vote: 6-3

Decision: Affirmed

Majority: Black, joined by Reed, Frankfurter, Douglas, and Rutledge, and Stone

Concurrence: Frankfurter

Dissent: Jackson

Dissent: Murphy

Dissent: Roberts

Mr. Justice Black delivered the opinion of the Court.

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

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

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

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

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

Affirmed.

Mr. Justice Murphy, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power,” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

...

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell* (1871) ... Being an obvious racial

discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an “immediate, imminent, and impending” public danger is evident to support this racial restriction, which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic, or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than *bona fide* military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. In it, he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies ... at large today” along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise, by their behavior, furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence ... No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry ... It is asserted merely that the loyalties of this group “were unknown and time was of the essence.” ...

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.

All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

Excerpted by Alexandria Metzdorf



McLaughlin v. Florida

379 U.S. 184 (1964)

Vote: 9-0

Decision: Reversed

Majority: White, joined by Warren, Black, Clark, Brennan and Goldberg

Concurrence: Harlan

Concurrence: Stewart, joined by Douglas

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the validity of a conviction under § 798.05 of the Florida statutes, F.S.A., providing that:

“Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the night-time the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.”

Because the section applies only to a white person and a Negro who commit the specified acts, and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold § 798.05 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment ...

Appellants were charged with a violation of § 798.05. The elements of the offense as described by the trial judge are the (1) habitual occupation of a room at night, (2) by a Negro and a white person (3) who are not married. The State presented evidence going to each factor, appellants’ constitutional contentions were overruled and the jury returned a verdict of guilty ... Solely on the authority of *Pace v. Alabama* 106 U. S. 583, the Florida Supreme Court affirmed and sustained the validity of § 798.05 as against appellants’ claims that the section denied them equal protection of the laws guaranteed by the Fourteenth Amendment. We noted probable jurisdiction ... We deal with the single issue of equal protection and on this basis set aside these convictions.

It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple ...

In this situation, *Pace v. Alabama* ... is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. In that case, the Court let stand a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro and imposing a greater penalty than allowed under another Alabama statute of general application and proscribing the same conduct whatever the race of the participants ... [T]he Court pointed out that Alabama had designated as a separate offense the commission by a white person and a Negro of the identical acts forbidden by the general provisions. There was, therefore, no impermissible discrimination, because the difference in punishment was “directed against the offence designated,” and because, in the case of each offense, all who committed it, white and Negro, were treated alike ... Because each of the Alabama laws applied equally to those to whom it was applicable, the different treatment accorded interracial and interracial couples was irrelevant.

...

Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose — in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida’s cohabitation law and those excluded. That question is what *Pace* ignored, and what must be faced here.

...

The Florida Supreme Court, relying upon *Pace v. Alabama* ... found no legal discrimination at all and gave no consideration to statutory purpose. The State in its brief in this Court, however, says that the legislative purpose of § 798.05, like the other sections of chapter 798, was to prevent breaches of the basic concepts of sexual decency, and we see no reason to quarrel with the State’s characterization of this statute, dealing as it does with illicit extramarital and premarital promiscuity.

We find nothing in this suggested legislative purpose, however, which makes it essential to punish promiscuity of one racial group and not that of another. There is no suggestion that a white person and a Negro are any more likely habitually to occupy the same room together than the white or the Negro couple or to engage in illicit intercourse if they do. Sections 798.01-798.05 indicate no legislative conviction that promiscuity by the interracial couple presents any particular problems requiring separate or different treatment if the suggested over-all policy of the chapter is to be adequately served.

Florida’s remaining argument is related to its law against interracial marriage, § 741.11, which, in the light of certain legislative history of the Fourteenth Amendment, is said to be immune from attack under the Equal Protection Clause. Its interracial cohabitation law, § 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.

We reject this argument, without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of the Amendment. For even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment ...

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy ... Those provisions of chapter 798 which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not. These provisions, if enforced, would reach illicit relations of any kind, and, in this way, protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage. These same provisions, moreover, punish premarital sexual relations as severely or more severely in some instances than do those provisions which focus on the interracial couple. Florida has offered no argument that the State's policy against interracial marriage cannot be as adequately served by the general, neutral, and existing ban on illicit behavior ... In short, it has not been shown that § 798.05 is a necessary adjunct to the State's ban on interracial marriage. We accordingly invalidate § 798.05 without expressing any views about the State's prohibition of interracial marriage, and reverse these convictions.

Reversed.

Excerpted by Alexandria Metzdorf



Loving v. Virginia

388 U.S. 1 (1967)

Vote: 9-0

Decision: Reversed

Majority: Warren, joined by Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Fortas

Concurrence: Stewart

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

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June, 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge, and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment ... we noted probable jurisdiction ...

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 258 of the Virginia Code:

Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Section 259, which defines the penalty for miscegenation, provides:

Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

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

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a “white person” marrying other than another “white

person,” a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants’ statements as to their race are correct, certificates of “racial composition” to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

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

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, *Maynard v. Hill* (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska* (1923), and *Skinner v. Oklahoma* (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York* (1949) ... In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President [Andrew] Johnson vetoed, and the Civil Rights Act of 1866, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment ... 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. *Brown v. Board of Education* (1954). See also *Strauder v. West Virginia* (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama* (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases* (1873) ...

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States* (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States* (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they cannot conceive of a valid legislative purpose ... which makes the color of a person's skin the test of whether his conduct is a criminal offense. *McLaughlin v. Florida* (Stewart, J., joined by Douglas, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain

White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

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

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. *Skinner v. Oklahoma* (1942). See also *Maynard v. Hill* (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

Excerpted by Alexandria Metzdorf



Palmore v. Sidoti

466 U.S. 429 (1984)

Vote: 9-0

Decision: Reversed

Majority: Burger, joined by Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O’Connor

Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

When petitioner Linda Sidoti Palmore and respondent Anthony Sidoti, both Caucasians, were divorced in May, 1980, in Florida, the mother was awarded custody of their 3-year-old daughter.

In September, 1981, the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations ...

The court then addressed the recommendations of the court counselor, who had made an earlier report

“in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. *Niles v. Niles*, 299 So. 2d 162.”

From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because

“[t]he wife [petitioner] has chosen for herself, and for her child, a lifestyle unacceptable to the father *and to society*. ... The child ... is, or at school age will be, subject to environmental pressures not of choice.”

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

“The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age, and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.*“

The Second District Court of Appeal affirmed without opinion ... thus denying the Florida Supreme Court jurisdiction to review the case. We granted certiorari and we reverse.

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the “father's evident resentment of the mother's choice of a black partner is not sufficient” to deprive her of custody, then turns to what it regarded as the damaging impact on the child from remaining in a racially mixed household. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that

“there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent.”

...

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid, and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

...

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved ... The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist, or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. 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.

...

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

The judgment of the District Court of Appeal is reversed.

It is so ordered.

Excerpted by Alexandria Metzdorf



Washington v. Davis

426 U.S. 229 (1976)

Vote: 7-2

Decision: Reversed

Majority: White, joined by Burger, Blackmun, Powell, Rehnquist, Stevens, and Stewart (Parts I and II).

Concurrence: Stevens

Dissent: Brennan, joined by Marshall

Mr. Justice White delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

[The issue involved an assertion] that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution ... Defendants answered, and discovery and various other proceedings followed. Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds. The District Court granted petitioners' and denied respondents' motions.

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," and which was "designed to test verbal ability, vocabulary, reading and comprehension."

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to estab-

lish its reliability for measuring subsequent job performance.” This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was “satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates [sic] to discriminate against otherwise qualified blacks.” It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance – “The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process.” The District Court ultimately concluded that “[t]he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability” and that the Department “should not be required on this showing to lower standards or to abandon efforts to achieve excellence.”

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment ... The Court of Appeals ... would be guided by *Griggs v. Duke Power Co* (1971), a case involving ... Title VII ... and ... over a dissent ... reversed the judgment of the District Court and directed that respondents’ motion for partial summary judgment be granted. We granted the petition for certiorari ...

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents’ favor ...

... We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe* (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Almost 100 years ago, *Strauder v. West Virginia* (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make

out an invidious discrimination forbidden by the Clause. “A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.” *Akins v. Texas* (1945) ...

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose ...

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins* (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an “unequal application of the law ... as to show intentional discrimination.” *Akins v. Texas* ...

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another ... Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida* (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations ...

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies “any person ... equal protection of the laws” simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups ... Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with

the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that “a police officer qualifies on the color of his skin rather than ability.”

...

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

...

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

Excerpted by Alexandria Metzdorf



Arlington Heights v. Metropolitan Housing Dev. Corp.

429 U.S. 252 (1977)

Vote: 5-3

Decision: Reversed and remanded

Majority: Powell, joined by Burger, Stewart, Blackmun, and Rehnquist

Concur/Dissent: Marshall, joined by Brennan

Dissent: White.

Not participating: Stevens

Justice Powell delivered the opinion of the Court.

In 1971, respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple family clas-

sification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. They alleged that the denial was racially discriminatory and that it violated, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968. Following a bench trial, the District Court entered judgment for the Village and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the “ultimate effect” of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. We granted the Village’s petition for certiorari and now reverse.

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960’s, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village’s 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order’s three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east, the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act. MHDC is such a developer. It was organized in 1968 by several prominent Chicago citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970, MHDC was in the process of building one § 236 development near Arlington Heights, and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

...

The planned development did not conform to the Village’s zoning ordinance, and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under § 236. The materials made clear that one requirement under § 236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to

assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition ... a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the “social issue”—the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village’s apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. [This project] did not meet this requirement ...

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village’s Board of Trustees that it deny the request ... The Village Board met on September 28, 1971, to consider MHDC’s request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June, MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and injunctive relief. A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs.

The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit, the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low income groups when they denied rezoning, but rather by a desire “to protect property values and the integrity of the Village’s zoning plan.” The District Court concluded also that the denial would not have a racially discriminatory effect.

A divided Court of Appeals reversed ... ruled that the denial ... had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

...

Our decision last Term, in *Washington v. Davis* (1976) made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent

or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts.

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 ... When there is a 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,” *Washington v. Davis*,—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. *Yick Wo v. Hopkins* (1886) ...

Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role ...

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in *Washington v. Davis*. The respondents proceeded on the erroneous theory that the Village’s refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision.

In making its findings on this issue, the District Court noted that some of the opponents ... might have been motivated by opposition to minority groups. The court held, however, that the evidence “does not warrant the conclusion that this motivated the defendants.”

On appeal, the Court of Appeals focused primarily on respondents’ claim that the Village’s buffer policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board’s decision to deny other rezoning proposals. “The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner.” The Court of Appeals therefore approved the District Court’s findings concerning the Village’s purposes in denying rezoning to MHDC.

We also have reviewed the evidence ... [T]here is little about the sequence of events leading up to the decision that would spark suspicion. The area around the Viatorian property 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.

In sum, 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.

This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

Reversed and remanded.

Excerpted by Alexandria Metzdorf



Defining State Action

Shelley v. Kraemer

334 U.S. 1 (1948)

Vote: 6-0

Decision: Reversed

Majority: Vinson, joined by Black, Frankfurter, Douglas, Murphy and Burton

Not participating: Reed, Jackson, and Rutledge

Chief Justice Vinson delivered the Opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

“ ... the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time 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.”

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and “in the immediate vicinity” of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case ...

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 ...

[But it is] 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. We do not understand respondents to urge the contrary ...

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 (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 respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

... [T]he examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process ...

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials ... [I]t has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

...

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the

order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement ...

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. 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. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh v. Alabama* (1946). [...]

Reversed.

Excerpted by Alexandria Metzdorf



Burton v. Wilmington Parking Authority

365 U.S. 715 (1961)

Vote: 6-3

Decision: Reversed

Majority: Clark, joined by Warren, Black, Douglas, and Brennan

Concurrence: Stewart

Dissent: Frankfurter

Dissent: Harlan, joined by and Whittaker

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 ... On appeal here from the judgment as having been based upon a statute construed unconstitutionally, we postponed consideration of the question of jurisdiction under 28 U.S.C. § 1257(2), to the hearing on the merits ... We agree with the respondents that the appeal should be dismissed, and accordingly the motion to dismiss is granted. However, since the action of Eagle in excluding appellant raises an important constitutional question, the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, 28 U.S.C. § 2103, and the writ is granted. 28 U.S.C. § 1257(3). 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.

...

Agreeing to pay an annual rental of \$28,700, Eagle covenanted to

"occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority."

Its lease, however, contains no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities except any as would impair the security of its bondholders ...

In August, 1958, appellant parked his car in the building and walked around to enter the restaurant by its front door on Ninth Street. Having entered and sought service, he was refused it. Thereafter, he filed this declaratory

judgment action in the Court of Chancery. On motions for summary judgment, based on the pleadings and affidavits, the Chancellor concluded, contrary to the contentions of respondents, that whether in fact the lease was a “device” or was executed in good faith, it would not “serve to insulate the public authority from the force and effect of the Fourteenth Amendment.” ... The Supreme Court of Delaware reversed ... holding that Eagle, “in the conduct of its business, is acting in a purely private capacity.” It therefore denied appellant’s claim under the Fourteenth Amendment ... Delaware’s highest court has thus denied the equal protection claim of the appellant ...

...

... It is clear, as it always has been since the *Civil Rights Cases, supra*, that “Individual invasion of individual rights is not the subject matter of the amendment,” at 109 U. S. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless, to some significant extent, the State, in any of its manifestations, has been found to have become involved in it ... to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an “impossible task” which “This Court has never attempted.” *Kotch v. Board of River Port Pilot Comm’rs* [1947]. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

... [T]he Delaware Supreme Court seems to have placed controlling emphasis on its conclusion, as to the accuracy of which there is doubt, that only some 15% of the total cost of the facility was “advanced” from public funds; ... that the Authority had no original intent to place a restaurant in the building, it being only a happenstance resulting from the bidding; that Eagle expended considerable moneys on furnishings; that the restaurant’s main and marked public entrance is on Ninth Street, without any public entrance direct from the parking area; and that

“the only connection Eagle has with the public facility ... is the furnishing of the sum of \$28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.”

... While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged.

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.” 22 Del.Code, §§ 501, 514. 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. Assuming that the distinction would be significant, *cf. Derrington v. Plummer*, the 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. It is irony amounting to grave injustice that, in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings ... 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.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore, respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law," *Whitney v. State Tax Comm'n*, 309 U. S. 530, 309 U. S. 542. 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.

The judgment of the Supreme Court of Delaware is reversed, and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Excerpted by Alexandria Metzdorf



Reitman v. Mulkey

387 U.S. 369 (1967)

Vote: 5-4

Decision: Affirmed

Majority: Warren, joined by Douglas, Brennan, White, and Fortas

Dissent: Harlan, joined by Black, Clark, and Stewart

Justice White delivered the opinion of the Court.

The question here is whether Art. I, § 26, of the California Constitution denies “to any person ... the equal protection of the laws” within the meaning of the Fourteenth Amendment of the Constitution of the United States. Section 26 of Art. I, an initiated measure submitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:

“Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, 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.”

The real property covered by § 26 is limited to residential property, and contains an exception for state-owned real estate.

The issue arose in two separate actions in the California courts, *Mulkey v. Reitman* and *Prendergast v. Snyder*. In *Reitman*, the Mulkeys, who are husband and wife and respondents here, sued under § 51 and § 52 of the California Civil Code alleging that petitioners had refused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that §§ 51 and 52, insofar as they were the basis for the Mulkeys’ action, had been rendered null and void by the adoption of Proposition 14 after the filing of the complaint. The trial court granted the motion, and respondents took the case to the California Supreme Court.

...

In the *Prendergast* case, respondents, husband and wife, filed suit in December, 1964, seeking to enjoin eviction from their apartment; respondents alleged that the eviction was motivated by racial prejudice, and therefore would violate § 51 and § 52 of the Civil Code. Petitioner Snyder cross-complained for a judicial declaration that he was entitled to terminate the month-to-month tenancy even if his action was based on racial considerations. In denying petitioner's motion for summary judgment, the trial court found it unnecessary to consider the validity of Proposition 14, because it concluded that judicial enforcement of an eviction based on racial grounds would, in any event, violate the Equal Protection Clause of the United States Constitution. The cross-complaint was dismissed with prejudice and petitioner Snyder appealed to the California Supreme Court, which considered the case along with *Mulkey v. Reitman*. That court, in reversing the *Reitman* case, held that Art. I, § 26, was invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. 64 Cal. 2d 529, 413 P.2d 825. For similar reasons, the court affirmed the judgment in the *Prendergast* case. 64 Cal. 2d 877, 413 P.2d 847. We granted certiorari because the cases involve an important issue arising under the Fourteenth Amendment.

We affirm the judgments of the California Supreme Court. We first turn to the opinion of that court in *Reitman*, which quite properly undertook to examine the constitutionality of § 26 in terms of its "immediate objective" its "ultimate effect" and its "historical context and the conditions existing prior to its enactment." Judgments such as these we have frequently undertaken ourselves ...

[Describes the California Supreme Court decision ...]

There is no sound reason for rejecting this judgment. Petitioners contend that the California court has misconstrued the Fourteenth Amendment, since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to "authorize" and "encourage" discrimination because it makes legally permissible that which was formerly proscribed ... [The California Supreme Court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discrimination. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the intent of § 26 was to authorize private racial discriminations in the housing market ... and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with § 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of § 26 in the California environment, and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that § 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 ... announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease ... But the section struck more deeply and more widely. Private discriminations in housing were now not only free from [statutory authority], but they also enjoyed a far different status than was true before the passage of those statutes. The 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. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

This Court has never attempted the “impossible task” of formulating an infallible test for determining whether the State “in any of its manifestations” has become significantly involved in private discriminations. “Only by sifting facts and weighing circumstances” on a case-by-case basis can a “nonobvious involvement of the State in private conduct be attributed its true significance.” *Burton v. Wilmington Parking Authority*, (1961). Here, the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.

... Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.

Affirmed.

Excerpted by Alexandria Metzdorf



Moose Lodge v. Irvis

407 U.S. 163 (1972)

Vote: 6-3

Decision: Reversed and remanded

Majority: Rehnquist, joined by Burger, Stewart, White, Blackmun, and Powell

Dissent: Douglas, joined by Marshall

Dissent: Brennan, joined by Marshall

Justice Rehnquist delivered the opinion of the Court.

Appellee Irvis, a Negro (hereafter appellee), was refused service by appellant Moose Lodge, a local branch of the national fraternal organization located in Harrisburg, Pennsylvania. Appellee then brought this action under 42 U.S.C. § 1983 for injunctive relief in the United States District Court ... He claimed that, because the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was “state action” for the purposes of the Equal Protection

Clause of the Fourteenth Amendment. He named both Moose Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief that would have required the defendant liquor board to revoke Moose Lodge's license so long as it continued its discriminatory practices. Appellee sought no damages.

A three-judge district court, convened at appellee's request, upheld his contention on the merits, and entered a decree declaring invalid the liquor license issued to Moose Lodge "as long as it follows a policy of racial discrimination in its membership or operating policies or practices." Moose Lodge alone appealed from the decree ...

...

The District Court did not find, and it could not have found on this record, that appellee had sought membership in Moose Lodge and been denied it. Appellant contends that, because of this fact, appellee had no standing to litigate the constitutional issue respecting Moose Lodge's membership requirements, and that, therefore, the decree of the court below erred insofar as it decided that issue.

Any injury to appellee from the conduct of Moose Lodge stemmed not from the lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.

...

Because appellee had no standing to litigate a constitutional claim arising out of Moose Lodge's membership practices, the District Court erred in reaching that issue on the merits. But it did not err in reaching the constitutional claim of appellee that Moose Lodge's guest service practices under these circumstances violated the Fourteenth Amendment. Nothing in the positions taken by the parties since the entry of the District Court decree has mooted that claim, and we therefore turn to its disposition.

...

Appellee, while conceding the right of private clubs to choose members upon a discriminatory basis, asserts that the licensing of Moose Lodge to serve liquor by the Pennsylvania Liquor Control Board amounts to such state involvement with the club's activities as to make its discriminatory practices forbidden by the Equal Protection Clause of the Fourteenth Amendment. The relief sought and obtained by appellee in the District Court was an injunction forbidding the licensing by the liquor authority of Moose Lodge until it ceased its discriminatory practices. We conclude that Moose Lodge's refusal to serve food and beverages to a guest by reason of the fact that he was a Negro does not, under the circumstances here presented, violate the Fourteenth Amendment.

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, supra*, 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,” (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

...

With the exception hereafter noted, the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor. There is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation. The only effect that the state licensing of Moose Lodge to serve liquor can be said to have on the right of any other Pennsylvanian to buy or be served liquor on premises other than those of Moose Lodge is that, for some purposes, club licenses are counted in the maximum number of licenses that may be issued in a given municipality ...

... 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 to make the latter “state action” within the ambit of the Equal Protection Clause of the Fourteenth Amendment.

...

Reversed and remanded.

Excerpted by Alexandria Metzdorf



Hills v. Gautreaux

425 U.S. 284 (1976)

Vote: 8-0

Decision: Affirmed

Majority: Stewarts, joined by Burger, Blackmun, Powell and Rehnquist

Concurrence: Marshall, joined by Brennan and White

Justice Stevens took no part in the consideration or decision of the case.

Mr. Justice Stewart delivered the opinion of the Court.

The United States Department of Housing and Urban Development (HUD) has been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 in connection with the selection of sites for public housing in the city of Chicago. The issue before us is whether the remedial order of the federal trial court may extend beyond Chicago's territorial boundaries.

This extended litigation began in 1966, when the respondents, six Negro tenants in or applicants for public housing in Chicago, brought separate actions on behalf of themselves and all other Negro tenants and applicants similarly situated against the Chicago Housing Authority (CHA) and HUD. The complaint filed against CHA in the United States District Court for the Northern District of Illinois alleged that, between 1950 and 1965, substantially all of the sites for family public housing selected by CHA and approved by the Chicago City Council were "at the time of such selection, and are now," located "within the areas known as the Negro Ghetto." The respondents further alleged that CHA deliberately selected the sites to "avoid the placement of Negro families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment. In a companion suit against HUD, the respondents claimed that it had "assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago" by providing financial assistance and other support for CHA's discriminatory housing projects.

The District Court stayed the action against HUD pending resolution of the CHA suit. In February, 1969, the court entered summary judgment against CHA on the ground that it had violated the respondents' constitutional rights by selecting public housing sites and assigning tenants on the basis of race. *Gautreaux v. Chicago Housing Authority*. Uncontradicted evidence submitted to the District Court established that the public housing system operated by CHA was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99 1/2% of the remaining family units located in Negro neighborhoods and 99% of those units occupied by Negro tenants. *Id.* at 910. In order to prohibit future violations and to remedy the effects of past unconstitutional practices, the court directed CHA to build its next 700 family units in predominantly white areas of Chicago, and thereafter to locate at least 75% of its new family public housing in predominantly white areas inside Chicago or in Cook County. *Gautreaux v. Chicago Housing Authority*. In addition, CHA was ordered to modify its tenant assignment and site selection procedures and to use its best efforts to increase the supply of dwelling units as rapidly as possible in conformity with the judgment.

The District Court then turned to the action against HUD. In September, 1970, it granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. The United States Court of Appeals for the Seventh Circuit reversed, and ordered the District Court to enter summary judgment for the respondents, holding that HUD had violated both the Fifth Amendment and § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, by knowingly sanctioning and assisting CHA's racially discriminatory public housing program. *Gautreaux v. Romney*.

On remand, the trial court addressed the difficult problem of providing an effective remedy for the racially segregated public housing system that had been created by the unconstitutional conduct of CHA and HUD. The court granted the respondents' motion to consolidate the CHA and HUD cases and ordered the parties to formulate "a comprehensive plan to remedy the past effects of unconstitutional site selection procedures." The order directed the parties to "provide the Court with as broad a range of alternatives as seem ... feasible," including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." After consideration of the plans submitted by the parties and the evidence adduced in their support, the court denied the respondents' motion to consider metropolitan area relief and adopted the petitioner's proposed order requiring HUD to use its best efforts to assist CHA in increasing the supply of dwelling units and enjoining HUD from funding family public housing programs in Chicago that were inconsistent with the previous judgment entered against CHA. The court found that metropolitan area relief was unwarranted because "the wrongs were committed within the limits of Chicago and solely against residents of the City" and there were no allegations that "CHA and HUD discriminated or fostered racial discrimination in the suburbs." On appeal, the Court of Appeals for the Seventh Circuit, with one judge dissenting, reversed and remanded the case for

"the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago ... but will increase the supply of dwelling units as rapidly as possible."

503 F.2d 930, 939. Shortly before the Court of Appeals announced its decision, this Court, in *Milliken v. Bradley* ... had reversed a judgment of the Court of Appeals for the Sixth Circuit that had approved a plan requiring the consolidation of 54 school districts in the Detroit metropolitan area to remedy racial discrimination in the operation of the Detroit public schools. Understanding *Milliken* "to hold that the relief sought there would be an impractical and unreasonable overresponse to a violation limited to one school district," the Court of Appeals concluded that the *Milliken* decision did not bar a remedy extending beyond the limits of Chicago in the present case because of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of numerous local school districts. 503 F.2d at 935-936. In addition, the appellate court found that, in contrast to *Milliken*, there was evidence of suburban discrimination and of the likelihood that there had been an "extra-city impact" of the petitioner's "intra-city discrimination." *Id.* at 936-937, 939-940. The appellate court's determination that a remedy extending beyond the city limits was both "necessary and equitable" rested in part on the agreement of the parties and the expert witnesses that "the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work." *Id.* at 936-937. HUD subsequently sought review in this Court of the permissibility in light of *Milliken* of "inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation." We granted certiorari to consider this important question. 421 U.S. 962.

In *Milliken v. Bradley*, *supra*, this Court considered the proper scope of a federal court's equity decree in the context of a school desegregation case ... *After finding that constitutional violations committed by the Detroit School Board and state officials had contributed to racial segregation in the Detroit schools, the trial court had proceeded to the formulation of a remedy. Although there had been neither proof of unconstitutional actions on the part of neighboring school districts nor a demonstration that the Detroit violations had produced significant segregative effects in those districts, the court established a desegregation panel and ordered it to prepare a remedial plan consolidating the Detroit school system and 53 independent suburban school districts. Id. at 733-734. The Court of Appeals for the Sixth Circuit affirmed the desegregation order ... This Court reversed the Court of Appeals, holding that the multidistrict remedy contemplated by the desegregation order was an erroneous exercise of the equitable authority of the federal courts.*

Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary. It "may be exercised only on the basis of a constitutional violation." quoting *Swann v. Charlotte-Mecklenburg Board of Education* ... *Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation."* *Swann, supra* ... *In Milliken, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs. The desegregation order in Milliken requiring the consolidation of local school districts in the Detroit metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct. Under these circumstances, the Court held that the inter-district decree was impermissible because it was not commensurate with the constitutional violation to be repaired.*

Since the *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts, and not on a balancing of particular considerations presented by school desegregation cases, it is apparent that the Court of Appeals erred in finding *Milliken* inapplicable on that ground to this public housing case. The school desegregation context of the *Milliken* case is nonetheless important to an understanding of its discussion of the limitations on the exercise of federal judicial power ... The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred, but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

The question presented in this case concerns only the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago. HUD does not dispute the Court of Appeals' determination that it violated the Fifth Amendment and § 601 of the Civil Rights Act of 1964 by knowingly funding CHA's racially discriminatory family public housing program, nor does it question the appropriateness of a remedial order designed to alleviate the effects of past segregative practices by requiring that public housing be developed in areas that will afford respondents an opportunity to reside in desegregated neighborhoods. But HUD contends that the *Milliken* decision bars a remedy affecting its conduct beyond the boundaries of Chicago for two

reasons. First, it asserts that such a remedial order would constitute the grant of relief incommensurate with the constitutional violation to be repaired. And second, it claims that a decree regulating HUD's conduct beyond Chicago's boundaries would inevitably have the effect of "consolidat[ing] for remedial purposes" governmental units not implicated in HUD's and CHA's violations.

We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief ... As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*:

"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."

Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred ...

In this case, it is entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here, the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits.

...

An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well established federal housing policy.

...

A remedial plan designed to insure that HUD will utilize its funding and administrative powers in a manner consistent with affording relief to the respondents need not abrogate the role of local governmental units in the federal housing-assistance programs. Under the major housing programs in existence at the time the District Court entered its remedial order pertaining to HUD, local housing authorities and municipal governments had to make application for funds or approve the use of funds in the locality before HUD could make housing assistance money available. *See* 42 U.S.C. §§ 1415(7)(b), 1421b(a)(2). An order directed solely to HUD would not force unwilling localities to apply for assistance under these programs, but would merely reinforce the regulations guiding HUD's determination of which of the locally authorized projects to assist with federal funds.

...

Use of the § 8 program to expand low income housing opportunities outside areas of minority concentration would not have a coercive effect on suburban municipalities. For under the program, the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing assistance plans, and to require that zoning and other land use restrictions be adhered to by builders.

In sum, there is no basis for the petitioner’s claim that court-ordered metropolitan area relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan area relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.

Since we conclude that a metropolitan area remedy in this case is not impermissible as a matter of law, we affirm the judgment of the Court of Appeals remanding the case to the District Court “for additional evidence and for further consideration of the issue of metropolitan area relief.” 503 F.2d at 940. Our determination that the District Court has the authority to direct HUD to engage in remedial efforts in the metropolitan area outside the city limits of Chicago should not be interpreted as requiring a metropolitan area order. The nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion, after affording the parties an opportunity to present their views.

The judgment of the Court of Appeals remanding this case to the District Court is affirmed, but further proceedings in the District Court are to be consistent with this opinion.

It is so ordered.

Excerpted by Rorie Solberg



Educational Affirmative Action

Grutter v. Bollinger

539 U.S. 306 (2003)

Vote: 5-4

Decision: Affirmed

Majority: O'Connor, joined by Stevens, Souter, Ginsburg, and Breyer

Concurrence: Ginsburg, joined by Breyer

Concurrence/Dissent: Scalia, joined by Thomas

Concurrence/Dissent: Thomas, joined by Scalia (Parts I-VII)

Dissent: Rehnquist, joined by Scalia, Kennedy and Thomas

Dissent: Kennedy

Justice O'Connor delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." ...

The hallmark of [the school's] policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational

objectives. So-called “soft” variables” such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection” are all brought to bear in assessing an “applicant’s likely contributions to the intellectual and social life of the institution.”

The policy aspires to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” *Id.*, at 118. The policy does not restrict the types of diversity contributions eligible for “substantial weight” in the admissions process, but instead recognizes “many possible bases for diversity admissions.” *Id.*, at 118, 120. The policy does, however, reaffirm the Law School’s longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” *Id.*, at 120. By enrolling a “critical mass” of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.” *Id.*, at 120-121.

The policy does not define diversity “solely in terms of racial and ethnic status.” *Id.*, at 121. Nor is the policy “insensitive to the competition among all students for admission to the [L]aw [S]chool.” *Ibid.* Rather, the policy seeks to guide admissions officers in “producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.” *Ibid.*

...

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991

until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U. S. C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a “predominant” factor, giving applicants who belong to certain minority groups “a significantly greater chance of admission than students with similar credentials from disfavored racial groups.” App.33-34. Petitioner also alleged that respondents “had no compelling interest to justify their use of race in the admissions process.” *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36..

In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class ... was not recognized as such by *Bakke* and it is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions ...

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest.

...

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. (1978) ... The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.*, at 320.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Adarand* (1995). This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. A. Croson Co.* (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*.

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*. Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.* When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

...

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one

justification for their use of race in the admissions process: obtaining “the educational benefits that flow from a diverse student body.” In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School’s argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke* ... But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Bakke*. From this premise, Justice Powell reasoned that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ ” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.” Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.”

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students.” The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” *Bakke* (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Bakke*; *Freeman v. Pitts* (1992) (“Racial balance is not to be achieved for its own sake”); *Richmond v. A. Croson Co.* Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

...

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” See *Sweatt v. Painter*. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still “constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” The purpose of the narrow tailoring requirement is to ensure that “the means chosen ‘fit’ ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Richmond v. A. Croson Co.* (plurality opinion).

... To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” *Bakke* (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough 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.”

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.

...

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke* (opinion of Powell, J.) (identifying the “denial ... of th[e] right to individualized consideration” as the “principal evil” of the medical school’s admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity. Like the Harvard plan, the Law School’s admissions policy “is flexible enough 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.” *Bakke* (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear “[t]here are many possible bases for diversity admissions,” and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each “applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.” All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minor-

ity applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice Kennedy [in dissenting opinion] speculates that “race is likely outcome determinative for many members of minority groups” who do not fall within the upper range of LSAT scores and grades. But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors.

...

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.” But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race ... The United States advocates “percentage plans,” recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14—18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We acknowledge that “there are serious problems of justice connected with the idea of preference itself.” *Bakke* (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally “remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.” *Id.* To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.” *Metro Broadcasting, Inc. v. FCC* (1990) (O’Connor, J., dissenting).

We are satisfied that the Law School’s admissions program does not. Because the Law School considers “all pertinent elements of diversity,” it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke* (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant “will not have been foreclosed from all consid-

eration for that seat simply because he was not the right color or had the wrong surname. ... His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants. We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” *Palmore v. Sidoti* (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.”

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity ...

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body ... The judgment of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

Excerpted by Alexandria Metzdorf



Regents of the Univ. of Calif. v. Bakke

438 U.S. 265 (1978)

Vote: 8-1

Decision: Affirmed in part and reversed in part

Majority: Powell (Parts I, and V-C), joined by Brennan, White, Marshall and Blackmun

Plurality: Powell (Part II-A), joined by White

Concurrence: Powell (Parts I, II-B, III-C, IV, V-A, and VI)

Concurrence/Dissent: Brennan, joined by Marshall, White and Blackmun

Concurrence/Dissent: White

Concurrence/Dissent: Marshall

Concurrence/Dissent: Blackmun

Concurrence/Dissent: Stevens, joined by Burger, Stewart and Rehnquist

Justice Powell announced the judgement of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups.

...

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of “disadvantaged” students in each Medical School class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process ... While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16.

[...]

From the year of the increase in class size – 1971 – through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students. Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only “disadvantaged” special applicants who were members of one of the designated minority groups.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years, Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." [Record] at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed ...

Bakke's 1974 application was completed early in the year ... Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.* at 64. In both years, applicants were admitted under the special program with grade point averages, MCT scores, and benchmark scores significantly lower than Bakke's.

After the second rejection, Bakke filed the instant suit in the Superior Court of California. He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment ... The University cross-complained for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. *Id.* at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." The California court accepted the findings of the trial court with respect to the University's program ...

Turning to Bakke's appeal, the court ruled that, since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program ... The California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal. 3d at 64, 553. P.2d at 1172. That order was stayed pending review in this Court. 429 U.S. 953 (1976). We granted certiorari to consider the important constitutional issue.

[Discussion of Title VI omitted]

The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, (1938). Respondent, on the other hand, contends

that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the “[r]ights established [by the Fourteenth Amendment] are personal rights.” *Shelley v. Kraemer* (1948).

...

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” It is settled beyond question that the

“rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights,”

Shelley v. Kraemer, supra ... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

...

[Discussion of precedent history omitted]

The special admissions program purports to serve the purposes of: (i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,” Brief for Petitioner 32; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

... If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

... [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

... Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body ...

...

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges — and the courts below have held — that petitioner’s dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university’s admissions program, the question remains whether the program’s racial classification is necessary to promote this interest.

...

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated — but no less effective — means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner’s preference program, and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element — to be weighed fairly against other elements — in the selection process.

[...]

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

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

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admis-

sions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.

Excerpted by Alexandria Metzdorf



Gratz v. Bollinger

539 U.S. 244 (2003)

Vote: 6-3

Decision: Reversed in part and remanded

Majority: Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas

Concurrence: O'Connor, joined by Breyer (in part)

Concurrence: Thomas

Concurrence: Breyer

Dissent: Stevens, joined by Souter

Dissent: Souter, joined by Ginsburg (in part)

Dissent: Ginsburg, joined by Souter and Breyer (in part)

Chief Justice Rehnquist delivered the opinion of the Court.

We granted certiorari in this case to decide whether “the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981.” Brief for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court’s decision upholding the guidelines.

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan’s (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University’s determination that, although Gratz was “well qualified,” she was “less competitive than the students

who ha[d] been admitted on first review.’” App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his “academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.” *Ibid.* Hamacher’s application was subsequently denied in April 1997, and he enrolled at Michigan State University.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan against the University, the LSA, James Duderstadt, and Lee Bollinger. Petitioners’ complaint was a class-action suit alleging “violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment ..., and for racial discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 2000d *et seq.*” App. 33. The liability phase was to determine “whether [respondents’] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.” *Id.*, at 70.

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly.

...

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the “SCUGA” factors. These factors included the quality of an applicant’s high school (S), the strength of an applicant’s high school curriculum (C), an applicant’s unusual circumstances (U), an applicant’s geographical residence (G), and an applicant’s alumni relationships (A). After these scores were combined to produce an applicant’s “GPA 2” score, the reviewing admissions counselors referenced a set of “Guidelines” tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status. For example, as a Caucasian in-state applicant, Gratz’s GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz’s scores would have fallen within a cell calling for admission.

In 1997, the University modified its admissions procedure ... Under the 1997 procedures, Hamacher’s GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

... [F]rom 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of “protected seats.”

Specific groups—including athletes, foreign students, ROTC candidates, and underrepresented minorities—were “protected categories” eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their discretion, “flag” an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University’s composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing “flagged” applications, the ARC determines whether to admit, defer, or deny each applicant.

[...]

Petitioners argue, first and foremost, that the University’s use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15-16. Petitioners further argue that “diversity as a basis for employing racial preferences is simply too open-ended, illdefined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.” *Id.*, at 17-18, 40-41. But for the reasons set forth today in *Grutter v. Bollinger*, *post*, at 327-333, the Court has rejected these arguments of petitioner.

Petitioners alternatively argue that even if the University’s interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University’s use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not “remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*.” Brief for Petitioners 18. Respondents reply that the University’s current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program CD. C. Davis) rejected by Justice Powell. They claim that their program “hews closely” to both the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed ...

It is by now well established that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.” *Adarand Constructors, Inc. v. Peña*, (1995) ...

To withstand our strict scrutiny analysis, respondents must demonstrate that the University’s use of race in its current admissions program employs “narrowly tailored measures that further compelling governmental inter-

ests.” *Id.*, at 227. Because “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” *Fullilove v. Klutznick*, (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail “a most searching examination.” *Adarand, supra*, at 223 ... We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

...

Justice Powell’s opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education ...

The current LSA policy does not provide such individualized consideration. The LSA’s policy automatically distributes 20 points to every single applicant from an “underrepresented minority” group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover ... the LSA’s automatic distribution of 20 points has the effect of making “the factor of race ... decisive” for virtually every minimally qualified underrepresented minority applicant.

...

Respondents contend that “[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system” upheld by the Court today in *Grutter*. Brief for Respondent Bollinger et al. 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system ... Nothing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. We further find that the admissions policy also violates Title VI and 42 U.S.C. § 1981.

Accordingly, we reverse that portion of the District Court’s decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



Fisher v. Texas (II)

579 U.S. 365 (2016)

Vote: 4-3

Decision: Affirmed

Majority: Kennedy, joined by Ginsburg, Breyer, and Sotomayor

Dissent: Thomas

Dissent: Alito, joined by Roberts and Thomas

Not participating: Kagan

Justice Kennedy delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

...

The University’s program is *sui generis* [unique]. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*.

Despite the Top Ten Percent Plan’s outsized effect on petitioner’s chances of admission, she has not challenged it ...

Furthermore, as discussed above, the University lacks any authority to alter the role of the Top Ten Percent Plan in its admissions process ...

That does not diminish, however, the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances ...

Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." *Fisher I*, see also *Grutter* ... Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Ibid.*

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals ... All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. *Fisher I*. The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

...

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002 ... Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data ... Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a "minimal impact" in advancing the [University's] compelling interest." Brief for Petitioner 46 ... Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought ... Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center

stage.” *Fisher I* (Ginsburg, J., dissenting).”It is race consciousness, not blindness to race, that drives such plans.” *Ibid.* Consequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it ... At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University’s own definition of the diversity it seeks.

...

In short, none of petitioner’s suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be “available” and “workable” means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I*. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored ...

A university is in large part defined by those intangible “qualities which are incapable of objective measurement but which make for greatness.” *Sweatt v. Painter* (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as “laboratories for experimentation.” The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies. The judgment of the Court of Appeals is affirmed.

Excerpted by Alexandria Metzdorf



Schuette v. BAMN

572 U.S. ____ (2014)

Vote: 6-2

Decision: Reversed

Plurality: Kennedy, joined by Roberts and Alito

Concurrence: Roberts

Concurrence: Scalia (in judgment), joined by Thomas

Concurrence: Breyer (in judgment)

Dissent: Sotomayor, joined by Ginsburg

Not participating: Kagan

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which the Chief Justice and Justice Alito join.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003 the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in *Gratz v. Bollinger*. The law school admission plan was addressed in *Grutter v. Bollinger*. Each admissions process permitted the explicit consideration of an applicant's race. In *Gratz*, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. In *Grutter*, the Court found no constitutional flaw in the law school admission plan's more limited use of race-based preferences.

In response to the Court's decision in *Gratz*, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decision making, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences,

including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

“(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

“(3) For the purposes of this section ‘state’ includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.”

...

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education ... The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

...

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Mich. Const., Art. VIII, § 5. Although the members of the boards are elected, some evidence in the record suggests they delegated authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan’s public universities did consider race as a factor in admissions decisions before 2006.

In holding § 26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Washington v. Seattle School Dist. No. 1* (1982) ... But that determination extends *Seattle’s* holding in a case presenting quite different issues to reach a conclusion that is mistaken here ...

Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race ... Although there had been no judicial finding of de jure segregation with respect to Seattle’s school district, it appears as though school

segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that "permitted white students to transfer out of black schools while restricting the transfer of black students into white schools." *Parents Involved in Community Schools v. Seattle School Dist.* (2007) (Breyer, J., dissenting) ...

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case ... *Seattle* stated that where a government policy "inures primarily to the benefit of the minority" and "minorities ... consider" the policy to be "in their interest," then any state action that "place[s] effective decisionmaking authority over" that policy "at a different level of government" must be reviewed under strict scrutiny. In essence, according to the broad reading of *Seattle*, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.

... The [Sixth Circuit's] expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling. The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption 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." *Shaw v. Reno* (1993); see also *Metro Broadcasting, Inc. v. FCC* (1990) (Kennedy, J., dissenting) ... It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race ...

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework, the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race. This risk is inherent in adopting the *Seattle* formulation.

...

By approving Proposal 2 and thereby adding § 26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their

own times.” Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

...

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts ...

For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan’s voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate’s instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary

to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Excerpted by Alexandria Metzdorf



Economic Affirmative Action

Fullilove v. Klutznick

448 U.S. 448 (1980)

Vote: 6-3

Decision: Affirmed

Plurality: Burger, joined by White and Powell

Concurrence: Marshall, joined by Brennan and Blackmun

Concurrence: Powell

Dissent: Stewart, joined by Rehnquist

Dissent: Stevens

Mr. Chief Justice Burger announced the judgment of the Court and delivered an opinion.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups.

In May, 1977, Congress enacted the Public Works Employment Act of 1977 which amended the Local Public Works Capital Development and Investment Act of 1976. The 1977 amendments authorized an additional \$4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has become the focus of this litigation. Section 103(f)(2) of the 1977 Act, referred to as the “minority business enterprise” or “MBE” provision, requires that:

“Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term ‘minority business enterprise’ means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”

...

On November 30, 1977, petitioners filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision. Named

as defendants were the Secretary of Commerce, as the program administrator, and the State and City of New York, as actual and potential project grantees. Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement, and that the MBE provision, on its face, violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.

...

The MBE provision was enacted as part of the Public Works Employment Act of 1977, which made various amendments to Title I of the Local Public Works Capital Development and Investment Act of 1976. The 1976 Act was intended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities. To accomplish these objectives, the Congress authorized the Secretary of Commerce, acting through the EDA, to make grants to state and local governments for construction, renovation, repair, or other improvement of local public works projects ...

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise, it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination ... In the words of its sponsor, the MBE provision was “designed to begin to redress this grievance that has been extant for so long.”

The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. The sponsors of the MBE provision in the House and the Senate expressly linked the provision to the existing administrative programs promoting minority opportunity in government procurement ...

Civil Rights Commission report discussed at some length the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state, and local levels ...

Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.

Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program

is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rule-making authority, and to develop an administrative operation consistent with legislative intentions and objectives.

... A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a coequal branch charged by the Constitution with the power to “provide for the ... general Welfare of the United States” and “to enforce, by appropriate legislation,” the equal protection guarantees of the Fourteenth Amendment. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, (1973), we accorded “great weight to the decisions of Congress” even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns.

...

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U.S. Const., Art. I, 8, cl. 1. This Court has recognized that the power to “provide for the ... general Welfare” is an independent grant of legislative authority, distinct from other broad congressional powers. *Buckley v. Valeo*, (1976); *United States v. Butler*, (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy ...

... Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that, in this respect, the objectives of the MBE provision are within the scope of the Spending Power.

...

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of “record” appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority busi-

nesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulatory “findings” on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws.

...

We now turn to the question whether, as a means to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant ... Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

...

Our review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree. Pursuant to the administrative program, grantees and their prime contractors are required to seek out all available, qualified, bona fide MBE’s; they are required to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE’s to obtain required working capital, and to give guidance through the intricacies of the bidding process ... There is available to the grantee a provision authorized by Congress for administrative waiver on a case-by-case basis should there be a demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program. *Supra* at 448 U. S. 469-470. There is also an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE’s are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

As a threshold matter, we reject the contention that, in the remedial context, the Congress must act in a wholly “color-blind” fashion ...

...

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act. It must be conceded that, by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business as usual" by public contracting agencies and among prime contractors.

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks, supra* ... The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

Another challenge to the validity of the MBE program is the assertion that it is underinclusive — that it limits its benefit to specified minority groups, rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extension would, of course, be appropriate for Congress to provide; it is not a function for the courts.

...

It is also contended that the MBE program is overinclusive — that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

...

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress, and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment. Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irreparable.

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either “test” articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.

Affirmed.

Excerpted by Alexandria Metzdorf



Wygant v. Jackson Board of Ed.

476 U.S. 267 (1986)

Vote: 5-4

Decision: Reversed

Plurality: Powell, joined by Burger, Rehnquist, O'Connor (all but part IV)

Concurrence: White (in judgment)

Concurrence: O'Connor (in part, in judgment)

Dissent: Marshall, joined by Brennan, and Blackmun

Dissent: Stevens

Justice Powell announced the judgment of the Court and delivered an opinion.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

In 1972, the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (Union) that would protect employees who were members of certain minority groups against layoffs. The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

“In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for position for which he is certificated maintaining the above minority balance.”

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court, *id.* at 30 (*Jackson Education Assn. v. Board of Education (Jackson I)* (mem. op.)), claiming that the Board’s failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment ... Following trial, the District Court *sua sponte* concluded that it lacked jurisdiction over the case ...

Rather than taking an appeal, the plaintiffs instituted a suit in state court, *Jackson Education Assn. v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) (*Jackson II*), raising in essence the same claims that had been raised in *Jackson I* ... In entering judgment for the plaintiffs, the state court found that the Board had breached its contract with the plaintiffs ...

... As a result, during the 1976-1977 and 1981-1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. The displaced nonminority teachers, petitioners here, brought suit in Federal District Court, alleging violations of the Equal Protection Clause ...

With respect to the equal protection claim, the District Court held that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, the court decided that the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing “role models” for minority schoolchildren, and upheld the constitutionality of the layoff provision.

The Court of Appeals for the Sixth Circuit affirmed, largely adopting the reasoning and language of the District Court. 746 F.2d 1152 (1984). We granted certiorari, 471 U.S. 1014 (1985), to resolve the important issue of the constitutionality of race-based layoffs by public employers. We now reverse.

Petitioners’ central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.

...

The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. *Mississippi University for Women v. Hogan*, (1982); *Bakke*, *supra*; see *Shelley v. Kraemer*, (1948) ...

“Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.” *Fullilove v. Klutznick*, (1980) (opinion of BURGER, C.J.). There are two prongs to this examination. First, any racial classification “must be justified by a compelling governmental interest.” *Palmore v. Sidoti*, (1984); see *Loving v. Virginia*, *supra*, cf. *Graham v. Richardson*, (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be “narrowly tailored to the achievement of that goal.” *Fullilove*, *supra*. We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination ...

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy ... No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

...

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program — Article XII — had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. 546 F. Supp. at 1199. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Despite the fact that Article XII has spawned years of litigation and three separate lawsuits, no such determination ever has been made. Although its litigation position was different, the Board in *Jackson I* and *Jackson II* denied the existence of prior discriminatory hiring practices. App. 33. This precise issue was litigated in both

those suits. Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now contends that, given another opportunity, it could establish the existence of prior discrimination. Although this argument seems belated at this point in the proceedings, we need not consider the question, since we conclude below that the layoff provision was not a legally appropriate means of achieving even a compelling purpose.

...

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

We accordingly reverse the judgment of the Court of Appeals for the Sixth Circuit.

It is so ordered.

Excerpted by Alexandria Metzdorf



City of Richmond v. J.A. Croson Co

488 U.S. 469 (1989)

Vote: 6-3

Decision: Affirmed

Majority: O'Connor (Parts I, III-B, and IV), joined by Rehnquist, White, Stevens and Kennedy

Plurality: O'Connor (Part II), joined by Rehnquist and White

Plurality: O'Connor (Parts III-A and V), joined by Rehnquist, White and Kennedy

Concurrence: Stevens (in part)

Concurrence: Kennedy (in part)

Concurrence: Scalia (in judgment)

Dissent: Marshall, joined by Brennan and Blackmun

Dissent: Blackmun, joined by Brennan

Justice O'Connor delivered the opinion of the Court.

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.

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, 12-156(a) (1985). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors.

... The Plan expired on June 30, 1988, and was in effect for approximately five years.

The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." ...

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms ...

...

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues

that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

...

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ “strict scrutiny” or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time “bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the ... general Welfare of the United States’ and ‘to enforce by appropriate legislation,’ the equal protection guarantees of the Fourteenth Amendment.” ...

Because of [Congress’s] unique powers, the Chief Justice concluded that “Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.”

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. The Chief Justice also noted that Congress drew on its experience under 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. The Chief Justice concluded that “Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.”

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. [...]The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have “pass[ed] muster.”

...

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief ...

That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, 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 ... insulate any racial classification from judicial

scrutiny ... 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 ...

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of 1 of the Fourteenth Amendment ...

Thus, 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.

...

The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making.

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.

Classification 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 expressed by the plurality in *Wygant* 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.

...

In *Bakke, supra*, the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups ... His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.* Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions.

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue ...

In *Wygant*, (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief ...

We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry." Like the "role model" theory employed in *Wygant*, 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." *Wygant* (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole ...

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 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 ...

...

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.

...

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting ... The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the “completely unrealistic” assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. Unlike the program upheld in *Fullilove*, the Richmond Plan’s waiver system focuses solely on the availability of MBE’s; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, 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.

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction ...

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.

Excerpted by Alexandria Metzdorf



Adarand Constructors, Inc. v. Pena**515 U.S. 200 (1995)**

Vote: 5-4

Decision: Vacated and remanded

Majority: O'Connor, joined by Kennedy, Rehnquist, Thomas (all but Part II-C) and Scalia (in part)

Concurrence: Scalia (in part)

Concurrence: Thomas (in part)

Dissent: Stevens, joined by Ginsburg

Dissent: Souter, joined by Ginsberg and Breyer

Dissent: Ginsburg, joined by Breyer

Justice O'Connor announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA'S concurrence, and an opinion with respect to Part III-C in which JUSTICE KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and, in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause ...

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid had it not been for the additional payment it received by hiring Gonzales instead. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that [t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act. 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

...

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall ... be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall ... deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

...

In *Bolling v. Sharpe*, (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" *id.*, at 499. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

...

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications ...

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke*, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students ... In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U. S., at 289-290. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* ...

Two years after *Bakke*, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove v. Klutznick*, (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke*, there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.* That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.* It employed instead a two-part test which asked, first, "whether the *objectives* of thee] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.* ...

In *Wygant v. Jackson Bd. of Ed.*, (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification ...”racial classifications of any sort must be subjected to ‘strict scrutiny.’” *Id* ...

The Court’s failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action ...

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government ...

Despite lingering uncertainty in the details, however, the Court’s cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,” *Wygant* ... Second, consistency: “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” *Croson* ... And third, congruence: “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment,” *Buckley v. Valeo*, (1976) ... Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny ...

A year later [after *Croson*], however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC* (1990), involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission. In *Metro Broadcasting*, the Court repudiated the long-held notion that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than it does on a State to afford equal protection of the laws, *Bolling*. It did so by holding that “benign” federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny.” [B]enign” federal racial classifications, the Court said,

—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. The Court did not explain how to tell whether a racial classification should be deemed “benign,” other than to express confiden[ce] that an “examination of the legislative scheme and its history” will separate benign measures from other types of racial classifications.

...

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race — — a *group* classification long recognized as “in most circumstances irrelevant and therefore prohibited,” *Hirabayashi [v. US, (1943)]* — — should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have

long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them ... Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove* (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it ... When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced ...

The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf



Equal Protection: Gender and Other Groups

Case List

Historical Treatment of Gender

[*Bradwell v. Illinois*](#) (1873)

[*Muller v. Oregon*](#) (1908)

[*Goesaert v. Cleary*](#) (1948)

"Setting the Standard"

[*Reed v. Reed*](#) (1971)

[*Frontiero v. Richardson*](#) (1973)

[*Kahn v. Shevin*](#) (1974)

[*Weinberger v. Wisenfeld*](#) (1975)

[*Stanton v. Stanton*](#) (1975)

[*Craig v. Boren*](#) (1976)

Applying the New Standard

[*Orr v. Orr*](#) (1979)

[*Administrator of Mass. v. Feeney*](#) (1979)

[*Roskter v. Goldberg*](#) (1981)

[*Michael M. v. Superior Court of Sonoma County*](#) (1981)

[*Sessions v. Morales-Santana*](#) (2017)

[*Vorchheimer v. School Dist. of Philadelphia*](#) (1977)

[*Miss. Univ. for Women v. Hogan*](#) (1982)

[*U.S. v. Virginia*](#) (1996)

Equal Protection beyond Race and Gender

Hernandez v. Texas (1954)

San Antonio Independent School District v. Rodriguez (1973)

Plyler v. Doe (1985)

Clark v. Jeter (1988)

Massachusetts Board of Retirement v. Murgia (1976)

City of Cleburne v. Cleburne Living Center (1985)

Romer v. Evans (1996)

Historical Treatment of Gender

Bradwell v. Illinois

83 U.S. 130 (1873)

Vote: 8-1

Decision: Affirmed

Majority: Miller, joined by Clifford, Davis, Strong, and Hunt

Concurring: Bradley, joined by Field, Swayne

Dissent: Chase

Mr. Justice MILLER delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States ...

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

...

In regard to that amendment counsel 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 fourteenth 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.

In this latter proposition we are not able to concur with counsel. We agree with him 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. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the Slaughter-House Cases* renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the

right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license. It is unnecessary to repeat the argument on- which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

JUDGMENT AFFIRMED.

Mr. Justice Bradley:

I concur in the judgment of the Court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counselor at law is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar ...

The claim that under the Fourteenth Amendment of the Constitution, which declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing 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 an 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 interest 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.

... The paramount destiny and mission of 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.

Excerpted by Kimberly Clairmont and Rorie Solberg



Muller v. Oregon

208 U.S. 412 (1908)

Vote: 9-0

Opinion: J. Brewer

Decision: Affirmed

Majority: Brewer, joined by Fuller, Harlan, White, Peckham, McKenna, Holmes, Day and Moody

MR. JUSTICE BREWER delivered the opinion of the court.

On February 19, 1903, the legislature of The State of Oregon passed an act ... the first section of which is in these words:

“SEC. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit, the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.” ...

On September 18, 1905, an information was filed in the Circuit Court of the State for the county of Multnomah, charging that the defendant “on the 4th day of September, A. D. 1905, in the county of Multnomah and State of Oregon, then and there being the-owner of a laundry, known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female ... to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.” A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of \$10. The Supreme Court of the State affirmed the conviction, *State v. Muller*, 48 Oregon, 252, whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry ...

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men ...

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights, they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner v. New York* ... that a law providing that no laborer shall be required or permitted to work in bakeries more than sixty hours in a week or ten hours in a day was not, as to men, a legitimate exercise of the police power of the State, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and, as such, was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

...

While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation ...

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this Court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute, and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract ...

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true wherein the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest. and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care, that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary. To secure a real equality of right doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions having in view not merely her own health, but the well-being of the race justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in different the functions in life which they perform.

For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged, that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is

Affirmed.

Excerpted by Kimberly Clairmont



Goesaert v. Cleary

335 U.S. 464 (1948)

Vote: 6-3

Opinion: J. Frankfurter

Decision: Affirmed

Majority: Frankfurter, joined by Vinson, Black, Reed, Jackson, Burton

Dissent: Rutledge, joined by Douglas, Murphy

MR. JUSTICE. FRANKFURTER delivered the opinion of the Court.

As part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed in all cities having a population of 50,000 or more, but no female may be so licensed unless she be “the wife or daughter of the male owner” of a licensed liquor establishment ... The case is here on direct appeal from an order of the District Court ... denying an injunction to restrain the enforcement of the Michigan law. The claim, denied below ... and renewed here, is that Michigan cannot forbid females generally from being barmaids and at the same time make an exception in favor of the wives and daughters of the owners of liquor establishments. Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it.

...

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations “which are different in fact or opinion to be treated in law as though they were the same.” *Tigner v. Texas*. Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which

either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws ...

It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of a case. Thus, it would be a sterile inquiry to consider whether this case is nearer to the nepotic pilotage law of Louisiana, *Kotch v. River Port Pilot Commissioners*, than it is to the Oklahoma sterilization law, *Skinner v. Oklahoma*. Suffice it to say that "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." ...

Nor is it unconstitutional for Michigan to withdraw from women the occupation of bartending because it allows women to serve as waitresses where liquor is dispensed. The District Court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. Nothing need be added to what was said below as to the other grounds on which the Michigan law was assailed.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, dissenting

While the equal protection clause does not require a legislature to achieve "abstract symmetry" or to classify with "mathematical nicety," that clause does require lawmakers to refrain from invidious distinctions of the sort drawn by the statute challenged in this case ...

The statute arbitrarily discriminates between male and female owners of liquor establishments. A male owner, although he himself is always absent from his bar, but may employ his wife and daughter as barmaids. A female owner may neither work as a barmaid herself nor employ her daughter in that position, even if a man is always present in the establishment to keep order. This inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids. Since there could be no other conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection.

Excerpted by Kimberly Clairmont



“Setting the Standard”

Reed v. Reed

404 U.S. 71 (1971)

Vote: 7-0

Opinion: Burger, joined by Douglas, Brennan, Stewart, White, Marshall and Blackmun

Decision: Reversed

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County, seeking appointment as administratrix of her son's estate. Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15-312 and 15-314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male ...

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15-312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant “by reason of Section 15-314 of the Idaho Code.” In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise “equally entitled.”

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15-314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment ...

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways ... The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A

classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” ...

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration, and thereby present the probate court “with the issue of which one should be named.” The court also concluded that, where such persons are not of the same sex, the elimination of females from consideration

“is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits ... of the two or more petitioning relatives. ...”

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if § 15-314 is viewed merely as a modifying appendage to § 15-312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause ...

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

Reversed and remanded.

Excerpted by Kimberly Clairmont



Frontiero v. Richardson

411 U.S. 677 (1973)

Vote: 8 to 1

Decision: Reversed, Plurality

Plurality: Brennan, joined by Douglas, White, Marshall

Concurring: Powell, joined by Burger, Blackmun, Stewart

Dissent: Rehnquist

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a “dependent” for the purposes of obtaining increased quarters allowances and medical and dental ... on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a “dependent” without regard to whether she is in fact, dependent upon him for any part of her support ... A servicewoman, on the other hand, may not claim her husband as a “dependent” under these programs unless he is in fact, dependent upon her for over one-half of his support ... Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction ... We noted probable jurisdiction ... We reverse.

...

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her “dependent.” Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant’s application was denied because she failed to demonstrate that her husband was dependent on her for more than one half of his support. Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse’s dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife’s support receives benefits, while a similarly situated female member is denied such benefits ...

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the “breadwinner” in the family-and the wife typically the “dependent” partner-“it would be more economical to require married

female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.” ... Indeed, given the fact Court speculated that such differential treatment might conceivably lead to a “considerable saving of administrative expense and manpower.” ...

...

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put, women, not on a pedestal, but in a cage ...

As a result of notions such as these, 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 ...

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.

Moreover, 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 and Surety Co.* (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 might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of “race, color, religion, *sex*, or national origin.” Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act “shall discriminate ... between employees on the basis of *sex*.” And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares 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*.” Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. *Oregon v. Mitchell* (1970) (opinion of BRENNAN, WHITE, and MARSHALL).

With these considerations in mind, 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.

... Thus, to this extent, at least, it may fairly be said that these statutes command “dissimilar treatment for men and women who are ... similarly situated.” *Reed v. Reed*.

Moreover, 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 ... 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. *Shapiro v. Thompson* (1970).

... 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.

Excerpted by Kimberly Clairmont



Kahn v. Shevin

416 U.S. 351 (1974)

Vote: 6-3

Decision: Affirmed

Majority: Douglas joined by Powell, Blackmun, Rehnquist, Burger, Stewart

Dissenting: Marshall, joined by White, Brennan

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Since at least 1885, Florida has provided for some form of property tax exemption for widows.¹ The current law granting all widows an annual \$500 exemption ... has been essentially unchanged since 1941. Appellant Kahn is a widower who lives in Florida and applied for the exemption to the Dade County Tax Assessor's Office. It was denied because the statute offers no analogous benefit for widowers. Kahn then sought a declaratory judgment in the Circuit Court for Dade County, Florida, and that court held the statute violative of the Equal Protection Clause of the Fourteenth Amendment because the classification "widow" was based upon gender ...

This is not a case like *Frontiero v. Richardson* ... where the Government denied its female employees both substantive and procedural benefits granted males "solely ... for administrative convenience." ... We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.* A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class ... if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution. *Allied Stores v. Bowers*. This principle has weathered nearly a century of Supreme Court adjudication, and it applies here as well. The statute before us is well within those limits.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court rejects widower Kahn's claim of denial of equal protection on the ground that the limitation in Fla.Stat. § 196.191(7) (1971), which provides an annual \$500 property tax exemption to widows, is a legislative classification that bears a fair and substantial relation to

"the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."

... In my view, however, a legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers, like classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics

over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society. *Frontiero v. Richardson* (1973). The Court is not, therefore, free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means. While, in my view, the statute serves a compelling governmental interest by “cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,” I think that the statute is invalid because the State’s interest can be served equally well by a more narrowly drafted statute.

I agree that, in providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups. No one familiar with this country’s history of pervasive sex discrimination against women can doubt the need for remedial measures to correct the resulting economic imbalances. Indeed, the extent of the economic disparity between men and women is dramatized by the data cited by the Court ... By providing a property tax exemption for widows, § 196.191(7) assists in reducing that economic disparity for a class of women particularly disadvantaged by the legacy of economic discrimination. In that circumstance, the purpose and effect of the suspect classification are ameliorative; the statute neither stigmatizes nor denigrates widowers not also benefited by the legislation. Moreover, inclusion of needy widowers within the class of beneficiaries would not further the State’s overriding interest in remedying the economic effects of past sex discrimination for needy victims of that discrimination. While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows.

The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means ...

MR. JUSTICE WHITE, dissenting.

The Florida tax exemption at issue here is available to all widows, but not to widowers. The presumption is that all widows are financially more needy and less trained or less ready for the job market than men. It may be that most widows have been occupied as housewife, mother, and homemaker, and are not immediately prepared for employment. But there are many rich widows who need no largess from the State; many others are highly trained, and have held lucrative positions long before the death of their husbands. At the same time, there are many widowers who are needy and who are in more desperate financial straits and have less access to the job market than many widows. Yet none of them qualifies for the exemption.

I find the discrimination invidious, and violative of the Equal Protection Clause. There is merit in giving poor widows a tax break, but gender-based classifications are suspect, and require more justification than the State has offered.

Excerpted by Kimberly Clairmont and Rorie Solberg



Weinberger v. Wisenfeld

420 U.S. 636 (1975)

Vote: 8-0

Opinion: Brennan, Burger, Stewart, White, Marshall, Blackmun, Powell and Rehnquist

Decision: Affirmed

Concurrence: Powell, joined by Burger

Concurrence: Rehnquist

Not participating: J. Douglas

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act are payable, with some limitations, both to the widow and to the couple's minor children in her care. § 202(g) of the Social Security Act ... Such benefits are payable on the basis of the earnings of a deceased wife and mother covered by the Act, however, only to the minor children, and not to the widower. The question in this case is whether this gender-based distinction violates the Due Process Clause of the Fifth Amendment.

...

Appellee Stephen C. Wiesenfled and Paula Polatschek were married on November 15, 1970. Paula, who worked as a teacher for five years before her marriage, continued teaching after her marriage. Each year she worked, maximum social security contributions were deducted from her salary. Paula's earnings were the couple's principal source of support during the marriage, being substantially larger than those of appellee. On June 5, 1972, Paula died in childbirth. Appellee was left with the sole responsibility for the care of their infant son, Jason Paul. Shortly after his wife's death, Stephen Wiesenfled applied at the Social Security office in New Brunswick, N. J., for social security survivors' benefits for himself and his son. He did obtain benefits for his son ... and received for Jason \$206.90 per month until September 1972, and \$248.30 per month thereafter. However, appellee was told that he was not eligible for benefits for himself, because ... benefits were available only to women. If he had been a woman, he would have received the same amount as his son as long as he was not working ... if working, that amount reduced by \$1 for every \$2 earned annually above \$2,400 ...

Appellee filed this suit in February 1973 ... on behalf of himself and of all widowers similarly situated. He sought a declaration that [the law] is unconstitutional to the extent that men and women are treated differently, an injunction restraining appellant from denying benefits ... solely on the basis of sex, and payment of past benefits commencing with June 1972, the month of the original application ...

...

Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. *Kahn v. Shevin*. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support ...

... Since OASDI benefits do depend significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.

... Here, it is apparent both from the statutory scheme itself and from the legislative history ... that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, [the law], linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work ...

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of [the law] is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense ...

Since the gender-based classification of [the law] cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*. Like the statutes there, “[b]y providing dissimilar treatment for men and women who are ... similarly situated, the challenged section violates the [Due Process] Clause.” *Reed v. Reed* (1971).

Affirmed.

Excerpted by Kimberly Clairmont



Stanton v. Stanton

421 U.S. 7 (1975)

Vote: 8-1

Decision: Reversed

Majority: Blackmun, joined by Burger, Douglas, Brennan, Stewart, White, Marshall, Powell

Dissent: Rehnquist

MR. JUSTICE. BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a state statute specifying for males a greater age of majority than it specifies for females denies, in the context of a parent's obligation for support payments for his children, the equal protection of the laws guaranteed by § 1 of the Fourteenth Amendment.

Appellant Thelma B. Stanton and appellee James Lawrence Stanton, Jr., were married at Elko, Nev., in February 1951. At the suit of the appellant, they were divorced in Utah on November 29, 1960. They have a daughter, Sherri Lyn, born in February 1953, and a son, Rick Arlund, born in January 1955. Sherri became 18 on February 12, 1971, and Rick on January 29, 1973. During the divorce proceedings in the District Court of Salt Lake County, the parties entered into a stipulation as to property, child support, and alimony. The court awarded custody of the children to their mother and incorporated provisions of the stipulation into its findings and conclusions and into its decree of divorce ...

When Sherri attained 18 the appellee discontinued payments for her support. In May 1973 the appellant moved the divorce court for entry of judgment in her favor and against the appellee for, among other things, support for the children for the periods after each respectively attained the age of 18 years. The court concluded that on February 12, 1971, Sherri "became 18 years of age, and under the provisions of [§] 15-2-1 Utah Code Annotated 1953, thereby attained her majority. Defendant is not obligated to plaintiff for maintenance and support of Sherri Lyn Stanton since that date." ...

The appellant appealed to the Supreme Court of Utah. She contended, among other things, that Utah Code Ann. 15-2-1 (1953) to the effect that the period of minority for males extends to age 21 and for females to age 18, is invidiously discriminatory, and serves to deny due process and equal protection of the laws in violation of the Fourteenth Amendment ... On this issue, the Utah court affirmed ...

We noted probable jurisdiction.

We turn to the merits. The appellant argues that Utah's statutory prescription establishing different ages of majority for males and females denies equal protection; that it is a classification based solely on sex and affects a child's "fundamental right" to be fed, clothed, and sheltered by its parents; that no compelling state interest supports the classification; and that the statute can withstand no judicial scrutiny, "close" or otherwise, for it has no relationship to any ascertainable legislative objective. The appellee contends that the test is that of rationality, and that the age classification has a rational basis, and endures any attack based on equal protection.

We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect. *Weinberger v. Wiesenfeld* (1975) [other citations omitted].

Reed, we feel, is controlling here ...

The test here, then, is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. We conclude that it does not. It may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males. The last mentioned factor, however, under the Utah statute loses whatever weight it otherwise might have, for the statute states that "all minors obtain their majority by marriage"; thus minority, and all that goes with it, is abruptly lost by marriage of a person of either sex at whatever tender age the marriage occurs.

Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction drawn by § 15-2-1 which, when related to the divorce decree, results in the appellee's liability for support for Sherri only to age 18 but for Rick to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. *Taylor v. Louisiana* (1975). Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance, particularly when marriage, as the statute provides, terminates minority for a person of either sex.

...

Our conclusion that in the context of child support the classification effectuated by § 15-2-1 denies the equal protection of the laws, as guaranteed by the Fourteenth Amendment, does not finally resolve the controversy as between this appellant and this appellee. With the age differential held invalid, it is not for this Court to determine when the appellee's obligation for his children's support, pursuant to the divorce decree, terminates under Utah law. The appellant asserts that, with the classification eliminated, the common law applies and that at common law the age of majority for both males and females is 21. The appellee claims that any unconstitutional inequality between males and females is to be remedied by treating males as adults at age 18, rather than by withholding the privileges of adulthood from women until they reach 21. This plainly is an issue of state law to be

resolved by the Utah courts on remand; the issue was noted, incidentally, by the Supreme Court of Utah ... The appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit. *Harrigfeld v. District Court* (1973) [other citations omitted].

Excerpted by Kimberly Clairmont



Craig v. Boren

429 U.S. 190 (1976)

Vote: 7-2

Decision: Reversed

Plurality: Brennan, joined by White, Marshall, Powell, Stevens

Concurrence: Blackmun,

Concurrence: Stewart

Concurrence: Powell

Concurrence: Stevens

Dissent: Rehnquist

Dissent: Burger

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute ... prohibits the sale of “nonintoxicating” 3.2% beer to males under the age of 21 and to females under the age of 18. 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 ...

... The question thus arises whether appellant Whitener, the licensed vendor of 3.2% beer, who has a live controversy against enforcement of the statute, may rely upon the equal protection objections of males 18-20 years of age to establish her claim of unconstitutionality of the age-sex differential. We conclude that she may ...

...

Analysis may appropriately begin with the reminder that *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 ... Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. *Stanley v. Illinois* (1972) [other citations omitted]. And only two Terms ago, *Stanton v. Stanton* (1975), expressly stating that *Reed v. Reed* was “controlling,” ... held that *Reed* required invalidation of a

Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds ...

... We turn then to the question whether, under *Reed*, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

...

We accept for purposes of discussion the District Court's identification of the objective underlying §§ 241 and 245 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 ... 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 decision making factor even though the statutes in question certainly rested on far more predictive empirical relationships than this ...

... 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 ...

... Even when state officials have posited sociological or empirical justifications for these gender-based differentiations, the courts have struck down discriminations aimed at an entire class under the guise of alcohol regula-

tion. In fact, social science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious. 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.

It is so ordered.

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." (emphasis added).

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* (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, *McGowan v. Maryland* (1961) [other citations omitted] ... and I believe that it is constitutional under that analysis.

Excerpted by Kimberly Clairmont



Applying the New Standard

Orr v. Orr

440 U.S. 268 (1979)

Vote: 6-3

Decision: Reversed

Majority: Brennan, joined by Stewart, White, Marshall, Blackmun, Stevens

Concurrence: Blackmun

Concurrence: Stevens

Dissent: Powell

Dissent: Rehnquist, joined by Burger

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That decree directed appellant, Mr. Orr, to pay appellee, Mrs. Orr, \$1,240 per month in alimony. On July 28, 1976, Mrs. Orr initiated a contempt proceeding in the Circuit Court of Lee County, Ala., alleging that Mr. Orr was in arrears in his alimony payments. On August 19, 1976, at the hearing on Mrs. Orr's petition, Mr. Orr submitted in his defense a motion requesting that Alabama's alimony statutes be declared unconstitutional because they authorize courts to place an obligation of alimony upon husbands but never upon wives. The Circuit Court denied Mr. Orr's motion and entered judgment against him for \$5,524, covering back alimony and attorney fees. Relying solely upon his federal constitutional claim, Mr. Orr appealed the judgment ... We noted probably jurisdiction ... We now hold the challenged Alabama statutes unconstitutional and reverse.

...

In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme "provides that different treatment be accorded ... on the basis of ... sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause," *Reed v. Reed* (1971). The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. *Craig v. Boren* (1976). "To withstand scrutiny" under the Equal Protection Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster* (1977). We shall, therefore, examine the three governmental objectives that might arguably be served by Alabama's statutory scheme.

Appellant views the Alabama alimony statutes as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens. *Cf. Stern v. Stern* (1973). We agree, as he urges, that prior cases settle that this purpose cannot sustain the statutes. *Stanton v. Stanton* ... held that the "old notio[n]" that "generally it is the man's primary responsibility to provide a home and its essentials," can no longer justify a statute that discriminates on the basis of gender ...

The opinion of the Alabama Court of Civil Appeals suggests other purposes that the statute may serve. Its opinion states that the Alabama statutes were "designed" for "the wife of a broken marriage who needs financial assistance," 351 So. 2d at 905. This may be read as asserting either of two legislative objectives. One is a legislative purpose to provide help for needy spouses, using sex as a proxy for need. The other is a goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce. We concede, of course, that assisting needy spouses is a legitimate and important governmental objective ...

Ordinarily, we would begin the analysis of the "needy spouse" objective by considering whether sex is a sufficiently "accurate proxy," ... for dependency to establish that the gender classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation," *Reed v. Reed*." ... Similarly, we would initially approach the "compensation" rationale by asking whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification, leaving the sexes "not similarly situated with respect to opportunities" in that sphere. *Schlesinger v. Ballard* (1975).

But in this case, even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would "not adequately justify the salient features of" Alabama's statutory scheme. *Craig v. Boren*. Under the statute, individualized hearings at which the parties' relative financial circumstances are considered already occur. *Russell v. Russell* (1945) [other citations omitted]. There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative convenience rationale exists to justify operating by generalization or proxy. Similarly, since individualized hearings can determine which women were in fact discriminated against vis-a-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex ...

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. *United Jewish Organizations v. Carey* (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender

classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound-if only indirectly-to the benefit of those without need for special solicitude ...

Therefore, it is open to the Alabama courts on remand to consider whether Mr. Orr's stipulated agreement to pay alimony, or other grounds of gender-neutral state law, bind him to continue his alimony payments."

Reversed and remanded.

Excerpted by Kimberly Clairmont



Administrator of Mass. v. Feeney

442 U.S. 256 (1979)

Vote: 7-2

Decision: Reversed

Majority: Stewart, joined by Burger, White, Blackmun, Powell, Rehnquist, Stevens

Concurrence: Stevens, joined by White

Dissent: J. Marshall, joined by J. Brennan

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute ... on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment ... [A]ll veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males ...

The Federal Government and virtually all of the States grant some sort of hiring preference to veterans. The Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous. It applies to all positions in the State's classified civil service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime." Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish.

Civil service positions in Massachusetts fall into two general categories, labor and official. For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of

their respective scores on an “eligible list.” Chapter 31, § 23, requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked — in the order of their respective scores — above all other candidates.

Rank on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of “certified eligibles” from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency is then required to choose from among these candidates. Although the veterans’ preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well nigh absolute advantage.

...

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans’ preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

...

The veterans’ hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well disciplined people to civil service occupations.

...

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subjected to a military draft.

When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans. During the decade between 1963

and 1973, when the appellee was actively participating in the State's merit selection system, 47,005 new permanent appointments were made in the classified official service. Forty-three percent of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status ...

The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has, discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment ...

The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. *Massachusetts Bd. Of Retirement v. Muria*. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York City Transit Authority v. Beazer* (other citations omitted).

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination ...

Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans-male as well as female-are placed at a disadvantage. Too many men are affected ... to permit the inference that the statute is but a pretext for preferring men over women ...

Veterans' hiring preferences represent an awkward-and, many argue, unfair-exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise. Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran more than a square deal. But the Fourteenth Amendment "cannot be made a refuge from ill-advised ... laws." *District of Columbia v. Brooke*. The substantial edge granted to veterans ... may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Roskter v. Goldberg

453 U.S. 57 (1981)

Vote: 6-3

Decision: Reversed

Majority: Rehnquist, joined by Burger, Stewart, Blackmun, Powell, Steven

Dissent: Marshall, joined by Brennan

Dissent: White, joined by Brennan

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether the Military Selective Service Act ... violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not female ...

On July 2, 1980, the President, by Proclamation, ordered the registration of specified groups of young men pursuant to the authority ... of the Act. Registration was to commence on July 21, 1980. Proclamation No. 4771, 3 CFR 82 (1980).

These events of last year breathed new life into a lawsuit which had been essentially dormant in the lower courts for nearly a decade. It began in 1971 when several men subject to registration for the draft and subsequent induction into the Armed Services filed a complaint in the United States District Court for the Eastern District of Pennsylvania challenging the MSSA on several grounds. A three-judge District Court was convened in 1974 to consider the claim of unlawful gender-based discrimination which is now before us ...

Whenever called upon to judge the constitutionality of an Act of Congress—"the gravest and most delicate duty that this Court is called upon to perform," *Blodett v. Holden* (1927), the Court accords "great weight to the decisions of Congress." *Columbia Broadcasting System, Inc. v. Democratic National Committee* (1973).

The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court.

The Solicitor General argues ... emphasizing the deference due Congress in the area of military affairs and national security, that this Court should scrutinize the MSSA only to determine if the distinction drawn

between men and women bears a rational relation to some legitimate Government purpose, *United States Railroad Retirement Bd. V. Fritz* (1980), and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination. *Michael M. v. Superior Court of Sonoma County* (1981) [other citations omitted]. . We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further “refinement” in the applicable tests as suggested by the Government ... In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision “military” on the one hand or “gender-based” on the other does not automatically guide a court to the correct constitutional result.

No one could deny that under the test of *Craig v. Boren* ... the Government’s interest in raising and supporting armies is an “important governmental interest.” Congress and its Committees carefully considered and debated two alternative means of furthering that interest: the first was to register only males for potential conscription, and the other was to register both sexes. Congress chose the former alternative. When that decision is challenged on equal protection grounds, the question a court must decide is not which alternative it would have chosen, had it been the primary decision-maker, but whether that chosen by Congress denies equal protection of the laws.

The question of registering women for the draft not only received considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee. Hearings held by both Houses of Congress in response to the President’s request for authorization to register women adduced extensive testimony and evidence concerning the issue.

Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory ... The Senate Report specifically found that “[w]omen should not be intentionally or routinely placed in combat positions in our military services.” ... The President expressed his intent to continue the current military policy precluding women from combat ... and appellees present their argument concerning registration against the background of such restrictions on the use of women in combat.” ... we must examine appellees’ constitutional claim concerning registration with these combat restrictions firmly in mind.

The existence of the combat restrictions clearly indicates the basis for Congress’ decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them ...

The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.

Congress' decision to authorize the registration of only men therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration. *Craig v. Boren* (1976) [other citations omitted]. The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops. As was the case in *Schlesinger v. Ballard ...* "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated" in this case ... The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality ...

... As the Senate Committee recognized a year before, "training would be needlessly burdened by women recruits who could not be used in combat." ... It is not for this Court to dismiss such problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.

Congress also concluded that whatever the need for women for noncombat roles during mobilization, whether 80,000 or less, it could be met by volunteers ...

In sum, Congress carefully evaluated the testimony that 80,000 women conscripts could be usefully employed in the event of a draft and rejected it in the permissible exercise of its constitutional responsibility. The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence.

Reversed.

Excerpted by Kimberly Clairmont



Michael M. v. Superior Court of Sonoma County

450 U.S. 464 (1981)

Vote: 5-4

Decision: Affirmed

Plurality: Rehnquist, joined by Burger, Stewart and Powell

Concurrence: Stewart

Concurrence: Blackmun (in part)

Dissent: Brennan, joined by White and Marshall

Dissent: Stevens

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL joined.

The question presented in this case is whether California’s “statutory rape” law ... violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.” The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17-year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16-year-old female, and her sister as they waited at a bus stop. Petitioner and Sharon, who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner’s initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that §261.5 unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner’s request for relief and petitioner sought review in the Supreme Court of California ...

As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications ... Unlike the California Supreme Court, we have not held that gender-based classifications are “inherently suspect” and thus we do not apply so-called “strict scrutiny” to those classifications. *Stanton v. Stanton* (1975). Our cases have held, however, that the traditional minimum rationality test takes on a somewhat “sharper focus” when gender-based classifications are challenged. *Craig v. Boren* (1976) (POWELL, concurring). In *Reed v. Reed* (1971) for example, the Court stated that gender-based classification will be upheld if it bears a “fair and substantial relationship” to legitimate state ends, while in *Craig v. Boren* ... the Court restated the test to require the classification to bear a “substantial relationship” to “important governmental objectives.”

Underlying these decisions is the principle that a legislature may not

“make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.”

Parham v. Hughes (1979) (plurality opinion of STEWART). Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct ... The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies ...

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the “purposes” of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State.

Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion. And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity ...

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female. We hold that such a statute is sufficiently related to the State’s objectives to pass constitutional muster ...

In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement ...

But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made “solely for ... administrative convenience,” *Frontiero v. Richardson* (1973), or rests on “the baggage of sexual stereotypes” as in *Orr v. Orr*.

As we have held, the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

Accordingly the judgment of the California Supreme Court is

Affirmed.

Excerpted by Kimberly Clairmont



Sessions v. Morales-Santana

582 U.S. ____ (2017)

Vote: 7-1

Decision: Reversed

Majority: Ginsburg joined by Roberts, Sotomayor, Kagan, Kennedy, and Breyer

Concurring: Thomas joined by Alito

Not participating: J. Gorsuch

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U. S. citizenship by a child born abroad, when one parent is a U. S. citizen, the other, a citizen of another nation. The main rule appears in 8 U. S. C. §1401(a)(7) (1958 ed.), now §1401(g) (2012 ed.). Applicable to married couples, §1401(a)(7) requires a period of physical presence in the United States for the U. S.-citizen parent. The requirement, as initially prescribed, was ten years' physical presence prior to the child's birth, §601(g) (1940 ed.); currently, the requirement is five years prebirth, §1401(g) (2012 ed.). That main rule is rendered applicable to unwed U. S.-citizen fathers by §1409(a). Congress ordered an exception, however, for unwed U. S.-citizen mothers. Contained in §1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón Morales-Santana, was born in the Dominican Republic when his father was just 20 days short of meeting §1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic, Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment entitles him to citizenship stature ...

Santana does not suffer discrimination on the basis of his gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the

right an unwed U. S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales Santana may seek to vindicate his father's right to the equal protection of the laws ...

But we recognize an exception where, as here, "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." *Powers v. Ohio* (1991). José Morales' ability to pass citizenship to his son, respondent Morales-Santana, easily satisfies the "close relationship" requirement. So, too, is the "hindrance" requirement well met. José Morales' failure to assert a claim in his own right "stems from disability," not "disinterest,". *Miller v. Albright* (1998) (O'Connor, concurring in judgment).

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. *Hoyt v. Florida* (1961). Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." *J.E.B. v. Alabama ex rel. T. B.* (1994).

Prescribing one rule for mothers, another for fathers, §1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification." *Kirchberg v. Feenstra* (1981).

The defender of legislation that differentiates on the basis of gender 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." *Mississippi Univ. For Women v. Hogan* (1982).

History reveals what lurks behind §1409. Enacted in the Nationality Act of 1940 (1940 Act) ... ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents. During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a non-marital child ...

In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as §1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. *Caban v. Mohammed*. Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact ...

Infecting the Government's risk-of-statelessness argument is an assumption without foundation." [F]oreign laws that would put the child of the U. S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would protect the child of the U. S.-citizen father against statelessness by providing that the child would take his mother's citizenship." ... The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child ...

One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U. S.-citizen mothers while ignoring the same risk for children of unwed U. S.-citizen fathers ...

The gender-based distinction infecting §§1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen “had it been apprised of the constitutional infirmity.” *Levin v. Commerce Energy, Inc.*, (2010). Although the preferred rule in the typical case is to extend favorable treatment ... this is hardly the typical case. Extension here would render the special treatment Congress prescribed in §1409(c), the one-year physical-presence requirement for U. S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)’s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U. S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, §1401(a)(7)’s now-five-year requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers ...

The judgment of the Court of Appeals for the Second Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Vorchheimer v. School Dist. of Philadelphia

430 U.S. 703 (1977)

Vote: 4-4

Decision: Per Curiam

Affirmed by an equally divided court.

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

532 F.2d 880 (1976)

Vote: 2-1

Decision: Reversed

Majority: Weis joined by Markey

Dissent: Gibbons

JOSEPH F. WEIS, Jr., Circuit Judge.

Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal? This appeal presents those questions and, after careful consideration, we answer negatively. Accordingly, we vacate the district court's judgment which held that the school board policy was impermissible.

Plaintiff is a teen-age girl who graduated with honors from a junior high school in Philadelphia. She then applied to Central High School, a public school in the city, but was refused admission because that institution is restricted to male students. After that setback, she filed this class action in the United States District Court seeking relief ... from alleged unconstitutional discrimination. After a trial, the district court granted an injunction, ordering that she and other qualified female students be admitted to Central ...

The plaintiff has stipulated that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance." Moreover, she agrees that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." In addition to this stipulation, the defendants presented the testimony of Dr. J. Charles Jones, an expert in the field of education. Dr. Jones expressed a belief, based on his study of New Zealand's sex-segregated schools, that students in that educational environment had a higher regard for scholastic achievement and devoted more time to homework than those in co-ed institutions. The district judge commented that even had the parties not stipulated to the educational value of the practice, "this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement" ...

An analysis of the statutory language, which recognizes the background to the legislative effort, is helpful. Congress' finding as to "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex ..." should be read in the light of the policies followed by many communities to avoid racial integration. It is at least questionable that Philadelphia maintains a "dual school system" and the application of this phraseology to the case at bar is dubious ...

The Act's policy declaration is that children are entitled to "equal educational opportunity" without regard to race, color, or sex. The finding of the district court discloses no inequality in opportunity for education between Central and Girls High Schools. We cannot, therefore, find that language applicable here.

We conclude the legislation is so equivocal that it cannot control the issue in this case. Our research into the legislative history reveals no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives. That drastic step should require clear and unequivocal expression. Judicial zeal for identity of educational methodology should not lead us to presume that Congress would impose such limitations upon the nationwide teaching community by equivocation or innuendo. Congress spoke clearly enough on single-sex schools in 1972 when it chose to defer action in order to secure the date

needed for an intelligent judgment. We do not believe that the ambiguous wording of the Equal Educational Opportunities Act of 1974 represented an abandonment of the clearly expressed desire to wait for more information before making a decision ...

We need not decide whether this case requires application of the rational or substantial relationship tests because, using either, the result is the same. We conclude that the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution ...

GIBBONS, Circuit Judge (dissenting).

...

... No doubt had the issue in this case been presented to the Court at any time from 1896 to 1954, a “separate but equal” analysis would have carried the day. I was under the distinct impression, however, that “separate but equal” analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over twenty years ago ... The majority opinion, in establishing a twentieth-century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*. But the resurrection of the “separate but equal” analysis is not my most serious quarrel with the majority opinion. What I find most disturbing is the majority’s deliberate disregard of an express Congressional finding that the maintenance of dual school systems in which students are assigned to schools solely on the basis of sex violates the equal protection clause of the fourteenth amendment ... So long as Congress has acted within the sphere of its legislative competence in making such a finding, I submit, we are not free to substitute a “separate but equal” legislative judgment of our own. Because I conclude that Congress has acted to prohibit the maintenance of single-sex public schools pursuant to its powers under § 5 of the fourteenth amendment, I dissent from the majority’s substitution of a “separate but equal” legislative judgment. I would affirm the decision below ...

Excerpted by Kimberly Clairmont



Miss. Univ. for Women v. Hogan

458 U.S. 718 (1982)

Vote: 5-4

Decision: Affirmed

Majority: O'Connor, joined by Brennan, White, Marshall, Stevens

Dissent: Burger

Dissent: Blackmun

Dissent: Powell, joined by Rehnquist

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States ... The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women ...

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program.' Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit.

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compensatory damages.

...

We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed v. Reed* (1971). That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. *Caban v. Mohammed* (1979) [other citations omitted].

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory

objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. *Frontiero v. Richardson* (1973) (plurality opinion).

The State’s primary justification for maintaining the single-sex admissions policy of MUW’s School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action ... As applied to the School of Nursing, we find the State’s argument unpersuasive ...

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification ...

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing’s first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide ... That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide ...

Rather than compensate for discriminatory barriers faced by women, MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job ...

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW’s policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men ...

Because we conclude that the State’s policy of excluding males from MUW’s School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

Excerpted by Kimberly Clairmont



U.S. v. Virginia

518 U.S. 515 (1996)

Vote: 7-1

Decision: Reversed

Majority: Ginsburg, joined by Stevens, O'Connor, Kennedy, Souter, Breyer

Concurring: Rehnquist

Dissent: Scalia

Not participating: Thomas

JUSTICE GINSBURG delivered the opinion of the Court.

...

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment ...

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them ... "[S]ome women, at least," the court said, "would want to attend the school if they had the opportunity." ... The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"- "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." ... And it was also established that "some women are capable of all of the individual activities required of VMI cadets." ... In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." ...

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged ... But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered," if women were admitted ... "Allowance for personal privacy would have to be made," ... "[p]hysical education requirements would have to be altered, at least for the women," ... the adversative environment could not survive unmodified ... Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." ...

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not ... advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."

...

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary

Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission-to produce "citizensoldiers" -the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources.

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen ... Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," ... and receives significantly lower salaries ... While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees ... A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition.

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff ... Training its attention on methods of instruction appropriate for "most women," the Task Force determined that a military model would be "wholly inappropriate" for VWIL.

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, ... but the VWIL House would not have a military format ... and VWIL would not require its students to eat meals together or to wear uniforms during the schoolday ... In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem ... In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets ... and the VMI Foundation agreed to supply a \$5.4625 million endowment for the VWIL program ... Mary Baldwin's own endowment is about \$19 million; VMI's is \$131 million ... Mary Baldwin will add \$35 million to its endowment based on future commitments; VMI will add \$220 million ... The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates ... but those graduates will not have the advantage afforded by a VMI degree.

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause ... A divided Court of Appeals affirmed the District Court's judgment.

...

The cross-petitions in this suit present two ultimate 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?

... 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 *post hoc* in response to litigation. And it must not rely on overbroad 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 classification. *Loving v. Virginia* (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."

...

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. 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.

...

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." ... Virginia challenges that "liability" ruling and 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 ... We consider these two justifications in turn.

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with

a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth ... Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options.

...

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 "eliminat[e] the very aspects of [the] program that distinguish [VMI] from ... other institutions of higher education in Virginia."

...

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," ... once routinely used to deny rights or opportunities ... 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 ...

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described ... was bent and bowed ... Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" ... that must be the solid base for any gender-defined classification.

...

In the second phase of the litigation, Virginia presented its remedial plan-maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes ... the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation ... The United States challenges this "remedial" ruling as pervasively misguided.

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." ... A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." ...

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 ...

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed ... Virginia deliberately did not make VWIL a military institute ... VWIL students thus do not experience the "bar-racks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic."

VWIL students receive their "leadership training" in seminars, externships, and speaker series ... episodes and encounters lacking the "[p]hysical rigor, mental stress, ... minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier 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 ...

As earlier stated ... generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men*. It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers ... By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group*, for "[o]nly about 15% of VMI cadets enter career military service."

...

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network ... Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet ... The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life ...

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution ...

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 ... Reluctant to admit African-Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students ... As originally opened, the new school had no independent faculty or library, and it lacked accreditation ... Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas." ...

There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the “more perfect Union.”

* * *

For the reasons stated, the initial judgment of the Court of Appeals, 976 F. 2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F. 3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

Excerpted by Kimberly Clairmont



Equal Protection beyond Race and Gender

Hernandez v. Texas

347 U.S. 475 (1954)

Vote: 9-0

Decision: Reversed

Majority: Warren, joined by Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed the judgment of the trial court ... Prior to the trial, the petitioner, by his counsel, offered timely motions to quash the indictment and the jury panel. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, although there were such persons fully qualified to serve residing in Jackson County. The petitioner asserted that exclusion of this class deprived him, as a member of the class, of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. After a hearing, the trial court denied the motions. At the trial, the motions were renewed, further evidence taken, and the motions again denied. An allegation that the trial court erred in denying the motions was the sole basis of petitioner's appeal. In affirming the judgment of the trial court, the Texas Court of Criminal Appeals considered and passed upon the substantial federal question raised by the petitioner ...

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"-that is, based upon differences between "white" and Negro ...

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." The parties

also stipulated that “there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.” ...

To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin-American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner’s case ...

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury 18 ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced.” His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

Reversed.

Excerpted by Kimberly Clairmont



San Antonio Independent School District v. Rodriguez

411 U.S. 1 (1973)

Vote: 5-4

Decision: Reversed

Majority: Powell, joined by Burger, Stewart, Blackmun, Rehnquist

Concurrence: Stewart

Dissent: White joined by Douglas and Brennan

Dissent: Marshall, joined by Douglas

Dissent: Brennan

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base ... The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December, 1971, the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented ...

Until recent times, Texas was a predominantly rural State, and its population and property wealth were spread relatively evenly across the State. Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced ... Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature, in the late 1940's, undertook a thorough evaluation of public education with an eye toward major reform ... The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible — as a unit — for providing the remaining 20% ... The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

...

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the

core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960—the lowest in the metropolitan area—and the median family income (\$4,686) is also the lowest. At an equalized tax rate of \$1.05 per \$100 of assessed property—the highest in the metropolitan area—the district contributed \$26 to the education of each child for the 1967- 1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly “Anglo,” having only 18% Mexican-Americans less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.

... And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas’ dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F. Supp. at 282. Finding that wealth is a “suspect” classification, and that education is a “fundamental” interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling [st]ate interest ...

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 “less drastic means” for effectuating its objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that “[n]o one familiar with the Texas system would contend that it has yet achieved perfection.” Apart from its concession that educational financing in Texas has “defects” and “imperfections,” the State defends the systems rationality with vigor and disputes the District Court’s finding that it lacks a “reasonable basis.” ...

This, then, establishes the framework for our analysis. 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 judg-

ment 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 invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment ...

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 precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniness, 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 ...

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 ...

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. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal, quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for, the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'" The

State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures “every child in every school district an adequate education.” No proof was offered at trial persuasively discrediting or refuting the State’s assertion ...

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 ...

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 ...

But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State’s system impermissibly interferes with the exercise of a “fundamental” right, and that, accordingly, the prior decisions of this Court require the application of the strict standard of judicial review. *Graham v. Richardson* (1971) [other citations omitted].

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin v. Yoder* (BURGER), (WHITE), (1972) [other citations omitted].

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that “the grave significance of education both to the individual and to our society” cannot be doubted.” 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. Mr. Justice Harlan, dissenting from the Court’s application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that ... if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority’s view of the importance of the interest affected, we would have gone “far toward making this Court a *super-legislature*.” *We would, indeed, then be assuming a legislative role, and one for which the Court lacks both authority and competence. But MR. JUSTICE STEWART’s response in Shapiro to Mr. Justice Harlan’s concern correctly articulates the limits of the fundamental rights rationale employed in the Court’s equal protection decisions:*

“The Court today does *not* ‘pick out particular human activities, characterize them as *fundamental*,’ and give them added protection. ... *To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.*” (Emphasis in original.)

The lesson of these cases in addressing the question now before the Court is plain. 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 ...

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 ...

While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others the existence of ‘some inequality’ in the manner in which the State’s rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan v. Maryland* (1961).

Every step leading to the establishment of the system Texas utilizes today — including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid — was implemented in an effort to extend public education and to improve its quality. Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory, and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution ...

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights ...

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 consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court’s action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.

These matters merit the continued attention of the scholars who already have contributed much their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

Excerpted by Kimberly Clairmont



Plyler v. Doe

457 U.S. 202 (1985)

Vote: 5-4

Decision: Affirmed

Majority: Brennan, joined by Marshall, Blackmun, Powell, Stevens

Concurrence: Marshall

Concurrence: Blackmun

Concurrence: Powell

Dissent: Burger, joined by White, Rehnquist, O'Connor

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may 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 ...

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not “legally admitted” into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not “legally admitted” to the country [§ 21.031] ...

This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District ... After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class ...

Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments ... Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government ...

A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose ...

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a “suspect class,” or that impinge upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State. We turn to a consideration of the standard appropriate for the evaluation of § 21.031 ...

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.” ... Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice ...

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, “education prepares individuals to be self-reliant and self-sufficient participants in society.” *Wisconsin v. Yoder*. Illit-

eracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause ...

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. 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. *San Antonio Independent School Dist. V. Rodriguez*. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. More is involved in these cases 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 hardship 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 ...

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is

Affirmed.

Excerpted by Kimberly Clairmont



Clark v. Jeter

486 U.S. 456 (1988)

Vote: 9-0

Decision: Reversed

Majority: O'Connor, joined by Rehnquist, White, Marshall, Blackmun, Stevens, Scalia and Kennedy

JUSTICE O'CONNOR delivered the opinion of the Court.

Under Pennsylvania law, an illegitimate child must prove paternity before seeking support from his or her father, and a suit to establish paternity ordinarily must be brought within six years of an illegitimate child's birth. By contrast, a legitimate child may seek support from his or her parents at any time. We granted certiorari to consider the constitutionality of this legislative scheme ...

On September 22, 1983, petitioner Cherlyn Clark filed a support complaint in the Allegheny County Court of Common Pleas on behalf of her minor daughter, Tiffany, who was born out of wedlock on June 11, 1973. Clark named respondent Gene Jeter as Tiffany's father. The court ordered blood tests, which showed a 99.3% probability that Jeter is Tiffany's father.

Jeter moved to dismiss the complaint on the ground that it was barred by the 6-year statute of limitations for paternity actions. In her response, Clark contended that this statute is unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In the alternative, she argued that the statute was tolled by fraudulent and misleading actions of the welfare department, or by threats and assaults by Jeter.

The trial court upheld the statute of limitations ... Therefore, the trial court entered judgment for Jeter ... Clark appealed to the Superior Court of Pennsylvania, again raising her constitutional challenges to the 6-year statute of limitations ... Before the court decided her case, the Pennsylvania Legislature enacted an 18-year statute of limitations for actions to establish paternity ... The Superior Court concluded, however, that Pennsylvania's new 18-year statute of limitations did not apply retroactively, and that it would not revive Clark's cause of action in any event ... The Pennsylvania Supreme Court denied her petition for allowance of appeal. We granted Clark's petition for certiorari.

...

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S.Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. V. Rodriguez* (1973) [other citations omitted]. Classifications based on race or national origin, *Loving v. Virginia* (1967), and classifications affecting fundamental rights, *Harper v. Virginia Bd. Of*

Elections (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. *Mississippi University for Women v. Hogan* (1982) [other citations omitted].

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because “visiting this condemnation on the head of an infant is illogical and unjust.” *Weber v. Aetna Casualty and Surety Co.*, (1972). Yet, in the seminal case concerning the child’s right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of “lurking problems with respect to proof of paternity.” *Gomez v. Perez* (1973). This Court has developed a particular framework for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity, and thereby limit the ability of illegitimate children to obtain support.

“First, the period for obtaining support ... must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State’s interest in avoiding the litigation of stale or fraudulent claims.” *Mills v. Habluetzel*.

In *Mills*, we held that Texas’ 1-year statute of limitations failed both steps of the analysis. We explained that paternity suits typically will be brought by the child’s mother, who might not act swiftly amidst the emotional and financial complications of the child’s first year ... the Court unanimously struck down Tennessee’s 2-year statute of limitations for paternity and child support actions brought on behalf of certain illegitimate children ... the Court first considered whether two years afforded a reasonable opportunity to bring such suits. The Tennessee statute was relatively more generous than the Texas statute ... because it did not limit actions against a father who had acknowledged his paternity in writing or by furnishing support; nor did it apply if the child was likely to become a public charge. Nevertheless, the Court concluded that the 2-year period was too short in light of the persisting financial and emotional problems that are likely to afflict the child’s mother. Proceeding to the second step of the analysis, the Court decided that the 2-year statute of limitations was not substantially related to Tennessee’s asserted interest in preventing stale and fraudulent claims ... this incremental difference would not create substantially greater proof and fraud problems ...

In light of this authority, we conclude that Pennsylvania’s 6-year statute of limitations violates the Equal Protection Clause. Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child. “The unwillingness of the ‘mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or ... from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor.” *Mills v. Habluetzel* (O’CONNOR concurring). Not all of these difficulties are likely to abate in six years. A mother might realize only belatedly “a loss of income attributable to the need to care for the child,” ... Furthermore, financial difficul-

ties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care. *Moore v. McNamara* (1984). Thus it is questionable whether a State acts reasonably when it requires most paternity and support actions to be brought within six years of an illegitimate child's birth.

We do not rest our decision on this ground, however, for it is not entirely evident that six years would necessarily be an unreasonable limitations period for child support actions involving illegitimate children. We are, however, confident that the 6-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims. *Mills v. Habluetzel* [other citations omitted].

The legislative history of the federal Child Support Enforcement Amendments explains why Congress thought such statutes of limitations are reasonable. Congress adverted to the problem of stale and fraudulent claims, but recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child ... This scientific evidence is available throughout the child's minority, and it is an additional reason to doubt that Pennsylvania had a substantial reason for limiting the time within which paternity and support actions could be brought.

We conclude that the Pennsylvania statute does not withstand heightened scrutiny under the Equal Protection Clause. We therefore find it unnecessary to reach Clark's due process claim. The judgment of the Superior Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont



Massachusetts Board of Retirement v. Murgia

427 U.S. 307 (1976)

Vote: Per curiam

Decision: Reversed

Dissent: Marshall

Justice Stevens took no part in the consideration or decision of this case

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3) (a) (1966), that a uniformed state police officer "shall be retired ... upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment ...

Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. Appellee brought this civil action in the United States District Court for the District of Massachusetts, alleging that the operation of § 26 (3) (a) denied him equal protection of the ... The District Judge dismissed appellee's complaint on the ground that the complaint did not allege a substantial constitutional question ... On appeal, the United States Court of Appeals for the First Circuit, in an unreported memorandum, set aside the District Court judgment and remanded the case with direction to convene a three-judge court. Upon a record consisting of depositions, affidavits, and other documentary material submitted by the parties, the three-judge court filed an opinion that declared § 26 (3) (a) unconstitutional on the ground that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest," and enjoined enforcement of the statute ...

We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. *San Antonio School District v. Rodriguez* (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 ... 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 consists of uniformed state police officers over the age of 50. It 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.*, (1938), in need of "extraordinary protection from the majoritarian political process." ...

We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

In this case, 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 that § 26 (3) (a) 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 ...

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. The problems of retirement have been well documented and are beyond serious dispute. But “[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised.” ... We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.

The judgment is reversed.

Excerpted by Kimberly Clairmont



City of Cleburne v. Cleburne Living Center

473 U.S. 432 (1985)

Vote: 6-3

Decision: Affirmed in part, Reversed in part

Majority: White, joined by Burger, Powell, Rehnquist, Stevens, O'Connor

Concurrence: Stevens, joined by Burger

Dissent/ Concurrence: Marshall, joined by Brennan and Blackmun

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. 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. We hold that a lesser standard of scrutiny is appropriate, but conclude that, under that standard, the ordinance is invalid as applied in this case.

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.

The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of “[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.” The city determined that the proposed group home should be classified as a “hospital for the feeble-minded.” After holding a public hearing on CLC’s application, the City Council voted 3 to 1 to deny a special use permit.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, *inter alia*, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance,” and that the City Council’s decision “was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.” ...

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe* (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson* (1981) [other citations omitted].

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida* (1964) [other citations omitted].

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States’ interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much

a task for legislators guided by qualified professionals, and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary ...

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others ... The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them ...

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, 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 ... We are reluctant to set out on that course, and we decline to do so ...

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel v. Williams* (1982) [other citations omitted].

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood ...

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

Excerpted by Kimberly Clairmont



Romer v. Evans

517 U.S. 620 (1996)

Vote: 6-3

Decision: Affirmed

Majority: Kennedy, joined by Stevens, O'Connor, Souter, Ginsburg, Breyer

Dissent: Scalia, joined by Rehnquist, Thomas

JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson* (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as “Amendment 2,” its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services ... What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation ... Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

“No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” *Ibid.*

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so ...

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 ...

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we. In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many antidiscrimination laws protecting non suspect classes ... In our view that does not resolve the issue. In any event, even 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 ...

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

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt v. Painter* (1950), (quoting *Shelley v. Kraemer* (1948)).

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

It is so ordered.

Excerpted by Kimberly Clairmont



Voting Rights

Case List

Access to the Ballot

[*Minor v. Happersett*](#) (1876)
[*Guinn v. United States*](#) (1915)
[*Lane v. Wilson*](#) (1939)
[*Nixon v. Herndon*](#) (1927)
[*Nixon v. Condon*](#) (1932)
[*Grovey v. Townsend*](#) (1935)
[*U.S. v. Classic*](#) (1941)
[*Smith v. Allwright*](#) (1944)
[*Lassiter v. Northampton County Board of Elections*](#) (1959)
[*Louisiana v. United States*](#) (1965)
[*Carrington v. Rash*](#) (1965)
[*Harper v. Virginia Bd. of Elections*](#) (1966)
[*Kramer v. Union Free Sch. Dist. No. 15*](#) (1969)
[*Richardson v. Ramirez*](#) (1974)
[*Hunter v. Underwood*](#) (1985)
[*Rice v. Cayetano*](#) (2000)
[*Crawford v. Marion County Election Board et al*](#) (2008)

Congressional Power to Protect Voting Rights

[*South Carolina v. Katzenbach*](#) (1966)
[*Shelby County v. Holder*](#) (2013)
[*Brnovich v. Democratic National Committee*](#) (2021)
[*Colegrove v. Green*](#) (1946)
[*Baker v. Carr*](#) (1962)
[*Wesberry v. Sanders*](#) (1964)
[*Reynolds v. Sims*](#) (1964)

Voting Districts or Redistricting and Race

[*Gomillion v. Lightfoot*](#) (1960)

[*Thornburgh v. Gingles*](#) (1986)

[*Shaw v. Reno*](#) (1993)

[*Miller v. Johnson*](#) (1995)

[*Bush v. Vera*](#) (1996)

[*Cooper v. Harris*](#) (2016)

Voting Districts and Partisan Gerrymandering

[*Rucho v. Common Cause*](#) (2019)

Access to the Ballot

Minor v. Happersett

88 U.S. 162 (1876)

Vote: 9-0

Decision: Affirmed

Majority: Waite, joined by Clifford, Swayne, Miller, Davis, Field, Strong, Bradley, and Hunt

ERROR to the Supreme Court of Missouri; the case being thus:

The fourteenth amendment to the Constitution of the United States, in its first section, thus ordains:

‘*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.’

And the constitution of the State of Missouri thus ordains:

‘Every *male* citizen of the United States shall be entitled to vote.’

Under a statute of the State all persons wishing to vote at any election, must previously have been registered in the manner pointed out by the statute, this being a condition precedent to the exercise of the elective franchise.

In this state of things, on the 15th of October, 1872 (one of the days fixed by law for the registration of voters), Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers, at the general election held in November, 1872, applied to one Happersett, the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a ‘male citizen of the United States,’ but a woman. She thereupon sued him in one of the inferior State courts of Missouri, for willfully refusing to place her name upon the list of registered voters, by which refusal she was deprived of her right to vote.

The registrar demurred, and the court in which the suit was brought sustained the demurrer, and gave judgment in his favor; a judgment which the Supreme Court affirmed. Mrs. Minor now brought the case here on error.

Mr. Francis Minor (with whom were Messrs. J. M. Krum and J. B. Henderson), for the plaintiff in error, went into an elaborate argument, partially based on what he deemed true political views, and partially resting on legal and constitutional grounds. These last seemed to be thus resolvable:

1st. As a *citizen* of the United States, the plaintiff was entitled to any and all the ‘privileges and immunities’ that belong to such position however defined; and as are held, exercised, and enjoyed by other citizens of the United States.

2d. The elective franchise is a ‘privilege’ of citizenship, in the highest sense of the word. It is the privilege preservative of all rights and privileges; and especially of the right of the citizen to participate in his or her government.

3d. The denial or abridgment of this privilege, if it exist at all, must be sought only in the fundamental charter of government,—the Constitution of the United States. If not found there, no inferior power or jurisdiction can legally claim the right to exercise it.

4th. But the Constitution of the United States, so far from recognizing or permitting any denial or abridgment of the privileges of its citizens, expressly declares that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’

5th. It follows that the provisions of the Missouri constitution and registry law before recited, are in conflict with and must yield to the paramount authority of the Constitution of the United States.

No opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. ...

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment “all persons born or naturalized in the United States and subject to the jurisdiction thereof” are expressly declared to be “citizens of the United States and of the State wherein they reside.” ...

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature. Senators are to be chosen by the legislatures of the States, and necessarily the members of the legislature required to make the choice are elected by the voters of the State. ...

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. ...

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

...

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "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." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective.

The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years ... The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years ... Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards ... But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. ...

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

AFFIRM THE JUDGMENT

Excerpted by Petar Jeknic



Guinn v. United States

238 U.S. 347 (1915)

Vote: 8-0

Decision: Reversed

Majority: White, joined by McKenna, Holmes, Day, Hughes, Van Devanter, Lamar, and Pitney

Not participating: McReynolds

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

...

Suffrage in Oklahoma was regulated by § 1, Article III of the Constitution under which the State was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this Amendment certain election officers in enforcing its provisions refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the Constitution under which the State was admitted, that is, before the amendment, and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. ...

... The original clause so far as material was this:

“The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote.”

And this is the amendment:

“No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. ...”

... No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard ... The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions

existing on January 1, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. ...

The questions then are: (1) ... [A]ssuming that the suffrage provision has the significance which the Government assumes it to have, is that provision as a matter of law repugnant to the Fifteenth Amendment? which leads us of course to consider the operation and effect of the Fifteenth Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the Government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what if any effect does that conclusion have upon the literacy standard otherwise established by the amendment? ... Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.* This is its text:

“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.”

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning ... In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. ...

(c) While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out *Ex parte Yarbrough* (1884); *Neal v. Delaware* (1880). ...

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on

the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

“But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.”

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. ...

And it will be so certified.

Excerpted by Petar Jeknic



Lane v. Wilson

307 U.S. 268 (1939)

Vote: 6-2

Decision: Reversed

Majority: Frankfurter, joined by Hughes, Stone, Roberts, Black, and Reed

Dissent: McReynolds, joined by Butler

Not participating: Douglas

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The constitution under which Oklahoma was admitted into the Union regulated the suffrage by Article III, whereby its “qualified electors” were to be “citizens of the State ... who are over the age of twenty-one years” with disqualifications in the case of felons, paupers and lunatics. Soon after its admission the suffrage provisions of the Oklahoma Constitution were radically amended by the addition of a literacy test from which white voters were in effect relieved through the operation of a “grandfather clause.” The clause was stricken down by this Court as violative of the prohibition against discrimination “on account of race, color or previous condition of servitude” of the Fifteenth Amendment. This outlawry occurred on June 21, 1915. In the meantime the Oklahoma general election of 1914 had been based on the offending “grandfather clause.” After the invalidation of that clause a special session of the Oklahoma legislature enacted a new scheme for registration as a prerequisite to voting. ... Section 4 of this statute (now § 5654) was obviously directed towards the consequences of the decision in *Guinn v. United States* (1915). Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. These had to apply for registration between April 30, 1916 and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those “absent from the county ... during such period of time, or ... prevented by sickness or unavoidable misfortune from registering ... within such time.” The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the “grandfather clause” immunity prior to *Guinn v. United States* (1915), and citizens who were outside it, and the not more than 12 days as the normal period of registration for the theretofore proscribed class.

The petitioner, a colored citizen of Oklahoma, who was the plaintiff below and will hereafter be referred to as such, sued three county election officials for declining to register him on October 17, 1934. He was qualified for registration in 1916 but did not then get on the registration list. The evidence is in conflict whether he presented himself in that year for registration and, if so, under what circumstances registration was denied him. The fact is that plaintiff did not get on the register in 1916. Under the terms of the statute he thereby permanently lost the right to register and hence the right to vote. The central claim of plaintiff is that of the unconstitutionality of § 5654. ...

... The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. *Guinn v. United States* (1915); *Myers v. Anderson* (1915). The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively hand-

icap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in *Guinn v. United States* (1915), the Oklahoma “grandfather clause” was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legislation of 1916 partakes too much of the infirmity of the “grandfather clause” to be able to survive.

Section 5652 of the Oklahoma statutes makes registration a prerequisite to voting. By §§ 5654 and 5659 all citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were perpetually disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the Guinn case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional “grandfather clause” had sheltered while subjecting colored citizens to a new burden. The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the Guinn case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. ... [T]he practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated “grandfather clause” were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked.

Excerpted by Petar Jeknic



Nixon v. Herndon

273 U.S. 536 (1927)

Vote: 9-0

Decision: Reversed

Majority: Homes, joined by Taft, Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. ... The petition alleges that the plaintiff is a negro, a citizen of the United States and of Texas and a resident of El Paso, and in every way qualified to vote, as set forth in detail, except that the statute to be mentioned interferes with his right; that on July 26, 1924, a primary election was held at El Paso for the nomination of can-

didates for a senator and representatives in Congress and State and other offices, upon the Democratic ticket; that the plaintiff, being a member of the Democratic party, sought to vote but was denied the right by defendants; that the denial was based upon a Statute of Texas enacted in May, 1923, and designated Article 3093a, by the words of which “in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas,” &c., and that this statute is contrary to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. ...

The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. *Slaughter House Cases*. *Strauder v. West Virginia* (1880). That Amendment “not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. ... The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case

Judgment reversed.

Excerpted by Petar Jeknic



Nixon v. Condon

286 U.S. 73 (1932)

Vote: 5-4

Decision: Reversed

Majority: Cardozo, joined by Hughes, Brandeis, Stone, and Roberts

Dissent: McReynolds, joined by Van Devanter, Sutherland, and Butler

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner, a Negro, has brought this action against judges of election in Texas to recover damages for their refusal by reason of his race or color to permit him to cast his vote at a primary election.

This is not the first time that he has found it necessary to invoke the jurisdiction of the federal courts in vindication of privileges secured to him by the Federal Constitution.

In *Nixon v. Herndon* (1927), decided at the October Term, 1926, this court had before it a statute of the State of Texas whereby the legislature had said that “in no event shall a negro be eligible to participate in a democratic party primary election [held in that State],” ... At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States.

Promptly after the announcement of that decision, the legislature of Texas enacted a new statute repealing the article condemned by this court; declaring that the effect of the decision was to create an emergency with a need for immediate action; and substituting for the article so repealed another bearing the same number. By the article thus substituted, “every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party ...”

Acting under the new statute, the State Executive Committee of the Democratic party adopted a resolution “that all white democrats who are qualified under the constitution and laws of Texas ... and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928,” ...

On July 28, 1928, the petitioner, a citizen of the United States, and qualified to vote unless disqualified by the foregoing resolution, presented himself at the polls and requested that he be furnished with a ballot. The respondents, the judges of election, declined to furnish the ballot or to permit the vote on the ground that the petitioner was a Negro and that by force of the resolution of the Executive Committee only white Democrats were allowed to be voters at the Democratic primary. ...

Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny. ...

A narrower base will serve for our judgment in the cause at hand. ... Whatever our conclusion might be if the statute had remitted to the party the untrammelled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law. ...

... The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. ...

With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon v. Herndon* (1927). Delegates of the State’s power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

The judgment below is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

Excerpted by Petar Jeknic



Grovey v. Townsend

265 U.S. 45 (1935)

Vote: 9-0

Decision: Affirmed

Majority: Roberts, joined by Hughes, Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, and Cardozo

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner, by complaint filed in the Justice Court of Harris County, Texas, alleged that although he is a citizen of the United States and of the State and County, and a member of and believer in the tenets of the Democratic party, the respondent, the county clerk, a state officer, having as such only public functions to perform, refused him a ballot for a Democratic party primary election, because he is of the negro race. ... Referring to statutes which regulate absentee voting at primary elections, the complaint states the petitioner expected to be absent from the county on the date of the primary election, and demanded of the respondent an absentee ballot, which was refused him in virtue of a resolution of the state Democratic convention of Texas, adopted May 24, 1932, which is:

“Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations.”

The complaint charges that the respondent acted without legal excuse and his wrongful and unlawful acts constituted a violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution. ...

The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and the consequent denial of petitioner’s right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution; and it is claimed that former decisions require us so to hold. The cited cases are, however, not in point. In *Nixon v. Herndon* (1927), a statute which enacted that “in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas,” was pronounced offensive to the Fourteenth Amendment. In *Nixon v. Condon* (1932), a statute was drawn in question which provided that “every political party in this State through its State Executive Committee shall have the

power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.” We held this was a delegation of state power to the state executive committee and made its determination conclusive irrespective of any expression of the party’s will by its convention, and therefore the committee’s action barring negroes from the party primaries was state action prohibited by the Fourteenth Amendment. Here the qualifications of citizens to participate in party counsels and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action. ...

Judgment affirmed.

(Overturned by *Smith v. Allwright*)

Excerpted by Petar Jeknic



U.S. v. Classic

313 U.S. 299 (1941)

Vote: 4-3

Decision: Reversed

Majority: Stone, joined by Roberts, Reed, and Frankfurter

Dissent: Douglas, joined by Black, and Murphy

Not participating: Chief Justice Hughes

Mr. Justice Stone delivered the opinion of the Court:

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary election under Louisiana law to nominate a candidate of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right “secured by the Constitution” within the meaning of § 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections.

...

The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted and cast is a right secured by Article I, §§ 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of § 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment ...

We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter, and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellees' alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of § 19 and to deprive inhabitants of the state of that right within the meaning of § 20, and finally, whether §§ 19 and 20, respectively, are in other respects applicable to the alleged acts of appellees.

...

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections, and, by its laws, it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary

...

The primary is conducted by the state at public expense. Act No. 46, *supra*, § 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election ...

Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution, and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.

...

Obviously included within the right to choose, secured by the Constitution is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution.

...

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2.

... But, in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For, in setting up an enduring framework of government, they undertook to carry out for the indefinite future, and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence, we read its words not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. If we remember that “it is a Constitution we are expounding,” we cannot rightly prefer, of the possible meanings of its words, that which will defeat, rather than effectuate, the constitutional purpose.

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose, or its words as any the less guarantying the integrity of that choice, when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election. Nor can we say that that choice which the Constitution protects is restricted to the second step because § 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress.

...

Unless the constitutional protection of the integrity of “elections” extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries. Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice. Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which, in the circumstances of this case, controls that choice, is an election within the meaning of the constitutional provision, and is subject to congressional regulation as to the manner of holding it.

Not only does § 4 of Article I authorize Congress to regulate the manner of holding elections, but, by Article I, § 8, Clause 18, Congress is given authority

“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.”

This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution.

“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 constitutional.”

McCulloch v. Maryland (1819). That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of representatives in Congress, secured by § 2 of Article I.

...

We think that § 20 authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his alienage, color, or race than are prescribed for the punishment of citizens. The meager legislative history of the section supports this conclusion. So interpreted, § 20 applies to deprivation of the constitutional rights of qualified voters to choose representatives in Congress. The generality of the section, made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted, by its terms, to deprivations which are willfully inflicted by those acting under color of any law, statute and the like.

MR. JUSTICE DOUGLAS, dissenting.

Free and honest elections are the very foundation of our republican form of government. Hence, any attempt to defile the sanctity of the ballot cannot be viewed with equanimity. As stated by Mr. Justice Miller in *Ex parte Yarbrough* (1884), “the temptations to control these elections by violence and corruption” have been a constant source of danger in the history of all republics. The acts here charged, if proven, are of a kind which carries that threat, and are highly offensive. Since they corrupt the process of Congressional elections, they transcend mere local concern and extend a contaminating influence into the national domain.

I think Congress has ample power to deal with them. That is to say, I disagree with *Newberry v. United States* (1921) to the extent that it holds that Congress has no power to control primary elections ...

[Art I, §2, §4 & §8] are an arsenal of power ample to protect Congressional elections from any and all forms of pollution. The fact that a particular form of pollution has only an indirect effect on the final election is immaterial. The fact that it occurs in a primary election or nominating convention is likewise irrelevant. The important

consideration is that the Constitution should be interpreted broadly, so as to give to the representatives of a free people abundant power to deal with all the exigencies of the electoral process. It means that the Constitution should be read so as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected. To hold that Congress is powerless to control these primaries would indeed be a narrow construction of the Constitution, inconsistent with the view that that instrument of government was designed not only for contemporary needs, but for the vicissitudes of time.

So I agree with most of the views expressed in the opinion of the Court. And it is with diffidence that I dissent from the result there reached.

Excerpted by Rorie Solberg



Smith v. Allwright

321 U.S. 649 (1944)

Vote: 7-1

Decision: Reversed

Majority: Reed, joined by Stone, Black, Murphy, Jackson, and Rutledge

Concurrence: Frankfurter

Dissent: Roberts

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages ... on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate ... the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas ...

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend* (1935). We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States v. Classic* (1941).

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county “shall be deemed a qualified elector.” Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic party was required to hold the primary which was the occasion of the alleged wrong to petitioner. ... These nominations are to be made by the qualified voters of the party. ...

The Democratic party on May 24, 1932, in a state convention adopted the following resolution, which has not since been “amended, abrogated, annulled or avoided”:

“Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations.”

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to vote on account of color. ...

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court ...

In *Grovey v. Townsend* (1935) this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race ... It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. ... Consequently, there was found no ground for holding that the county clerk’s refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendment.

Since *Grovey v. Townsend* (1935) and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic* (1941). We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, “where the primary is by law made an integral part of the election machinery.” ... This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of federal officials. By this decision the doubt as to whether or not such primaries were a part of “elections” subject to federal control ... was erased. ... As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* (1935) was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. ...

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action ... federal courts must for themselves appraise the facts leading to that conclusion. Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary ... Texas requires by the law the election of the county officers of a party. ... Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made. ...

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. ... When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts

and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States* (1915).

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson* (1939).

The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend* (1935), no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in *Grovey v. Townsend* (1935), the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a State of a citizen's right to vote. *Grovey v. Townsend* (1935) is overruled.

Judgment reversed.

Excerpted by Petar Jeknic



Lassiter v. Northampton County Board of Elections

360 U.S. 45 (1959)

Vote: 9-0

Decision: Affirmed

Majority: Douglas, joined by Warren, Black, Frankfurter, Clark, Harlan, Brennan, Whittaker, and Stewart

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy started in a Federal District Court. Appellant, a Negro citizen of North Carolina, sued to have the literacy test for voters prescribed by that State declared unconstitutional and void. ...

... Appellant applied for registration as a voter. Her registration was denied by the registrar because she refused to submit to a literacy test as required by the North Carolina statute. She appealed to the County Board of Elections. On the *de novo* hearing before that Board appellant again refused to take the literacy test and she was again denied registration for that reason. She appealed to the Superior Court which sustained the Board against the claim that the requirement of the literacy test violated the Fourteenth, Fifteenth, and Seventeenth Amendments of the Federal Constitution. Preserving her federal question, she appealed to the North Carolina Supreme Court which affirmed the lower court. The case came here by appeal, and we noted probable jurisdiction. ...

We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. ...

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns. ... So while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. ...

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason* (1890)) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an “independent and intelligent” exercise of the right of suffrage. *Stone v. Smith* (Massachusetts Supreme Court). North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis v. Schnell* (1949) the test was the citizen’s ability to “understand and explain” an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy.

We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter “be able to read and write any section of the Constitution of North Carolina in the English language.” That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Affirmed.

Excerpted by Petar Jeknic



Louisiana v. United States

380 U.S. 145 (1965)

Vote: 9-0

Decision: Affirmed

Majority: Black, joined by Warren, Douglas, Clark, Brennan, Stewart, White, Goldberg

Concurrence: Harlan

MR. JUSTICE BLACK delivered the opinion of the Court.

... [B]eginning with the adoption of the Louisiana Constitution of 1898, when approximately 44% of all the registered voters in the State were Negroes, the State had put into effect a successful policy of denying Negro citizens the right to vote because of their race. The 1898 constitution adopted what was known as a “grandfather clause,” ... Such a transparent expedient for disfranchising Negroes ... was held unconstitutional in 1915 ... *Guinn v. United States* (1915). Soon after that decision Louisiana, in 1921, adopted a new constitution replacing the repudiated “grandfather clause” with what the complaint calls an “interpretation test,” which required that an applicant for registration be able to “give a reasonable interpretation” of any clause in the Louisiana Constitution or the Constitution of the United States. From the adoption of the 1921 interpretation test until 1944, the District Court’s opinion stated, the percentage of registered voters in Louisiana who were Negroes never exceeded one percent. Prior to 1944 Negro interest in voting in Louisiana had been slight, largely because the State’s white primary law kept Negroes from voting in the Democratic Party primary election, the only election that mattered in the political climate of that State. In 1944, however, this Court invalidated the substantially identical white primary law of Texas, and with the explicit statutory bar to their voting in the primary removed and because of a generally heightened political interest, Negroes in increasing numbers began to register in Louisiana. The white primary system had been so effective in barring Negroes from voting that the “interpretation test” as a disfranchising device had been ignored over the years. Many registrars continued to ignore it after 1944, and in the next dozen years the proportion of registered voters who were Negroes rose from two-tenths of one percent to approximately 15% by March 1956. This fact, coupled with this Court’s 1954 invalidation of laws

requiring school segregation, prompted the State to try new devices to keep the white citizens in control. The Louisiana Legislature created a committee which became known as the “Segregation Committee” to seek means of accomplishing this goal. The chairman of this committee also helped to organize a semiprivate group called the Association of Citizens Councils, which thereafter acted in close cooperation with the legislative committee to preserve white supremacy. The legislative committee and the Citizens Councils set up programs, which parish voting registrars were required to attend, to instruct the registrars on how to promote white political control. ... Beginning in the middle 1950’s registrars of at least 21 parishes began to apply the interpretation test. In 1960 the State Constitution was amended to require every applicant thereafter to “be able to understand” as well as “give a reasonable interpretation” of any section of the State or Federal Constitution “when read to him by the registrar.” The State Board of Registration in cooperation with the Segregation Committee issued orders that all parish registrars must strictly comply with the new provisions.

The interpretation test, the court found, vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not. Under the State’s statutes and constitutional provisions the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct. There was ample evidence to support the District Court’s finding that registrars in the 21 parishes where the test was found to have been used had exercised their broad powers to deprive otherwise qualified Negro citizens of their right to vote; and that the existence of the test as a hurdle to voter qualification has in itself deterred and will continue to deter Negroes from attempting to register in Louisiana.

Because of the virtually unlimited discretion vested by the Louisiana laws in the registrars of voters, and because in the 21 parishes where the interpretation test was applied that discretion had been exercised to keep Negroes from voting because of their race, the District Court held the interpretation test invalid on its face and as applied, as a violation of the Fourteenth and Fifteenth Amendments to the United States Constitution ...

... There can be no doubt from the evidence in this case that the District Court was amply justified in finding that Louisiana’s interpretation test, as written and as applied, was part of a successful plan to deprive Louisiana Negroes of their right to vote. This device for accomplishing unconstitutional discrimination has been little if any less successful than was the “grandfather clause” invalidated by this Court’s decision in *Guinn v. United States, supra*, 50 years ago, which when that clause was adopted in 1898 had seemed to the leaders of Louisiana a much preferable way of assuring white political supremacy. The Governor of Louisiana stated in 1898 that he believed that the “grandfather clause” solved the problem of keeping Negroes from voting “in a much more upright and manly fashion” than the method adopted previously by the States of Mississippi and South Carolina, which left the qualification of applicants to vote “largely to the arbitrary discretion of the officers administering the law.” ...

But Louisiana of a later generation did place just such arbitrary power in the hands of election officers who have used it with phenomenal success to keep Negroes from voting in the State. The State admits that the statutes and provisions of the state constitution establishing the interpretation test “vest discretion in the registrars of voters to determine the qualifications of applicants for registration” while imposing “no definite and objective

standards upon registrars of voters for the administration of the interpretation test.” ... The applicant facing a registrar in Louisiana thus has been compelled to leave his voting fate to that official’s uncontrolled power to determine whether the applicant’s understanding of the Federal or State Constitution is satisfactory. As the evidence showed, colored people, even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States. This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. ... We likewise affirm here the District Court’s holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to “understand and give a reasonable interpretation of any section” of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found ... in the Fifteenth Amendment ... to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws.

Affirmed.

Excerpted by Petar Jeknic



Carrington v. Rash

380 U.S. 89 (1965)

Vote: 8-1

Decision: Reversed

Majority: Stewart, joined by Black, Douglas, Clark, Brennan, Stewart, White, and Goldberg

Dissent: Harlan

Not participating: Warren

MR. JUSTICE STEWART delivered the opinion of the Court.

A provision of the Texas Constitution prohibits “[a]ny member of the Armed Forces of the United States” who moves his home to Texas during the course of his military duty from ever voting in any election in that State “so long as he or she is a member of the Armed Forces.” The question presented is whether this provision, as construed by the Supreme Court of Texas in the present case, deprives the petitioner of a right secured by the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Texas decided that it does not and refused to issue a writ of mandamus ordering petitioner’s local election officials to permit him to vote, two Justices dissenting. We granted certiorari.

The petitioner, a sergeant in the United States Army, entered the service from Alabama in 1946 at the age of 18. The State concedes that he has been domiciled in Texas since 1962, and that he intends to make his home there permanently. He has purchased a house in El Paso where he lives with his wife and two children. He is also the proprietor of a small business there. The petitioner's post of military duty is not in Texas, but at White Sands, New Mexico. He regularly commutes from his home in El Paso to his Army job at White Sands. He pays property taxes in Texas and has his automobile registered there. But for his uniform, the State concedes that the petitioner would be eligible to vote in El Paso County, Texas.

Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope v. Williams* (1904). There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter v. Northampton Election Bd.* (1959). ...

This Texas constitutional provision, however, is unique. Texas has said that no serviceman may ever acquire a voting residence in the State so long as he remains in service. ...

It is argued that this absolute denial of the vote to servicemen like the petitioner fulfills two purposes. First, the State says it has a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community. Secondly, the State says it has a valid interest in protecting the franchise from infiltration by transients, and it can reasonably assume that those servicemen who fall within the constitutional exclusion will be within the State for only a short period of time.

The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area. We stress—and this a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions," *Schneider v. State* (1939), cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. Yet, that is what Texas claims to have done here.

The State's second argument is that its voting ban is justified because of the transient nature of service in the Armed Forces. As the Supreme Court of Texas stated: "Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence ... they do not elect to be where they are. Their reasons for being where they are ... cannot be the same as [those of] the permanent residents." The Texas Constitution provides that a United States citizen can become a qualified elector if he has "resided in this State one (1) year

next preceding an election and the last six (6) months within the district or county in which such person offers to vote.” It is the integrity of this qualification of residence which Texas contends is protected by the voting ban on members of the Armed Forces.

But only where military personnel are involved has Texas been unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote. ... By statute, Texas deals with particular categories of citizens who, like soldiers, present specialized problems in determining residence. Students at colleges and universities in Texas, patients in hospitals and other institutions within the State, and civilian employees of the United States Government may be as transient as military personnel. But all of them are given at least an opportunity to show the election officials that they are bona fide residents.

Indeed, Texas has been able, in other areas, to winnow successfully from the ranks of the military those whose residence in the State is bona fide. ...

We deal here with matters close to the core of our constitutional system.”The right ... to choose,” *United States v. Classic* (1941), that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. California* (1948). By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.”[T]here is no indication in the Constitution that ... occupation affords a permissible basis for distinguishing between qualified voters within the State.” *Gray v. Sanders* (1963).

We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But this constitutional provision goes beyond such rules.”[T]he presumption here created is ... definitely conclusive—incapable of being overcome by proof of the most positive character.” *Heiner v. Donnan* (1932). All servicemen not residents of Texas before induction come within the provision’s sweep. Not one of them can ever vote in Texas, no matter how long Texas may have been his true home.”[T]he uniform of our country ... [must not] be the badge of disfranchisement for the man or woman who wears it.”

Reversed.

Excerpted by Petar Jeknic



Harper v. Virginia Bd. of Elections

383 U.S. 663 (1966)

Vote: 6-3

Decision: Reversed

Majority: Douglas, joined by Warren, Clark, Brennan, White, and Fortas

Dissent: Black

Dissent: Harlan, joined by Stewart

JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax. ...

While the right to vote in federal elections is conferred by Art. I, §2, of the Constitution (*United States v. Classic* (1941)), the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter v. Northampton Election Board* (1959). We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write ... has some relation to standards designed to promote intelligent use of the ballot."

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus, without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot, we held in *Carrington v. Rash* (1965), that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services."By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. ... We think the same must be true of requirements of wealth or affluence or payment of a fee.

Long ago, in *Yick Wo v. Hopkins* (1886), the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds v. Sims* (1964), we said, "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.” There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded:

“A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution’s Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln’s vision of ‘government of the people, by the people, [and] for the people.’ The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.”

We say the same whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen’s vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver’s license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context – that is, as a condition of obtaining a ballot – the requirement of fee paying causes an “invidious” discrimination that runs afoul of the Equal Protection Clause. ...

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics” *Lochner v. New York* (1905). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*. Seven of the eight Justices then sitting subscribed to the Court’s opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 – more than a half-century later – we repudiated the “separate-but-equal” doctrine of *Plessy* as respects public education we stated: “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.” *Brown v. Board of Education* (1954).

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that “the opportunity for equal participation by all voters in the election of state legislators” is required. *Reynolds v. Sims* (1964).

We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds v. Sims* (1964), is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections, is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

...

... In substance the Court's analysis of the equal protection issue goes no further than to say that the electoral franchise is "precious" and "fundamental," and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor[.]" These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes."

... it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens. Nondiscriminatory and fairly applied literacy tests, upheld by this Court in *Lassiter v. Northampton Election Board* (1959), find justification on very similar grounds.

These viewpoints, to be sure, ring hollow on most contemporary ears. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three-quarters of the States quickly ratified the Twenty-Fourth Amendment; and by the fact that rules such as the "pauper exclusion" in Virginia law, have never been enforced.

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. ...

I would affirm the decision of the District Court.

Original excerpt in Ruthann Robson, [Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law](#), Published by CALI eLangdell Press. Further excerpted by Petar Jeknic. Licensed under [CC BY-NC-SA](#).



Kramer v. Union Free Sch. Dist. No. 15 395 U.S. 621 (1969)

Vote: 5-3

Decision: Reversed

Majority: Warren, joined by Douglas, Brennan, White, and Marshall

Dissent: Stewart, joined by Black, and Harlan

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.

New York law provides basically three methods of school board selection. In some large city districts, the school board is appointed by the mayor or city council. On the other hand, in some cities, primarily those with less than 125,000 residents, the school board is elected at general or municipal elections in which all qualified city voters may participate. Finally, in other districts such as the one involved in this case, which are primarily rural and suburban, the school board is elected at an annual meeting of qualified school district voters.

The challenged statute is applicable only in the districts which hold annual meetings. To be eligible to vote at an annual district meeting, an otherwise qualified district resident must either (1) be the owner or lessee of taxable real property located in the district, (2) be the spouse of one who owns or leases qualifying property, or (3) be the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school.

... Appellant is a 31-year-old college-educated stock-broker who lives in his parents' home in the Union Free School District No. 15, a district to which § 2012 applies. He is a citizen of the United States and has voted in federal and state elections since 1959. However, since he has no children and neither owns nor leases taxable real property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful. After the school district rejected his 1965 application, appellant instituted the present class action challenging the constitutionality of the voter eligibility requirements. ...

... 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 determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” *Williams v. Rhodes* (1968). And, in this case, we must give the statute a close and exacting examination.” [S]ince 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* (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

... 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.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a “rational basis” for the distinctions made are not applicable. The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic

assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.

... 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 may reasonably and permissibly conclude that “property taxpayers” (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district’s schools are those “primarily interested” in school affairs.

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 pocket-books, to acquire such information as they may need.”

We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those “primarily interested” or “primarily affected.” Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited. For, 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 dis-

tribute 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.

Excerpted by Petar Jeknic



Richardson v. Ramirez

418 U.S. 24 (1974)

Vote: 7-3

Decision: Reversed

Majority: Rehnquist, joined by Burger, Stewart, White, Blackmun, Powell

Dissent: Marshall, joined by Brennan, and Douglas (Part I-A)

MR. JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

The three individual respondents in this case were convicted of felonies and have completed the service of their respective sentences and paroles. They filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters. They claimed, on behalf of themselves and others similarly situated, that application to them of the provisions of the California Constitution and implementing statutes which disenfranchised persons convicted of an “infamous crime” denied them the right to equal protection of the laws under the Federal Constitution. The Supreme Court of California held that “as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and arti-

cle XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification ... violate the equal protection clause of the Fourteenth Amendment.” We granted certiorari.

Each of the individual respondents was convicted of one or more felonies, and served some time in jail or prison followed by a successfully terminated parole. Respondent Ramirez was convicted in Texas; respondents Lee and Gill were convicted in California. When Ramirez applied to register to vote in San Luis Obispo County, the County Clerk refused to allow him to register. The Monterey County Clerk refused registration to respondent Lee, and the Stanislaus County Registrar of Voters (hereafter also included in references to clerks) refused registration to respondent Gill. All three respondents were refused registration because of their felony convictions.

In May 1972 respondents filed a petition for a writ of mandate in the Supreme Court of California. ... [I]t was contended that California’s denial of the franchise to the class of ex-felons could no longer withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Relying on the Court’s recent voting-rights cases, respondents argued that a compelling state interest must be found to justify exclusion of a class from the franchise, and that California could assert no such interest with respect to ex-felons. ...

Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the Clause itself as it is embodied in the Fourteenth Amendment, respondents’ claim implicates not merely the language of the Equal Protection Clause of §1 of the Fourteenth Amendment, but also the provisions of the less familiar §2 of the Amendment:

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. (Emphasis supplied.)

Petitioner contends that the italicized language of §2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. She goes on to argue that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in §1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by §2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of §2, “except for participation in rebellion, or other crime,” was intended to have a different meaning than would appear from its face.

The problem of interpreting the “intention” of a constitutional provision is, as countless cases of this Court recognize, a difficult one. Not only are there deliberations of congressional committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States. The legislative history bearing on the meaning of the relevant language of §2 is scant indeed; the framers of the Amendment

were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says. ...

Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of §2, by the fact that at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.

More impressive than the mere existence of the state constitutional provisions disenfranchising felons at the time of the adoption of the Fourteenth Amendment is the congressional treatment of States readmitted to the Union following the Civil War. For every State thus readmitted, affirmative congressional action in the form of an enabling act was taken, and as a part of the readmission process the State seeking readmission was required to submit for the approval of the Congress its proposed state constitution. In March 1867, before any State was readmitted, Congress passed “An act to provide for the more efficient Government of the Rebel States,” the so-called Reconstruction Act. Section 5 of the Reconstruction Act established conditions on which the former Confederate States would be readmitted to representation in Congress. It provided:

“That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disfranchised for participation in the rebellion or for felony at common law*, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress ... said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law ...” (Emphasis supplied.) ...

This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons. Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. *Murphy v. Ramsey* (1885); *Davis v. Beason* (1890). Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northampton County Board of Elections* (1959), where we upheld North Carolina’s imposition of a literacy requirement for voting, the Court said:

“Residence requirements, age, previous criminal record (*Davis v. Beason*) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.”

... Despite this settled historical and judicial understanding of the Fourteenth Amendment’s effect on state laws disenfranchising convicted felons, respondents argue that our recent decisions invalidating other state-imposed restrictions on the franchise as violative of the Equal Protection Clause require us to invalidate the disenfranchisement of felons as well. They rely on such cases to support the conclusions of the Supreme Court of California that a State must show a “compelling state interest” to justify exclusion of ex-felons from the franchise and that California has not done so here.

As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in §2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of §2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. ... §1 in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which §2 imposed for other forms of disenfranchisement. ...

Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles. The California court did not reach respondents’ alternative contention that there was such a total lack of uniformity in county election officials’ enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, WITH WHOM MR. JUSTICE BRENNAN JOINS, DISSENTING.

The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment. This result is, in my view, based on an unsound historical analysis which already has been rejected by this Court. In straining to reach that result, I believe that the Court has also disregarded important limitations on its jurisdiction. For these reasons, I respectfully dissent.

... The Court construes §2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons. Section 2 does except disenfranchisement for “participation in rebellion, or other crime” from the operation of its penalty provision. As the Court notes, however, there is little independent legislative history as to the crucial words “or other crime”; the proposed §2 went to a joint committee containing only the phrase “participation in rebellion” and emerged with “or other crime” inexplicably tacked on. In its exhaustive review of the lengthy legislative history of the Fourteenth Amendment, the Court has come upon only one explanatory reference for the “other crimes” provision – a reference which is unilluminating at best.

The historical purpose for §2 itself is, however, relatively clear and in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available – either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice – enfranchise Negro voters or lose congressional representation. ...

It is clear that §2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy – reduced representation – to cure a particular form of electoral abuse – the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination. This Court has repeatedly rejected that rationale.

Rather, a discrimination to which the penalty provision of §2 is inapplicable must still be judged against the Equal Protection Clause of §1 to determine whether judicial or congressional remedies should be invoked. ...

The Court’s references to congressional enactments contemporaneous to the adoption of the Fourteenth Amendment, such as the Reconstruction Act and the readmission statutes, are inapposite. They do not explain the purpose for the adoption of §2 of the Fourteenth Amendment. They merely indicate that disenfranchisement for participation in crime was not uncommon in the States at the time of the adoption of the Amendment. Hence, not surprisingly, that form of disenfranchisement was excepted from the application of the special penalty provision of §2. But because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by §2 does not necessarily imply congressional approval of this disenfranchisement. By providing a special remedy for disenfranchisement of a particular class of voters in §2, Congress did not approve all election discriminations to which the §2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny. ...

Disenfranchisement for participation in crime ... was common at the time of the adoption of the Fourteenth Amendment. But “constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.” We have repeatedly observed:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. *Harper v. Virginia Board of Elections* (1966).

Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of §2, can serve to insulate such disenfranchisement from equal protection scrutiny.

In my view, the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of §1 of the Fourteenth Amendment. That analysis properly begins with the observation that because the right to vote “is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,” *Reynolds v. Sims*, voting is a “fundamental” right. ... “[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’” ...

I think it clear that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case. There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government. As the Secretary of State of California observed in his memorandum to the Court in support of respondents in this case:

“It is doubtful ... whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.”

It is argued that disenfranchisement is necessary to prevent vote frauds. Although the State has a legitimate and, in fact, compelling interest in preventing election fraud, the challenged provision is not sustainable on that ground. First, the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population. In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters.

Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote. ...

Another asserted purpose is to keep former felons from voting because their likely voting pattern might be subversive of the interests of an orderly society ...

To the extent [previous cases] approve the doctrine that citizens can be barred from the ballot box because they would vote to change the existing criminal law, those decisions are surely of minimal continuing precedential value. We have since explicitly held that such “differences of opinion cannot justify excluding [any] group from ... ‘the franchise’:

“[I]f they are ... residents, ... they, as all other qualified residents, have a right to an equal opportunity for political representation. ... ‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing reexamination. This Court’s holding in [previous cases] that a State may disenfranchise a class of voters to “withdraw all political influence from those who are practically hostile” to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal “to prevent persons from being enabled by their votes to defeat the criminal laws of the country.” Today, presumably those who support the legalization of marihuana could be barred from the ballot box for much the same reason. The ballot is the democratic system’s coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect [those precedents], I would expressly disavow any continued adherence to the dangerous notions therein expressed. ...

The disenfranchisement of ex-felons had “its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.” *Byers v. Sun Savings Bank* (Oklahoma 1914).

I think it clear that measured against the standards of this Court’s modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand.

I respectfully dissent.

Original excerpt in Ruthann Robson, [Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law](#), Published by CALI eLangdell Press. Further excerpted by Petar Jeknic. Licensed under [CC BY-NC-SA](#).



Hunter v. Underwood

471 U.S. 222 (1985)

Vote: 8-0

Decision: Affirmed

Majority: Rehnquist, joined by Burger, Brennan, White, Marshall, Blackmun, Stevens, O’Connor

Not participating: Powell

JUSTICE REHNQUIST delivered the opinion of the Court.

We are required in this case to decide the constitutionality of Art. VIII, § 182, of the Alabama Constitution of 1901, which provides for the disenfranchisement of persons convicted of, among other offenses, “any crime ... involving moral turpitude.” Appellees Carmen Edwards, a black, and Victor Underwood, a white, have been blocked from the voter rolls pursuant to § 182 by the Boards of Registrars for Montgomery and Jefferson Counties, respectively, because they each have been convicted of presenting a worthless check. ...

The predecessor to § 182 was Art. VIII, § 3, of the Alabama Constitution of 1875, which denied persons “convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary” the right to register, vote or hold public office. These offenses were largely, if not entirely, felonies. The drafters of § 182, which was adopted by the 1901 convention, expanded the list of enumerated crimes substantially to include the following:

“treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, [and] crime against nature.”

The drafters retained the general felony provision — “any crime punishable by imprisonment in the penitentiary” — but also added a new catchall provision covering “any ... crime involving moral turpitude.” This latter phrase is not defined, but it was subsequently interpreted by the Alabama Supreme Court to mean an act that is “immoral in itself, regardless of the fact whether it is punishable by law. ...

... Various minor nonfelony offenses such as presenting a worthless check and petty larceny fall within the sweep of § 182, while more serious nonfelony offenses such as second-degree manslaughter, assault on a police officer, mailing pornography, and aiding the escape of a misdemeanant do not because they are neither enumerated in § 182 nor considered crimes involving moral turpitude. It is alleged, and the Court of Appeals found, that the crimes selected for inclusion in § 182 were believed by the delegates to be more frequently committed by blacks.

Section 182 on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes or a crime falling within one of the catchall provisions. Appellee Edwards nonetheless claims that the provision has had a racially discriminatory impact. The District Court made no finding on this claim, but the Court of Appeals implicitly found the evidence of discriminatory impact indisputable:

“The registrars’ expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.”

... Presented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment:

“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977). See *Washington v. Davis* (1976).

Once racial discrimination is shown to have been a “substantial” or “motivating” factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.

... Although understandably no “eyewitnesses” to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:

“And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.”

Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.

... The evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians. Having reviewed this evidence, we are persuaded that the Court of Appeals was correct in its assessment. That court’s opinion presents a thorough analy-

sis of the evidence and demonstrates conclusively that § 182 was enacted with the intent of disenfranchising blacks. We see little purpose in repeating that factual analysis here. At oral argument in this Court appellants' counsel essentially conceded this point, stating: "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182; that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that."

In their brief to this Court, appellants maintain on the basis of their expert's testimony that the real purpose behind § 182 was to disenfranchise poor whites as well as blacks. The Southern Democrats, in their view, sought in this way to stem the resurgence of Populism which threatened their power ...

Even were we to accept this explanation as correct, it hardly saves § 182 from invalidity. The explanation concedes both that discrimination against blacks, as well as against poor whites, was a motivating factor for the provision and that § 182 certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation. ...

Appellants contend that the State has a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude, and that § 182 should be sustained on that ground. The Court of Appeals convincingly demonstrated that such a purpose simply was not a motivating factor of the 1901 convention. ...

At oral argument in this Court, appellants' counsel suggested that, regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes — felonies and moral turpitude misdemeanors — are acceptable bases for denying the franchise. Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under [*precedent*].

... The single remaining question is whether § 182 is excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the "other crime" provision of § 2 of that Amendment. Without again considering the implicit authorization of § 2 to deny the vote to citizens "for participation in rebellion, or other crime," see *Richardson v. Ramirez* (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez, supra*, suggests the contrary.

The judgment of the Court of Appeals is

Affirmed.

Excerpted by Petar Jeknic



Rice v. Cayetano

528 U.S. 495 (2000)

Vote: 5-4

Decision: Reversed

Majority: Kennedy, joined by Roberts, Scalia, Thomas, Alito

Concurrence: Breyer, joined by Souter

Dissent: Stevens, joined by Ginsburg (Part II)

Dissent: Ginsburg

Justice Kennedy, delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States ... controls the case. ...

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. Reciting its purpose to rehabilitate the native Hawaiian population, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. ...

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. ...

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. ...

In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, which has as its mission “[t]he betterment of conditions of native Hawaiians ... [and] Hawaiians[.]” Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

“Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare. ...”

OHA is overseen by a nine-member board of trustees, the members of which ... shall be “elected by qualified voters who are Hawaiians, as provided by law.” The term “Hawaiian” is defined by statute:

“Hawaiian’ means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.”

The statute defines “native Hawaiian” as follows:

“Native Hawaiian’ means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.”

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither “native Hawaiian” nor “Hawaiian” as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: “I am also Hawaiian and desire to register to vote in OHA elections.” Rice marked through the words “am also Hawaiian and,” then checked the form “yes.” The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. ...

... Finding that the electoral scheme was “rationally related to the State’s responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians,” the District Court held that the voting restriction did not violate the Constitution’s ban on racial classifications.

The Court of Appeals affirmed ... [T]he court held that Hawaii “may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be.” The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes “contain a racial classification on their face.”

We granted certiorari, and now reverse.

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. ...

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect ... the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. ...

Unlike [previous] cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. ... We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. ... The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

... The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. ... Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-based voting qualification.

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes. ... In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

... Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

... To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.

Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. ...

We would not find those cases dispositive in any event, however. ... Our special purpose district cases have not suggested that compliance with the one-person, one-vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. ...

Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of “native Hawaiians,” the State permits both “native Hawaiians” and “Hawaiians” to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Hawaii’s argument fails on more essential grounds. The State’s position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. ... Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. ... Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, the Amendment was designed to eliminate. ...

...

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice Stevens, with whom Justice Ginsburg joins as to Part II, dissenting.

... As the majority itself must tacitly admit, the terms of the [Fifteenth] Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. ...

Presumably recognizing this distinction, the majority relies on the fact that “[a]ncestry can be a proxy for race.” That is, of course, true, but it by no means follows that ancestry is always a proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. ... [T]he voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens — a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. ... Cases such as these that “strike down these voting systems ... designed to exclude one racial class (at least) from voting, “have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because “people to whom assets belong should have control over them ...” ...

In this light, it is easy to understand why the classification here is not “demeaning” at all, for it is simply not based on the “premise that citizens of a particular race are somehow more qualified than others to vote on certain matters,” It is based on the permissible assumption in this context that families with “any” ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and selfdetermination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others. ...

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the “political consensus” the majority claims it seeks — a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii. ...

Accordingly, I respectfully dissent.

Excerpted by Petar Jeknic



Crawford v. Marion County Election Board et al

553 U.S. 181 (2008)

Vote: 6-3

Decision: Affirmed

Plurality: Stevens, joined by Roberts, Kennedy

Concurrence: Scalia, joined by Thomas, Alito

Dissent: Souter, joined by Ginsburg

Dissent: Breyer

Justice STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice KENNEDY join.

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the “Voter ID Law” or “SEA 483,” the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk’s office within 10 days. No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity. ...

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification. ...

In *Harper v. Virginia Bd. of Elections* (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of \$1.50. We rejected the dissenters’ argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. Applying a stricter standard, we concluded that a State “violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” ... Although the State’s justification for the tax was rational, it was invidious because it was irrelevant to the voter’s qualifications.

Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze* (1983), however, we confirmed the general rule that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the standard set forth in *Harper*. Rather than applying any “litmus test” that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the “hard judgment” that our adversary system demands.

... However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests “sufficiently weighty to justify the limitation.” *Norman v. Reed* (1992). We therefore begin our analysis of the constitutionality of Indiana’s statute by focusing on those interests.

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters. ... Each is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient. The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration — namely, that Indiana’s voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.

Election Modernization

Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State’s choice to use government-issued photo identification as a relevant source of information concerning a citizen’s eligibility to vote.

In the National Voter Registration Act of 1993 (NVRA), Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. ...

In HAVA [Help America Vote Act], Congress required every State to create and maintain a computerized statewide list of all registered voters. ...

HAVA also imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either “a current and valid photo identification” or another form of documentation such as a bank statement or paycheck. If the voter is voting by mail, he must include a copy of the identification with his ballot. ...

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that

the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III ...

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor — though perpetrated using absentee ballots and not in-person fraud — demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. ... While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

In its brief, the State argues that the inflation of its voter rolls provides further support for its enactment of SEA 483. ... Even though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification.

Safeguarding Voter Confidence

Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

States employ different methods of identifying eligible voters at the polls. ... A photo identification requirement imposes some burdens on voters that other methods of identification do not share. ...

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV [Bureau of Motor Vehicles] are also free. For most voters who need them, the inconvenience

of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. ...

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. ... But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification ... Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.

Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification ...

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. ... From this limited evidence we do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana. ...

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. ... When we consider only the statute's

broad application to all Indiana voters we conclude that it “imposes only a limited burden on voters’ rights.” *Burdick* (1992). The “precise interests” advanced by the State are therefore sufficient to defeat petitioners’ facial challenge to SEA 483. ...

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it. ... It is fair to infer that partisan considerations may have played a significant role in the decision to enact SEA 483. If such considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.

But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting “the integrity and reliability of the electoral process.” *Anderson v. Celebrezze* (1983).

The judgment of the Court of Appeals is affirmed.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

... To evaluate a law respecting the right to vote — whether it governs voter qualifications, candidate selection, or the voting process — we use the approach set out in *Burdick v. Takushi*, (1992). This calls for application of a deferential “important regulatory interests” standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. ... Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring “nominal effort” of everyone, are not severe. Burdens are severe if they go beyond the merely inconvenient.

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, but what petitioners view as the law’s several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. ...

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.

...

The universally applicable requirements of Indiana’s voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not “even represent a significant increase over the usual burdens of voting.” And the State’s interests, are sufficient

to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence — not a constitutional imperative that falls short of what is required.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana’s “Voter ID Law” threatens to impose nontrivial burdens on the voting right of tens of thousands of the State’s citizens and a significant percentage of those individuals are likely to be deterred from voting. The statute is unconstitutional under the balancing standard of *Burdick v. Takushi* (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. ...

Under *Burdick*, “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,” *Burdick v. Takushi* (1992), upon an assessment of the “character and magnitude of the asserted [threatened] injury,” and an estimate of the number of voters likely to be affected.

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. The travel is required for the personal visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV), which is demanded of anyone applying for a driver’s license or nondriver photo identification. See *Indiana Democratic Party v. Rokita* (2006) The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive ...

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably serious for many of the individuals who lack photo identification. They almost certainly will not own cars, and public transportation in Indiana is fairly limited. ...

For those voters who can afford the round trip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present “a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport. ... So most voters must pay at least one fee to get the ID necessary to cast a regular ballot. As with the travel costs, these fees are far from shocking on their face, but in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile. ...

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers “indigent” as well as those with religious objections to being photographed, and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana’s chosen exception does not amount to much relief.

The law allows these voters who lack the necessary ID to sign the pollbook and cast a provisional ballot. As the lead opinion recognizes, though, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ID at that point). ... Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage. ...

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not "severe" ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

... Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically. The Voter ID Law places hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting.

Because the lead opinion finds only "limited" burdens on the right to vote, it avoids a hard look at the State's claimed interests. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of "the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" ...

There is no denying the abstract importance, the compelling nature, of combating voter fraud. But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana ...

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State ... [The absence of evidence] is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. ...

The antifraud rationale is open to skepticism on one further ground, what *Burdick* spoke of as an assessment of the degree of necessity for the State's particular course of action. ... [T]he State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report. ...

Although Indiana claims to have adopted its ID requirement relying partly on the Carter-Baker Report, the State conspicuously rejected the Carter-Baker Report's phase-in recommendation aimed at reducing the burdens on the right to vote, and just as conspicuously fails even to try to explain why. ...

... The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence. ...

Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement has been shown to outweigh the serious burdens it imposes on the right to vote.

If more were needed to condemn this law, our own precedent would provide it, for the calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak. If the Court's decision in *Harper v. Virginia Bd. of Elections* (1966), stands for anything, it is that being poor has nothing to do with being qualified to vote. *Harper* made clear that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."

...

The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old. I would vacate the judgment of the Seventh Circuit, and remand for further proceedings.

Justice BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon v. Shrink Missouri Government PAC* (2000). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID. ...

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to \$12 for a copy of a birth certificate; up to \$100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of \$1.50 (less than \$10 today, inflation adjusted). See *Harper v. Virginia Bd. of Elections* (1966). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*. ...

By way of contrast, two other States — Florida and Georgia — have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana. Moreover, a Florida voter who lacks photo ID may cast a provisional ballot at the polling place that will be counted if the State determines that his signature matches the one on his voter registration form.

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documentation than does Indiana. ... While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter-Baker Commission recommended nationwide. Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country ...

... [W]hile the Constitution does not in general prohibit Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs. For these reasons, I dissent.

Excerpted by Kimberly Clairmont



Congressional Power to Protect Voting Rights

South Carolina v. Katzenbach

383 U.S. 301 (1966)

Vote: 8-1

Decision: Dismissed

Majority: Warren, joined by Douglas, Clark, Harlan, Brennan, Stewart, White, and Fortas

Concur/Dissent: Black

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. We therefore deny South Carolina’s request that enforcement of these sections of the Act be enjoined.

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. ...

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. ...

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. ... [R]egistration of voting-age Negroes in Alabama rose only from

14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

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. ...

During the hearings and debates on the Act, Selma, Alabama, was repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registration rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. ...

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. ...

... The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. ... As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

... In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a voting qualification or procedure different from those in force on November 1, 1964. This suspension of new rules is terminated, however, under either of the follow-

ing circumstances: (1) if the area has submitted the rules to the Attorney General, and he has not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise on racial grounds. ...

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. ...

The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting ... We turn now to a more detailed description of the standards which govern our review of the Act.

Section 1 of the Fifteenth Amendment declares that “[t]he 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.” This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. ...

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 constitutional.” *McCulloch v. Maryland* (1819)

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

“Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.” *Ex parte Virginia* (1879).

... 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. ...

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach v McClung* (1964); *United States v. Darby* (1941). Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. ...

Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See *McGowan v. Maryland* (1961); *Salsburg v. Maryland* (1954). The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle v. Smith* (1911)

Coverage formula.

We now consider the related question of whether the specific States and political subdivisions within § 4 (b) of the Act were an appropriate target for the new remedies. ... Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment. ...

Review of new rules.

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See *Home Bldg. & Loan Assn. V. Blaisdell*(1934); *Wilson v. New* (1917). Congress knew that some of the States covered by § 4 (b) of the Act had 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. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner. ...

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. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them. 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. Hopefully, millions of non-white Americans will not be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly “[t]he 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.”

The bill of complaint is

Dismissed.

MR. JUSTICE BLACK, concurring and dissenting.

Though, as I have said, I agree with most of the Court’s conclusions, I dissent from its holding that every part of § 5 of the Act is constitutional. Section 4 (a), to which § 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of § 4 (b). Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color.

... 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 far-away 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. And if one law concerning voting can make the States plead for this approval by a distant

federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against state officials once an operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

... In this and other prior Acts Congress has quite properly vested the Attorney General with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to the States than as an aid to the enforcement of the Act. I would hold § 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens.

Excerpted by Petar Jeknic



Shelby County v. Holder

570 U.S. 529 (2013)

Vote: 5-4

Decision: Reversed

Majority: Roberts, Scalia, Kennedy, Thomas, Alito

Concurrence: Thomas

Dissent: Ginsburg, Breyer, Kagan, and Sotomayor

Chief Justice ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting — a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States — an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and inge-

nious defiance of the Constitution.” *South Carolina v. Katzenbach* (1966). As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.” Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide.” *Northwest Austin Municipal Util. Dist. No. One v. Holder* (2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. ...

In *Northwest Austin* (2009), we stated that “the Act imposes current burdens and must be justified by current needs.” And we concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” These basic principles guide our review of the question before us.

The Constitution and laws of the United States are “the supreme Law of the Land.” State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to “negative” state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This “allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” *Bond v. United States* (2011). But the federal balance “is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” ...

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U.S. (1911). Indeed, “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. *South Carolina v. Katzenbach* (1966). At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

The Voting Rights Act sharply departs from these basic principles. It suspends “*all* changes to state election law — however innocuous — until they have been precleared by federal authorities in Washington, D.C.” States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding “not only switches the burden of proof to the applicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.” ...

In 1966, we found these departures from the basic features of our system of government justified. The “blight of racial discrimination in voting” had “infected the electoral process in parts of our country for nearly a century.” *Katzenbach* (1966). Several States had enacted a variety of requirements and tests “specifically designed to prevent” African-Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States “merely switched to discriminatory devices not covered by the federal decrees,” “enacted difficult new tests,” or simply “defied and evaded court orders.” Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites. ...

At the time, the coverage formula — the means of linking the exercise of the unprecedented authority with the problem that warranted it — made sense. ... It accurately reflected those jurisdictions uniquely characterized by voting discrimination “on a pervasive scale,” linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the “stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant.”

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Northwest Austin* (2009). The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the

last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” That Report also explained that there have been “significant increases in the number of African-Americans serving in elected offices”; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.

... The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were before Congress when it reauthorized the Act in 2006:

Voter registration numbers from 1965 to those from 2004 in the six originally covered States

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.6	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

... There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. ... Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized — as if nothing had changed. In fact, the Act’s unusual remedies have grown even stronger. ...

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how “clean” the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional s of current conditions.

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was “rational in both practice and theory.” *Katzenbach* (1966). The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the “coverage formula raise[d] serious constitutional questions.” *Northwest Austin* (2009). As we explained, a statute’s “current burdens” must be justified by “current needs,” and any “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s ... Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See *Katzenbach* (1966). There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

... The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then — regardless of how that discrimination compares to discrimination in States unburdened by coverage. This argument does not look to “current political conditions,” but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history — rightly so — in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach* (1966).

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need[.]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs. ...

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. ... Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on “second-generation barriers,” which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent’s contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

... There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

Striking down an Act of Congress “is the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden* (1927). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. ...

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In the Court’s view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, con-

tinuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

"[V]oting discrimination still exists; no one doubts that." But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights. ...

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States* (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." See also *Shaw v. Reno* (1993). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. ...

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. The question before the Court is whether Congress had the authority under the Constitution to act as it did.

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo v. Hopkins* (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation." In choosing this language, the Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

"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 constitutional." *McCulloch v. Maryland* (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin*, is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.

... [T]he Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature's legitimate objective.

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch* (1819): Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise. ...

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County’s facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the “equal sovereignty” doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record. ...

The Court stops any application of § 5 by holding that § 4(b)’s coverage formula is unconstitutional. It pins this result, in large measure, to “the fundamental principle of equal sovereignty.” In *Katzenbach*, however, the Court held, in no uncertain terms, that the principle “*applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared.” *Katzenbach* (1966)(emphasis added).

Katzenbach, the Court acknowledges, “rejected the notion that the [equal sovereignty] principle operate[s] as a bar on differential treatment outside [the] context [of the admission of new States].” But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty “remains highly pertinent in assessing subsequent disparate treatment of States.” If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*’s limitation of the equal sovereignty doctrine to “the admission of new States,” the suggestion is untenable. *Northwest Austin* cited *Katzenbach*’s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. *Northwest Austin* (2009). In today’s decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*’s ruling on the limited “significance” of the equal sovereignty principle.

... In the Court’s conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, *i.e.*, that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. I am aware of no precedent for imposing such a double burden on defenders of legislation.

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress’ bailiwick.

Instead, the Court strikes § 4(b)’s coverage provision because, in its view, the provision is not based on “current conditions.” It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. Volumes of evidence supported Congress’ determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on “decades-old data and eradicated practices.” Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must “star[t] from scratch.” I do not see why that should be so. ...

The sad irony of today’s decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA’s success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself. The same assumption — that the problem could be solved when particular methods of voting discrimination are identified and eliminated — was indulged and proved wrong repeatedly prior to the VRA’s enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress’ recognition of the “variety and persistence” of measures designed to impair minority voting rights. *Katzenbach* (1966). In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 & half; years” he had served in the House. After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.” That determination of the body empowered to enforce the Civil War Amendments “by appropriate legislation” merits this Court’s utmost respect. In my judgment, the Court errs egregiously by overriding Congress’ decision.

For the reasons stated, I would affirm the judgment of the Court of Appeals.



Brnovich v. Democratic National Committee

594 U.S. ____ (2021)

Vote: 6-3

Decision: Reversed

Majority: Alito, joined by Thomas, Kavanaugh, Barrett, Roberts, and Gorsuch

Dissent: Kagan, joined by Sotomayor, and Breyer

JUSTICE ALITO delivered the opinion of the Court.

In these cases, we are called upon for the first time to apply §2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted. Arizona law generally makes it very easy to vote. All voters may vote by mail or in person for nearly a month before election day, but Arizona imposes two restrictions that are claimed to be unlawful. First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter’s family member, household member, or caregiver.

...

Congress enacted the landmark Voting Rights Act of 1965, 79 Stat. 437, as amended, 52 U. S. C. §10301 et seq., in an effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race. Ratified in 1870, the Fifteenth Amendment provides in §1 that “[t]he 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 of the Amendment then grants Congress the “power to enforce [the Amendment] by appropriate legislation.”

Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century. States employed a variety of notorious methods, including poll taxes, literacy tests, property qualifications, “white primar[ies],” and “grandfather clause[s].”¹ Challenges to some blatant efforts reached this Court and were held to violate the Fifteenth Amendment ...

Unlike other provisions of the VRA, §2 attracted relatively little attention during the congressional debates and was “little-used” for more than a decade after its passage. But during the same period, this Court considered several cases involving “vote-dilution” claims asserted under the Equal Protection Clause of the Fourteenth Amendment ...

What is now §2(b) was added, and that provision sets out what must be shown to prove a §2 violation. It requires consideration of “the totality of circumstances” in each case and demands proof that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by members of a protected class “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” ...

This Court first construed the amended §2 in *Thornburg v. Gingles* (1986)—another vote-dilution case. Justice Brennan’s opinion for the Court set out three threshold requirements for proving a §2 vote-dilution claim ...”The essence of a §2 claim,” the Court said, “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities” of minority and non-minority voters to elect their preferred representatives. *Id.*, at 47.

...

The present dispute concerns two features of Arizona voting law, which generally makes it quite easy for residents to vote. All Arizonans may vote by mail for 27 days before an election using an “early ballot.” ... No special excuse is needed ... and any voter may ask to be sent an early ballot automatically in future elections, §16–544(A) (2015). In addition, during the 27 days before an election, Arizonans may vote in person at an early voting location in each county ... And they may also vote in person on election day ...

Each county is free to conduct election-day voting either by using the traditional precinct model or by setting up “voting centers.” Voting centers are equipped to provide all voters in a county with the appropriate ballot for the precinct in which they are registered ...

... Voters who choose to vote in person on election day in a county that uses the precinct system must vote in their assigned precinct ... If a voter goes to the wrong polling place, poll workers are trained to direct the voter to the right location. If a voter finds that his or her name does not appear on the register at what the voter believes is the right precinct, the voter ordinarily may cast a provisional ballot. Ariz. Rev. Stat. Ann. §16–584 (Cum. Supp. 2020). That ballot is later counted if the voter’s address is determined to be within the precinct. See *ibid.* But if it turns out that the voter cast a ballot at the wrong precinct, that vote is not counted. See §16–584(E); App. 37–41 ...

For those who choose to vote early by mail, Arizona has long required that “[o]nly the elector may be in possession of that elector’s unvoted early ballot.” §16–542(D). In 2016, the state legislature enacted House Bill 2023 (HB 2023), which makes it a crime for any person other than a postal worker, an elections official, or a voter’s caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. §§16–1005(H)–(I).

In 2016, the Democratic National Committee and certain affiliates brought this suit and named as defendants (among others) the Arizona attorney general and secretary of state in their official capacities. Among other things, the plaintiffs claimed that both the State’s refusal to count ballots cast in the wrong precinct and its ballot-collection restriction “adversely and disparately affect Arizona’s American Indian, Hispanic, and African American citizens,” in violation of §2 of the VRA. *Democratic Nat. Comm. v. Hobbs* (CA9 2020) (en banc). In addition, they alleged that the ballot-collection restriction was “enacted with discriminatory intent” and thus violated both §2 of the VRA and the Fifteenth Amendment. *Ibid.*

... the District Court made extensive findings of fact and rejected all the plaintiffs’ claims, *id.*, at 838–883. The court first found that the out-of-precinct policy “has no meaningfully disparate impact on the opportunities of minority voters to elect” representatives of their choice ...

The District Court similarly found that the ballot collection restriction is unlikely to “cause a meaningful inequality in the electoral opportunities of minorities.” Rather, the court noted, the restriction applies equally to all voters and “does not impose burdens beyond those traditionally associated with voting.” ... Finally, the court found that the ballot-collection law had not been enacted with discriminatory intent ...

A divided panel of the Ninth Circuit affirmed, but an en banc court reversed ...

We begin with two preliminary matters. Secretary of State Hobbs contends that no petitioner has Article III standing to appeal the decision below as to the out-of-precinct policy, but we reject that argument. All that is needed to entertain an appeal of that issue is one party with standing, see *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (2020) (slip op., at 13, n. 6), and we are satisfied that Attorney General Brnovich fits the bill ... [T]he attorney general is authorized to represent the State in any action in federal court.

Second, we think it prudent to make clear at the beginning that we decline in these cases to announce a test to govern all VRA §2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots. Each of the parties advocated a different test, as did many amici and the courts below ... All told, no fewer than 10 tests have been proposed. But as this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases.

... [B]ecause this is our first §2 time, place, or manner case, a fresh look at the statutory text is appropriate. Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.

... §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation. Section 2(b) states that §2 is violated only where “the political processes leading to nomination or election” are not “*equally open* to participation” by members of the relevant protected group “*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.” (Emphasis added.)

The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be “equally open” to minority and non-minority groups alike, and the most relevant definition of the term “open,” as used in §2(b), is “without restrictions as to who may participate,” Random House Dictionary of the English Language 1008 (J. Stein ed. 1966), or “requiring no special status, identification, or permit for entry or participation,” Webster’s Third New International Dictionary 1579 (1976).

What §2(b) means by voting that is not “equally open” is further explained by this language: “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Putting these terms together, it appears that the core of §2(b) is the requirement that voting be “equally open.” The statute’s reference to equal “opportunity” may stretch that concept to some degree to include consideration of a person’s ability to *use* the means that are equally open. But equal openness remains the touchstone.

... The provision [§2(b)] requires consideration of “the totality of circumstances.” Thus, any circumstance that has a logical bearing on whether voting is “equally open” and affords equal “opportunity” may be considered. We will not attempt to compile an exhaustive list, but several important circumstances should be mentioned.

1. First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of “open[ness]” and “opportunity” connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. After all, every voting rule imposes a burden of some sort ... But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is “equally open” and that furnishes an equal “opportunity” to cast a ballot must tolerate the “usual burdens of voting.” ...

2. For similar reasons, the degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration. Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared. The burdens associated with the rules in widespread use when §2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally “open” or furnishing an equal “opportunity” to vote in the sense meant by §2. Therefore, it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots ... We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States. We have no need to decide whether adherence to, or a return to, a 1982 framework is necessarily lawful under §2, but the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.

3. The size of any disparities in a rule’s impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.

4. Next, courts must consider the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision. This follows from §2(b)’s reference to the collective concept of a State’s “political processes” and its “political process” as a whole. Thus, where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.

5. Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account. As noted, every voting rule imposes a burden of some sort, and therefore, in determining “based on the totality of circumstances” whether a rule goes too far, it is important to consider the reason for the rule. Rules that are supported by strong state interests are less likely to violate §2.

One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. This interest helped to spur the adoption of what soon became standard practice in this country and in other democratic nations the world round: the use of private voting booths ...

The interpretation set out above follows directly from what §2 commands: consideration of “the totality of circumstances” that have a bearing on whether a State makes voting “equally open” to all and gives everyone an equal “opportunity” to vote. The dissent, by contrast, would rewrite the text of §2 and make it turn almost entirely on just one circumstance—disparate impact.

That is a radical project, and the dissent strains mightily to obscure its objective ...

Section 2 of the Voting Rights Act provides vital protection against discriminatory voting rules, and no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated. But §2 does not deprive the States of their authority to establish non-discriminatory voting rules, and that is precisely what the dissent’s radical interpretation would mean in practice. The dissent is correct that the Voting Rights Act exemplifies our country’s commitment to democracy, but there is nothing democratic about the dissent’s attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.

In light of the principles set out above, neither Arizona’s out-of-precinct rule nor its ballot-collection law violates §2 of the VRA. Arizona’s out-of-precinct rule enforces the requirement that voters who choose to vote in person on election day must do so in their assigned precincts. Having to identify one’s own polling place and then travel there to vote does not exceed the “usual burdens of voting.” ... On the contrary, these tasks are quintessential examples of the usual burdens of voting.

Not only are these unremarkable burdens, but the District Court’s uncontested findings show that the State made extensive efforts to reduce their impact on the number of valid votes ultimately cast. The State makes accurate precinct information available to all voters. When precincts or polling places are altered between elections, each registered voter is sent a notice showing the voter’s new polling place. ... Arizona law also mandates that election officials send a sample ballot to each household that includes a registered voter who has not opted to be placed on the permanent early voter list ... and this mailing also identifies the voter’s proper polling location, ... In addition, the Arizona secretary of state’s office sends voters pamphlets that include information (in both English and Spanish) about how to identify their assigned precinct ...

The burdens of identifying and traveling to one’s assigned precinct are also modest when considering Arizona’s “political processes” as a whole. The Court of Appeals noted that Arizona leads other States in the rate of votes

rejected on the ground that they were cast in the wrong precinct, and the court attributed this to frequent changes in polling locations, confusing placement of polling places, and high levels of residential mobility. 948 F. 3d, at 1000–1004. But even if it is marginally harder for Arizona voters to find their assigned polling places, the State offers other easy ways to vote. Any voter can request an early ballot without excuse. Any voter can ask to be placed on the permanent early voter list so that an early ballot will be mailed automatically. Voters may drop off their early ballots at any polling place, even one to which they are not assigned. And for nearly a month before election day, any voter can vote in person at an early voting location in his or her county. The availability of those options likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast—0.47% of all ballots in the 2012 general election and just 0.15% in 2016.

Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. The District Court accepted the plaintiffs’ evidence that, of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot. For non-minority voters, the rate was around 0.5%. ... A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open ...

Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State’s objectives. And the Court of Appeals’ preferred alternative would have obvious disadvantages. Partially counting out-of-precinct ballots would complicate the process of tabulation and could lead to disputes and delay. In addition, as one of the en banc dissenters noted, it would tend to encourage voters who are primarily interested in only national or state-wide elections to vote in whichever place is most convenient even if they know that it is not their assigned polling place ...

In light of the modest burdens allegedly imposed by Arizona’s out-of-precinct policy, the small size of its disparate impact, and the State’s justifications, we conclude the rule does not violate §2 of the VRA.18.

HB 2023 likewise passes muster under the results test of §2. Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official’s office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person. 329 F. Supp. 3d, at 839 (citing ECF Doc. 361, ¶57). Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the “usual burdens of voting.” *Crawford*, 553 U. S., at 198 (opinion of Stevens, J.). And voters can also ask a statutorily authorized proxy—a family member, a household member, or a caregiver—to mail a ballot or drop it off at any time within 27 days of an election.

...

The plaintiffs were unable to provide statistical evidence showing that HB 2023 had a disparate impact on minority voters ...

Even if the plaintiffs had shown a disparate burden caused by HB 2023, the State’s justifications would suffice to avoid §2 liability. “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell v. Gonzalez* (2006). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence ...

As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State’s justifications, leads us to the conclusion that the law does not violate §2 of the VRA.

We also granted certiorari to review whether the Court of Appeals erred in concluding that HB 2023 was enacted with a discriminatory purpose. The District Court found that it was not, 329 F. Supp. 3d, at 882, and appellate review of that conclusion is for clear error, *Pullman-Standard v. Swint* (1982). If the district court’s view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance. *Anderson v. Bessemer City* (1985). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. Bessemer City* (1985).

The District Court’s finding on the question of discriminatory intent had ample support in the record ...

...

We are more than satisfied that the District Court’s interpretation of the evidence is permissible. The spark for the debate over mail-in voting may well have been provided by one Senator’s enflamed partisanship, but partisan motives are not the same as racial motives. See *Cooper v. Harris* (2017).

The Court of Appeals did not dispute the District Court’s assessment of the sincerity of HB 2023’s proponents. It even agreed that some members of the legislature had a “sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed.” The Court of Appeals nevertheless concluded that the District Court committed clear error by failing to apply a “cat’s paw” theory sometimes used in employment discrimination cases ...

A “cat’s paw” is a “dupe” who is “used by another to accomplish his purposes.” ... A plaintiff in a “cat’s paw” case typically seeks to hold the plaintiff’s employer liable for “the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.” ... The “cat’s paw” theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill’s sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.

Arizona’s out-of-precinct policy and HB 2023 do not violate §2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Kagan, with whom Justice Breyer and Justice Sotomayor join, dissenting.

If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. Section 2, the provision at issue here, guarantees that members of every racial group will have equal voting opportunities. Citizens of every race will have the same shot to participate in the political process and to elect representatives of their choice. They will all own our democracy together—no one more and no one less than any other.

If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary. Because a century after the Civil War was fought, at the time of the Act’s passage, the promise of political equality remained a distant dream for African American citizens. Because States and localities continually “contriv[ed] new rules,” mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls. *South Carolina v. Katzenbach* (1966). Because “Congress had reason to suppose” that States would “try similar maneuvers in the future”—“pour[ing] old poison into new bottles” to suppress minority votes. *Ibid.*; *Reno v. Bossier Parish School Bd.* (2000) (Souter, J., concurring in part and dissenting in part). Because Congress has been proved right.

The Voting Rights Act is ambitious, in both goal and scope. When President Lyndon Johnson sent the bill to Congress, ten days after John Lewis led marchers across the Edmund Pettus Bridge, he explained that it was “carefully drafted to meet its objective—the end of discrimination in voting in America.” H. R. Doc. No. 120, 89th Cong., 1st Sess., 1–2 (1965). He was right about how the Act’s drafting reflected its aim.

“The end of discrimination in voting” is a far-reaching goal. And the Voting Rights Act’s text is just as far-reaching. A later amendment, adding the provision at issue here, became necessary when this Court construed the statute too narrowly. And in the last decade, this Court assailed the Act again, undoing its vital Section 5. See *Shelby County v. Holder* (2013). But Section 2 of the Act remains, as written, as expansive as ever—demanding that every citizen of this country possess a right at once grand and obvious: the right to an equal opportunity to vote.

Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. See *ante*, at 21, 25. So the majority writes its own set of rules, limiting Section 2 from multiple directions. See *ante*, at 16–19. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters. I could say—and will in the following pages—that this is not how the Court is supposed to interpret and apply statutes. But that ordinary critique woefully undersells the problem. What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about “the end of discrimination in voting.” I respectfully dissent.

(omitted; describes the history and electoral practices that brought about the VRA.)

Yet efforts to suppress the minority vote continue. No one would know this from reading the majority opinion. It hails the “good news” that legislative efforts had mostly shifted by the 1980s from vote denial to vote dilution. *Ante*, at 7. And then it moves on to other matters, as though the Voting Rights Act no longer has a problem to address—as though once literacy tests and poll taxes disappeared, so too did efforts to curb minority voting. But as this Court recognized about a decade ago, “racial discrimination and racially polarized voting are not ancient history.” *Bartlett v. Strickland* (2009). Indeed, the problem of voting discrimination has become worse since that time—in part because of what this Court did in *Shelby County*. Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.

Much of the Voting Rights Act’s success lay in its capacity to meet ever-new forms of discrimination ... In that way, the Act would prevent the use of new, more nuanced methods to restrict the voting opportunities of non-white citizens.

And for decades, Section 5 operated as intended. Between 1965 and 2006, the Department stopped almost 1200 voting laws in covered areas from taking effect. See *Shelby County* (2013) (Ginsburg, J., dissenting) ... In reviewing mountains of such evidence in 2006, Congress saw a continuing need for Section 5. Although “discrimination today is more subtle than the visible methods used in 1965,” Congress found, it still produces “the same [effects], namely a diminishing of the minority community’s ability to fully participate in the electoral process.” H. R. Rep. No. 109–478, p. 6 (2006). Congress thus reauthorized the preclearance scheme for 25 years.

But this Court took a different view. Finding that “[o]ur country has changed,” the Court saw only limited instances of voting discrimination—and so no further need for preclearance. *Shelby County* (2013). Displacing Congress’s contrary judgment, the Court struck down the coverage formula essential to the statute’s operation ... But how did the majority know there was nothing more for Section 5 to do—that the (undoubted) changes in the country went so far as to make the provision unnecessary? It didn’t, as Justice Ginsburg explained in dissent. The majority’s faith that discrimination was almost gone derived, at least in part, from the success of Section 5—from its record of blocking discriminatory voting schemes. Discarding Section 5 because those schemes had diminished was “like throwing away your umbrella in a rainstorm because you are not getting wet.” *Bostock v. Clayton County* (2020).

The rashness of the act soon became evident. Once Section 5’s strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters ...

... In recent months, State after State has taken up or enacted legislation erecting new barriers to voting ... Those laws shorten the time polls are open, both on Election Day and before. They impose new prerequisites to voting by mail, and shorten the windows to apply for and return mail ballots. They make it harder to register to vote, and easier to purge voters from the rolls. Two laws even ban handing out food or water to voters standing in line. Some of those restrictions may be lawful under the Voting Rights Act. But chances are that some have the kind of impact the Act was designed to prevent—that they make the political process less open to minority voters than to others.

So the Court decides this Voting Rights Act case at a perilous moment for the Nation’s commitment to equal citizenship ... Congress never meant for Section 2 to bear all of the weight of the Act’s commitments. That pro-

vision looks to courts, not to the Executive Branch, to restrain discriminatory voting practices. And litigation is an after-the-fact remedy, incapable of providing relief until an election—usually, more than one election—has come and gone. See *id.*, at 572 (Ginsburg, J., dissenting). So Section 2 was supposed to be a back-up, for all its sweep and power. But after *Shelby County*, the vitality of Section 2—a “permanent, nationwide ban on racial discrimination in voting”—matters more than ever. *Shelby* (2013) (majority opinion). For after *Shelby County*, Section 2 is what voters have left.

Section 2, as drafted, is well-equipped to meet the challenge. Congress meant to eliminate all “discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups.” S. Rep. No. 97–417, p. 28 (1982) (S. Rep.). And that broad intent is manifest in the provision’s broad text.

Section 2, as relevant here, has two interlocking parts ...

Those provisions have a great many words ... But their essential import is plain: Courts are to strike down voting rules that contribute to a racial disparity in the opportunity to vote, taking all the relevant circumstances into account.

...

But when to conclude—looking to effects, not purposes—that a denial or abridgment has occurred? Again, answering that question is subsection (b)’s function. See *supra*, at 12–13. It teaches that a violation is established when, “based on the totality of circumstances,” a State’s electoral system is “not equally open” to members of a racial group. And then the subsection tells us what that means. A system is not equally open if members of one race have “less opportunity” than others to cast votes, to participate in politics, or to elect representatives. The key demand, then, is for equal political opportunity across races.

That equal “opportunity” is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. When Congress amended Section 2, the word “opportunity” meant what it also does today: “a favorable or advantageous combination of circumstances” for some action. See *American Heritage Dictionary*, at 922. In using that word, Congress made clear that the Voting Rights Act does not demand equal outcomes. If members of different races have the same opportunity to vote, but go to the ballot box at different rates, then so be it—that is their preference, and Section 2 has nothing to say. But if a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageous) for one racial group than for others—then Section 2 kicks in. It applies, in short, whenever the law makes it harder for citizens of one race than of others to cast a vote.

And that is so even if (as is usually true) the law does not single out any race, but instead is facially neutral ... Those laws, Congress thought, would violate Section 2, though they were not facially discriminatory, because they gave voters of different races unequal access to the political process.

Congress also made plain, in calling for a totality-of- circumstances inquiry, that equal voting opportunity is a function of both law and background conditions—in other words, that a voting rule’s validity depends on how

the rule operates in conjunction with facts on the ground ... But sometimes government officials enact facially neutral laws that leverage—and become discriminatory by dint of—pre-existing social and economic conditions. The classic historical cases are literacy tests and poll taxes. A more modern example is the one Justice Scalia gave, of limited registration hours. Congress knew how those laws worked: It saw that “inferior education, poor employment opportunities, and low incomes”—all conditions often correlated with race—could turn even an ordinary-seeming election rule into an effective barrier to minority voting in certain circumstances.

...

The majority’s opinion mostly inhabits a law-free zone. It congratulates itself in advance for giving Section 2’s text “careful consideration.” *Ante*, at 14. And then it leaves that language almost wholly behind ...

The majority instead founds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a “totality of circumstances” analysis. *Ante*, at 16. But as described above, Congress mainly added that language so that Section 2 could protect against “the demonstrated ingenuity of state and local governments in hobbling minority voting power.” *De Grandy* (1994). The totality inquiry requires courts to explore how ordinary-seeming laws can interact with local conditions—economic, social, historical—to produce race-based voting inequalities. That inquiry hardly gives a court the license to devise whatever limitations on Section 2’s reach it would have liked Congress to enact. But that is the license the majority takes ...

Start with the majority’s first idea: a “[m]ere inconvenience[]” exception to Section 2. *Ante*, at 16. Voting, the majority says, imposes a set of “usual burdens”: Some time, some travel, some rule compliance. *Ibid*. And all of that is beneath the notice of Section 2—even if those burdens fall highly unequally on members of different races. See *ibid*. But that categorical exclusion, for seemingly small (or “[un]usual” or “[un]serious”) burdens, is nowhere in the provision’s text. To the contrary (and as this Court has recognized before), Section 2 allows no “safe harbor[s]” for election rules resulting in disparate voting opportunities. *De Grandy* (1994). The section applies to *any* discriminatory “voting qualification,” “prerequisite to voting,” or “standard, practice, or procedure”—even the kind creating only (what the majority thinks of as) an ordinary burden ...

And what is a “mere inconvenience” or “usual burden” anyway? The drafters of the Voting Rights Act understood that “social and historical conditions,” including disparities in education, wealth, and employment, often affect opportunities to vote. *Gingles* (1986). What does not prevent one citizen from casting a vote might prevent another. How is a judge supposed to draw an “inconvenience” line in some reasonable place, taking those differences into account? Consider a law banning the handing out of water to voters. No more than—or not even—an inconvenience when lines are short; but what of when they are, as in some neighborhoods, hours-long? The point here is that judges lack an objective way to decide which voting obstacles are “mere” and which are not, for all voters at all times. And so Section 2 does not ask the question.

The majority’s “multiple ways to vote” factor is similarly flawed. *Ante*, at 18. True enough, a State with three ways to vote (say, on Election Day; early in person; or by mail) may be more “open” than a State with only one (on Election Day). And some other statute might care about that. But Section 2 does not. What it cares about is

that a State’s “political processes” are “*equally* open” to voters of all races. And a State’s electoral process is not equally open if, for example, the State “only” makes Election Day voting by members of one race peculiarly difficult.

...

The majority’s approach, which would ask only whether a discriminatory law “*reasonably* pursue[s] important state interests,” gives election officials too easy an escape from Section 2. *Ante*, at 25 (emphasis added). Of course preventing voter intimidation is an important state interest. And of course preventing election fraud is the same. But those interests are also easy to assert groundlessly or pretextually in voting discrimination cases. Congress knew that when it passed Section 2 ...

Just look at Arizona. Two of that State’s policies disproportionately affect minority citizens’ opportunity to vote. The first—the out-of-precinct policy—results in Hispanic and African American voters’ ballots being thrown out at a statistically higher rate than those of whites. And whatever the majority might say about the ordinariness of such a rule, Arizona applies it in extra-ordinary fashion: Arizona is *the* national outlier in dealing with out-of-precinct votes, with the next-worst offender nowhere in sight. The second rule—the ballot-collection ban—makes voting meaningfully more difficult for Native American citizens than for others. And nothing about how that ban is applied is “usual” either—this time because of how many of the State’s Native American citizens need to travel long distances to use the mail. Both policies violate Section 2, on a straightforward application of its text. Considering the “totality of circumstances,” both “result in” members of some races having “less opportunity than other members of the electorate to participate in the political process and to elect a representative of their choice.” §10301(b). The majority reaches the opposite conclusion because it closes its eyes to the facts on the ground.

...

... The majority is wrong to assert that those statistics are “highly misleading.” *Ante*, at 28. In the majority’s view, they can be dismissed because the great mass of voters are unaffected by the out-of-precinct policy. See *ibid*. But Section 2 is less interested in “absolute terms” (as the majority calls them) than in relative ones. *Ante*, at 27; see *supra*, at 14–15. Arizona’s policy creates a statistically significant disparity between minority and white voters: Because of the policy, members of different racial groups do not in fact have an equal likelihood of having their ballots counted.

...

Arizona’s law mostly banning third-party ballot collection also results in a significant race-based disparity in voting opportunities. The problem with that law again lies in facts nearly unique to Arizona—here, the presence of rural Native American communities that lack ready access to mail service. Given that circumstance, the Arizona statute discriminates in just the way Section 2 proscribes. The majority once more comes to a different conclusion only by ignoring the local conditions with which Arizona’s law interacts.

The critical facts for evaluating the ballot-collection rule have to do with mail service. Most Arizonans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom. Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. See 329 F. Supp. 3d, at 836. And for many or most, there is no nearby post office. Native Americans in rural Arizona “often must travel 45 minutes to 2 hours just to get to a mailbox ...” And between a quarter to a half of households in these Native communities do not have a car. See *ibid.* So getting ballots by mail and sending them back poses a serious challenge for Arizona’s rural Native Americans.

For that reason, an unusually high rate of Native Americans used to “return their early ballots with the assistance of third parties.” *Id.*, at 870 ...

Still, Arizona enacted—with full knowledge of the likely discriminatory consequences—the near-blanket ballot-collection ban challenged here.

...

Congress enacted the Voting Rights Act to address a deep fault of our democracy—the historical and continuing attempt to withhold from a race of citizens their fair share of influence on the political process. For a century, African Americans had struggled and sacrificed to wrest their voting rights from a resistant Nation. The statute they and their allies at long last attained made a promise to all Americans. From then on, Congress demanded, the political process would be equally open to every citizen, regardless of race.

...

This Court has no right to remake Section 2. Maybe some think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone ... But Congress gets to make that call. Because it has not done so, this Court’s duty is to apply the law as it is written. The law that confronted one of this country’s most enduring wrongs; pledged to give every American, of every race, an equal chance to participate in our democracy; and now stands as the crucial tool to achieve that goal. That law, of all laws, deserves the sweep and power Congress gave it. That law, of all laws, should not be diminished by this Court.

Excerpted by Petar Jeknic and Rorie Solberg



Colegrove v. Green

328 U.S. 549 (1946)

Vote: 4-3

Decision: Affirmed

Plurality: Frankfurter, joined by Reed, and Burton

Concurrence: Rutledge

Dissent: Black, joined by Douglas, Murphy

Not participating: Jackson

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE REED and MR. JUSTICE BURTON concur.

... These are three qualified voters in Illinois districts which have much larger populations than other Illinois Congressional districts. They brought this suit against the Governor, the Secretary of State, and the Auditor of the State of Illinois ... to restrain them, in effect, from taking proceedings for an election in November 1946, under the provisions of Illinois law governing Congressional districts. Formally, the appellants asked for a decree ... declaring these provisions to be invalid because they violated various provisions of the United States Constitution ... in that by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901 lacked compactness of territory and approximate equality of population. ...

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. ... It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

The appellants urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. ... The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. ...

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. ... The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. ...

Dismissal of the complaint is affirmed.

MR. JUSTICE RUTLEDGE.

... [W]e have but recently been admonished again that it is the very essence of our duty to avoid decision upon grave constitutional questions, especially when this may bring our function into clash with the political departments of the Government, if any tenable alternative ground for disposition of the controversy is presented.

There is one, however, in this case. And I think the gravity of the constitutional questions raised so great, together with the possibilities for collision above mentioned, that the admonition is appropriate to be followed here. Other reasons support this view ...

... The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. ...

... I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause.

Mr. Justice Black, dissenting.

The complaint alleges the following facts essential to the position I take: appellants, citizens and voters of Illinois, live in congressional election districts, the respective populations of which range from 612,000 to 914,000. Twenty other congressional election districts have populations that range from 112,116 to 385,207. In seven of these districts the population is below 200,000. The Illinois Legislature established these districts in 1901 on the basis of the Census of 1900. The Federal Census of 1910, of 1920, of 1930, and of 1940, each showed a growth of population in Illinois and a substantial shift in the distribution of population among the districts established in 1901. But up to date, attempts to have the State Legislature reapportion congressional election districts so as more nearly to equalize their population have been unsuccessful ... The implication is that the issues of state and congressional apportionment are thus so interdependent that it is to the interest of state legislators to perpetuate the inequitable apportionment of both state and congressional election districts. Prior to this proceeding, a series of suits had been brought in the state courts challenging the State's local and federal apportionment system. In all these cases, the Supreme Court of the State had denied effective relief.

In the present suit, the complaint attacked the 1901 State Apportionment Act on the ground that it, among other things, violates Article I and the Fourteenth Amendment of the Constitution. Appellants claim that, since they live in the heavily populated districts, their vote is much less effective than the vote of those living in a district which, under the 1901 Act, is also allowed to choose one Congressman, though its population is sometimes only one-ninth that of the heavily populated districts. Appellants contend that this reduction of the effectiveness of their vote is the result of a willful legislative discrimination against them, and thus amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment ... These allegations have not been denied. Under these circumstances, and since there is no adequate legal remedy for depriving a citizen of his right to vote, equity can and should grant relief.

It is difficult for me to see why the 1901 State Apportionment Act does not deny appellants equal protection of the laws.

...

The only type of case in which this Court has held that a federal district court should, in its discretion, stay its hand any more than a state court is where the question is one which state courts or administrative agencies have special competence to decide. This is not that type of question. What is involved here is the right to vote guaranteed by the Federal Constitution. It has always been the rule that, where a federally protected right has been invaded, the federal courts will provide the remedy to rectify the wrong done ...

Nor is there any more difficulty in enforcing a decree in this case than there was in the *Smiley* case. It is true that declaration of invalidity of the State Act and the enjoining of state officials would result in prohibiting the State from electing Congressmen under the system of the old congressional districts. But it would leave the State free to elect them from the State at large, which, as we held in the *Smiley* case, is a manner authorized by the Constitution. It is said that it would be inconvenient for the State to conduct the election in this manner. But it has an element of virtue that the more convenient method does not have — namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives, as is essential under a free government, and it is constitutional.

MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

Excerpted by Petar Jeknic



Baker v. Carr

369 U.S. 186 (1962)

Vote: 6-2

Decision: Reversed

Majority: Brennan, joined by Warren, Black, Douglas, Clark, and Stewart

Concurrence: Douglas

Concurrence: Clark

Concurrence: Stewart

Dissent: Frankfurter, joined by Harlan

Dissent: Harlan, joined by Frankfurter

MR. JUSTICE BRENNAN delivered the opinion of the Court.

... The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States

by virtue of the debasement of their votes,” was dismissed by a three-judge court ... We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion.

... Tennessee’s standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. ... In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State’s population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

...

JUSTICIABILITY

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green*, and subsequent *per curiam* cases. The court stated: “From a review of these decisions there can be no doubt that the federal rule ... is that the federal courts ... will not intervene in cases of this type to compel legislative reapportionment.” 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.” The cited cases do not hold the contrary.

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.” *Nixon v. Herndon* (1927). 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 ... Appellants’ claim that they are being denied equal protection is justiciable, and if “discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.” ... But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the “political question” doctrine.

... The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the “political question” label to obscure the need for case-by-case inquiry.

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. ...

... 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. ...

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 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.

Excerpted by Petar Jeknic



Wesberry v. Sanders

376 U.S. 1 (1964)

Vote: 7-2

Decision: Reversed

Majority: Black, joined by Warren, Douglas, Brennan, White, and Goldberg

Concur/Dissent: Clark

Dissent: Harlan, joined by Stewart (in part)

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellants are citizens and qualified voters of Fulton County, Georgia, and as such are entitled to vote in congressional elections in Georgia's Fifth Congressional District. That district, one of ten created by a 1931 Georgia statute, includes Fulton, Dekalb, and Rockdale Counties and has a population according to the 1960 census of 823,680. The average population of the ten districts is 394,312, less than half that of the Fifth. One district, the Ninth, has only 272,154 people, less than one-third as many as the Fifth. Since there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.

Claiming that these population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians, the appellants brought this action ...

We agree with the District Court that the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District. A single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention. The history of the

Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

During the Revolutionary War the rebelling colonies were loosely allied in the Continental Congress, a body with authority to do little more than pass resolutions and issue requests for men and supplies. Before the war ended the Congress had proposed and secured the ratification by the States of a somewhat closer association under the Articles of Confederation. ... Farsighted men felt that a closer union was necessary if the States were to be saved from foreign and domestic dangers.

The result was the Constitutional Convention of 1787, called for “the sole and express purpose of revising the Articles of Confederation. ...” When the Convention met in May, this modest purpose was soon abandoned for the greater challenge of creating a new and closer form of government than was possible under the Confederation. ...

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. ...

The dispute came near ending the Convention without a Constitution. Both sides seemed for a time to be hopelessly obstinate. Some delegations threatened to withdraw from the Convention if they did not get their way. ... The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise, based on a proposal which had been repeatedly advanced by Roger Sherman and other delegates from Connecticut. It provided on the one hand that each State, including little Delaware and Rhode Island, was to have two Senators. ... The other side of the compromise was that, as provided in Art. I, § 2, members of the House of Representatives should be chosen “by the People of the several States” and should be “apportioned among the several States ... according to their respective Numbers.” While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson of Connecticut had summed it up well: “in *one* branch the *people*, ought to be represented; in the *other*, the *States*.”

The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent “people” they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State’s inhabitants. The Constitution embodied Edmund Randolph’s proposal for a periodic census to ensure “fair representation of the people,” an idea endorsed by Mason as assuring that “numbers of inhabitants” should always be the measure of representation in the House of Representatives. ...

It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. ...

It is in the light of such history that we must construe Art. I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen “by the People of the several States” and shall be “apportioned among the several States ... according to their respective Numbers.” It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, or diluted by stuffing of the ballot box. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. In urging the people to adopt the Constitution, Madison said in No. 57 of *The Federalist*:

“Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. ...”

Readers surely could have fairly taken this to mean, “one person, one vote.”

While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Reversed and remanded.

Excerpted by Petar Jeknic



Reynolds v. Sims

377 U.S. 533 (1964)

Vote: 8-1

Decision: Affirmed

Majority: Warren, joined by Black, Douglas, Brennan, White, and Goldberg

Concurrences: Clark

Concurrence: Stewart

Dissent: Harlan

MR. CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under the Equal Protection Clause of the Federal Constitution, the

existing and two legislatively proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures.

... The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment ...

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied “equal suffrage in free and equal elections ... and the equal protection of the laws” in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution. The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which “clearly demonstrates that no reapportionment ... shall be effected”; that representation at any future constitutional convention would be established by the legislature, making it unlikely that the membership of any such convention would be fairly representative ...

On July 21, 1962, the District Court held that the inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been “generally conceded” by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. Under the existing provisions, applying 1960 census figures, only 25.1% of the State’s total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House ...

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people, or as a result of a constitutional convention convened after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature. ...

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. *Ex parte Yarbrough* (1884) ... In *Mosley* (1915), the Court stated that it is “as equally unquestionable that the right to have one’s vote counted is as open to protection ... as the right to put a ballot in a box.” The right to vote can neither be denied outright, nor destroyed by alteration of

ballots, nor diluted by ballot-box stuffing. As the Court stated in *Classic* (1941), “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . .” Racially based gerrymandering, *Gomillion v. Lightfoot* (1960) and the conducting of white primaries, *Nixon v. Herndon* (1927), both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . .

... the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, 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 . . . While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State’s citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like *Skinner v. Oklahoma* (1942), such a case “touches a sensitive and important area of human rights,” and “involves one of the basic civil rights of man,” presenting questions of alleged “invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.” 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. Almost a century ago, in *Yick Wo v. Hopkins* (1886), the Court referred to “the political franchise of voting” as “a fundamental political right, because preservative of all rights.”

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 gainsaid 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. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. 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. One must be ever aware that the Constitution forbids “sophisticated as well as simple-minded modes of discrimination.” ...

... [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

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, *Brown v. Board of Education* (1954), or economic status, *Griffin v. Illinois* (1956), *Douglas v. California* (1963). Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

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. The complexities of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

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 for state legislators 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, under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. ...

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, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation followed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population. Seats in the Alabama House, under the proposed constitutional amendment, are distributed by giving each of the 67 counties at least one, with the remaining 39 seats being allotted among the more populous counties on a population basis. This scheme, at least at first glance, appears to resemble that prescribed for the Federal House of Representatives, where the 435 seats are distributed among the States on a population basis, although each State, regardless of its population, is given at least one Congressman. Thus, although there are substantial differences in underlying rationale and result, the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress. Thus, although there are substantial differences in underlying rationale and result, the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress.

... Much has been written ... about the applicability of the so-called federal analogy to state legislative apportionment arrangements. ...

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. ... But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. ...

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.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. ...

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. ...

We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well-considered exercise of judicial power ...

... [W]e affirm the judgment below and remand the cases for further proceedings consistent with the views stated in this opinion.

It is so ordered.

Original excerpt in Ruthann Robson, [Liberty, Equality, and Due Process: Cases, Controversies, and Contexts in Constitutional Law](#), Published by CALI eLangdell Press. Further excerpted by Petar Jeknic. Licensed under [CC BY-NC-SA](#).



Voting Districts or Redistricting and Race

Gomillion v. Lightfoot

364 U.S. 339 (1960)

Vote: 9-0

Decision: Reversed

Majority: Frankfurter, joined by Warren, Black, Douglas, Clark, Harlan, Brennan, and Stewart

Concurrence: Whittaker

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

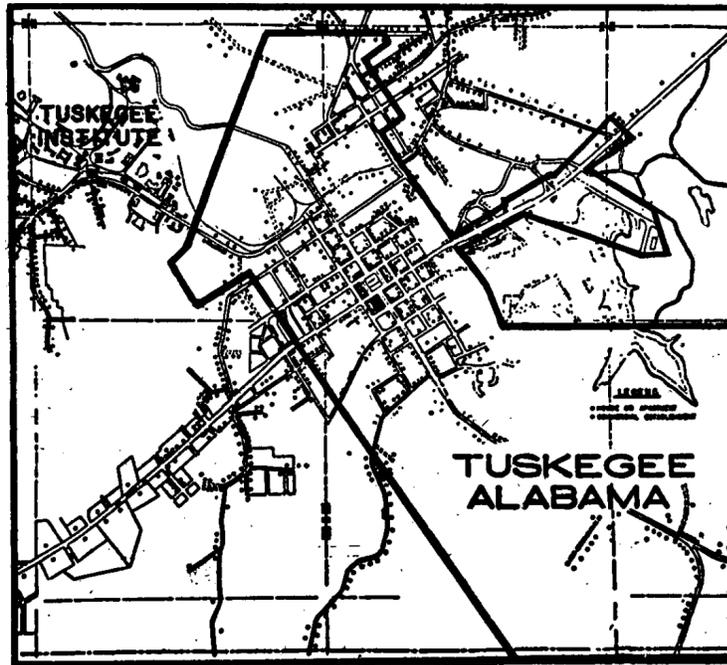
This litigation challenges the validity, under the United States Constitution, of Local Act No. 140, passed by the Legislature of Alabama in 1957, redefining the boundaries of the City of Tuskegee. Petitioners, Negro citizens of Alabama who were, at the time of this redistricting measure, residents of the City of Tuskegee, brought an action in the United States District Court for the Middle District of Alabama for a declaratory judgment that Act 140 is unconstitutional, and for an injunction to restrain the Mayor and officers of Tuskegee and the officials of Macon County, Alabama, from enforcing the Act against them and other Negroes similarly situated. Petitioners' claim is that enforcement of the statute, which alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure, will constitute a discrimination against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will deny them the right to vote in defiance of the Fifteenth Amendment.

The respondents moved for dismissal of the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction of the District Court. The court granted the motion, stating,

“This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama.”

On appeal, the Court of Appeals for the Fifth Circuit, affirmed ... We brought the case here since serious questions were raised concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments.

At this stage of the litigation, we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution. The complaint, charging that Act 140 is a device to disenfranchise Negro citizens, alleges the following facts: Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure.



The entire area of the square comprised the City prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city

The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.

These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson* (1939).

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. ...

... The Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. ...

... [S]uch power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the grab of the realignment of political subdivisions. “It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.” *Frost & Frost Trucking Co. v. Railroad Commission of California* (1926).

... A statute which is alleged to have worked unconstitutional deprivations of petitioners’ rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city’s boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights

For these reasons, the principal conclusions of the District Court and the Court of Appeals are clearly erroneous and the decision below must be

Reversed.

MR. JUSTICE WHITTAKER, concurring.

I concur in the Court’s judgment, but not in the whole of its opinion. It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution. I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act No. 140 to abridge petitioners’ “right ... to vote” in the Fifteenth Amendment sense. It seems to me that the “right ... to vote” that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division. And, inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one’s right to vote in Division A is not abridged by a redistricting that places his residence in Division B if he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B ...

But it does seem clear to me that accomplishment of a State’s purpose — to use the Court’s phrase — of “fencing Negro citizens out of” Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment, *Brown v. Board of Education* (1954), *Cooper v. Aaron* (1958), and, as stated, I would think the decision should be rested on that ground — which, incidentally, clearly would not involve, just as the cited cases did not involve, the *Colegrove* problem.

Excerpted by Petar Jeknic



Thornburgh v. Gingles

478 U.S. 30 (1986)

Note: This is a statutory case but the decision here is important for understanding the next two cases; thus, a short excerpt has been included.

Vote: 9-0

Decision: Affirmed in part and reversed in part

Majority: Brennan Burger, joined by Burger, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O’Connor

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, IV-A, and V, an opinion with respect to Part III-C, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, and an opinion with respect to Part IV-B, in which JUSTICE WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, *as amended* June 29, 1982. 42 U.S.C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters “to participate in the political process and to elect representatives of their choice.” § 2(b), 96 Stat. 134.

...

Preliminarily, the [District] court found that black citizens constituted a distinct population and registered-voter minority in each challenged district. The court noted that, at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the

court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2, and enjoined appellants from conducting elections pursuant to those portions of the plan ... We noted probable jurisdiction, 471 U.S. 1064 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

...

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb* (1971), a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election ...

...

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a *prima facie* case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent.

...

The District Court in this case carefully considered the totality of the circumstances and found that, in each district, racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, *see supra*, at *Thornburg v. Gingles* (1986), we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

Excerpted by Rorie Solberg



Shaw v. Reno

509 U.S. 630 (1993)

Vote: 5-4

Decision: Reversed

Majority: O'Connor, joined by Rehnquist, Scalia, Kennedy, and Thomas

Dissent: White, joined by Blackmun, Stevens, and Souter

O'Connor, J., delivered the opinion for a unanimous 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 racebased state legislation designed to benefit members of historically disadvantaged racial minority groups. As a result of the 1990 census, North Carolina became entitled to a 12th seat in the United States House of Representatives. The General Assembly enacted a reapportionment plan that included one majority-black congressional district. After the Attorney General of the United States objected to the plan pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, the General Assembly passed new legislation creating a second majority-black district. 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.

The voting age population of North Carolina is approximately 78% white, 20% black, and 1% Native American; the remaining 1% is predominantly Asian. App. to Brief for Federal Appellees 16a. The black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the State’s 100 counties. Brief for Appellants 57. Geographically, the State divides into three regions: the eastern Coastal Plain, the central Piedmont Plateau, and the western mountains. H. Lefler & A. Newsom, *The History of a Southern State: North Carolina* 18-22 (3d ed. 1973). The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part. O. Gade & H. Stillwell, *North Carolina: People and Environments* 65-68 (1986).

Forty of North Carolina’s one hundred counties are covered by § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, which prohibits a jurisdiction subject to its provisions from implementing changes in a “standard, prac-

tice, or procedure with respect to voting” without federal authorization, *ibid.* ... Because the General Assembly’s reapportionment plan affected the covered counties, the parties agree that § 5 applied. Tr. of Oral Arg. 14, 27-29. The State chose to submit its plan to the Attorney General for preclearance.

The Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, interposed a formal objection to the General Assembly’s plan. The Attorney General specifically objected to the configuration of boundary lines drawn in the south-central to southeastern region of the State. In the Attorney General’s view, the General Assembly could have created a second majority-minority district “to give effect to black and Native American voting strength in this area” by using boundary lines “no more irregular than [those] found elsewhere in the proposed plan,” but failed to do so for “pretextual reasons.” See App. to Brief for Federal Appellees IOa-IIa.

... Instead, the General Assembly enacted a revised redistricting plan, 1991 N. C. Extra Sess. Laws, ch. 7, that included a second majority-black district. The General Assembly located the second district not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85.

The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the South Carolina border. District 1 has been compared to a “Rorschach ink-blot test,” *Shaw v. Barr* (1992) (Voorhees, C. J., concurring in part and dissenting in part), and a “bug splattered on a windshield,” *Wall Street Journal*, Feb. 4, 1992, p. A14.

The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas “until it gobbles in enough enclaves of black neighborhoods.” 808 F. Supp., at 476-477 (Voorhees, C. J., concurring in part and dissenting in part). Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to “trade” districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. See Brief for Republican National Committee as *Amicus Curiae* 14-15 ...

The Attorney General did not object to the General Assembly’s revised plan. But numerous North Carolinians did ... alleging that the plan constituted an unconstitutional political gerrymander under *Davis v. Bandemer* (1986). That claim was dismissed, see *Pope v. Blue* (1992), and this Court summarily affirmed

Shortly after the complaint in *Pope v. Blue* was filed, appellants instituted the present action in the United States District Court for the Eastern District of North Carolina. Appellants alleged not that the revised plan constituted a political gerrymander, nor that it violated the “one person, one vote” principle, see *Reynolds v. Sims* (1964), but that the State had created an unconstitutional *racial* gerrymander.

...

Appellants contended that the General Assembly’s revised reapportionment plan violated several provisions of the United States Constitution, including the Fourteenth Amendment. They alleged that the General Assembly deliberately “create[d] two Congressional Districts in which a majority of black voters was concentrated arbitrarily-without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions” with the purpose “to create Congressional Districts along racial lines” and to assure the election of two black representatives to Congress. App. to Juris. Statement 102a.

...

By a 2-to-1 vote, the District Court also dismissed the complaint against the state appellees. The majority found no support for appellants’ contentions that race-based districting is prohibited by Article I, § 4, or Article I, § 2, of the Constitution, or by the Privileges and Immunities Clause of the Fourteenth Amendment.

...

We noted probable jurisdiction. 506 U. S. 1019 (1992).

“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society. ...” *Reynolds v. Sims* (1964). For much of our Nation’s history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that “[t]he right of citizens of the United States to vote” no longer would be “denied or abridged ... by any State on account of race, color, or previous condition of servitude.” U. S. Const., Amdt. 15, § 1.

But “[a] number of states ... refused to take no for an answer and continued to circumvent the fifteenth amendment’s prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of pervasive racial discrimination.” Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose V s. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 637 (1983) ...

Another of the weapons in the States’ arsenal was the racial gerrymander-“the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes.” *Bandemer* (1986) (Powell, J., concurring in part and dissenting in part) ...

But it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. Drawing on the “one person, one vote” principle, this Court recognized that “[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot.” ... Accordingly, the Court held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. Congress, too, responded to the problem of vote dilution. In 1982, it amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group’s voting strength, regardless of the legislature’s intent. 42 U. S. C. § 1973; see *Thornburg v. Gingles* (1986) (applying amended § 2 to vote-dilution claim involving multimember districts); see also *Voinovich v. Quilter* (1993) (single-member districts).

It is against this background that we confront the questions presented here. In our view, the District Court properly dismissed appellants' claims against the federal appellees. Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering. That argument strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.

An understanding of the nature of appellants' claim is critical to our resolution of the case. In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process.

Despite their invocation of the ideal of a "color-blind" Constitution, see *Plessy v. Ferguson* (1896) (Harlan, J., dissenting), appellants appear to concede that race-conscious redistricting is not always unconstitutional. See Tr. of Oral Arg. 16-19. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause.

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Arndt. 14, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race ...

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ... Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.

Appellants contend that redistricting legislation that is so bizarre on its face that it is "unexplainable on grounds other than race," *Arlington Heights, supra*, at 266, demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.

...

... *Gomillion* thus supports appellants' contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.

...

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. *Post*, at 668 (WHITE, J., dissenting). We hold only that, on the facts of this case, appellants 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.

In this case, the Attorney General suggested that North Carolina could have created a reasonably compact second majority-minority district in the south-central to southeastern part of the State. We express no view as to whether appellants successfully could have challenged such a district under the Fourteenth Amendment. We also do not decide whether appellants’ complaint stated a claim under constitutional provisions other than the Fourteenth Amendment. 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 justification. 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.

Excerpted by Kimberly Clairmont



Miller v. Johnson

515 U.S. 900 (1995)

Vote: 5-4

Decision: Affirmed

Majority: Kennedy, joined by Rehnquist, O'Connor, Thomas, and Scalia

Concurrence: O'Connor

Dissent: Stevens

Dissent: Ginsburg, joined by Breyer, Stevens, and Souter (except as to Part III-B)

JUSTICE KENNEDY delivered the opinion of the Court.

The constitutionality of Georgia's congressional redistricting plan is at issue here. In *Shaw v. Reno*, 509 U. S. 630 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw*, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, 1. Its central mandate is racial neutrality in governmental decisionmaking. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, 1. Its central mandate is racial neutrality in governmental decisionmaking ... The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, 1. Its central mandate is racial neutrality in governmental decisionmaking.

In *Shaw v. Reno*, we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task ...

This litigation requires us to apply the principles articulated in *Shaw* to the most recent congressional redistricting plan enacted by the State of Georgia ...

In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act (Act) ... In consequence, § 5 of the Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a “standard, practice, or procedure with respect to voting” made after November 1, 1964 ... The preclearance mechanism applies to congressional redistricting plans, and requires that the proposed change “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” ... “[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” ...

... Citing much evidence of the legislature’s purpose and intent in creating the final plan, as well as the irregular shape of the district (in particular several appendages drawn for the obvious purpose of putting black populations into the district), the court found that race was the overriding and predominant force in the districting determination. The [District] court proceeded to apply strict scrutiny. Though rejecting proportional representation as a compelling interest, it was willing to assume that compliance with the Act would be a compelling interest ... [T]he court found that the Act did not require three majority-black districts, and that Georgia’s plan for that reason was not narrowly tailored to the goal of complying with the Act ...

Finding that the “evidence of the General Assembly’s intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved,” the District Court held that race was the predominant, overriding factor in drawing the Eleventh District ...

Appellants do not take issue with the court’s factual finding of this racial motivation. Rather, they contend that evidence of a legislature’s deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw*. They argue that, regardless of the legislature’s purposes, a plaintiff must demonstrate that a district’s shape is so bizarre that it is unexplainable other than on the basis of race, and that appellees failed to make that showing here. Appellants’ conception of the constitutional violation misapprehends our holding in *Shaw* and the equal protection precedent upon which *Shaw* relied ...

Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting ...

In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district’s geometry and makeup nor required to make a threshold showing of bizarreness. Today’s litigation requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge ...

The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process ...

The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The 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. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." ...

In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district ...

To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest ... We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied ...

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had policy ... and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans ...

The Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is

neither assured nor well served, however, by carving electorates into racial blocs.”If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.” ...

It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

The judgment of the District Court is affirmed, and the cases are remanded for further proceedings consistent with this decision.

It is so ordered.

Excerpted by Kimberly Clairmont



Bush v. Vera

517 U.S. 952 (1996)

Vote: 5-4

Decision: Affirmed

Majority: O’Connor, joined by Rehnquist, and Kennedy

Concurrence: O’Connor

Concurrence: Kennedy

Concurrence: Thomas, joined by Scalia

Dissent: Stevens, joined by Ginsburg, and Breyer

Dissent: Souter, joined by Ginsburg, and Breyer

JUSTICE O’CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

This is the latest in a series of appeals involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census ... That census revealed a population increase, largely in urban minority populations, that entitled Texas to three additional congressional seats. In response, and with a view to complying with the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U. S. C. § 1973 et seq., the Texas Legislature promulgated a redistricting plan that, among other things, created District 30, a new majority-African-American district in Dallas County; created District 29, a new majority-Hispanic district in and around Houston in Harris County; and reconfigured District 18, which is adjacent to District 29, to make it a majority- African-American district. The Department of Justice precleared that plan under VRA § 5 in 1991, and it was used in the 1992 congressional elections ...

The plaintiffs, six Texas voters, challenged the plan, alleging that 24 of Texas' 30 congressional districts constitute racial gerrymanders in violation of the Fourteenth Amendment. The three-judge United States District Court for the Southern District of Texas held Districts 18, 29, and 30 unconstitutional ...

We must now determine whether those districts are subject to strict scrutiny. Our precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny. Strict scrutiny applies where “redistricting legislation ... is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles,” *Shaw I*, ...

Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts ... For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were “subordinated” to race. *Miller* (1995). By that, we mean that race must be “*the predominant* factor motivating the legislature’s [redistricting] decision.” *Ibid.* (emphasis added) ...

The present suit is a mixed motive suit. The appellants concede that one of Texas’ goals in creating the three districts at issue was to produce majority-minority districts, but they also cite evidence that other goals, particularly incumbency protection also played a role in the drawing of the district lines ... A careful review is, therefore, necessary to determine whether these districts are subject to strict scrutiny ...

We begin with general findings and evidence regarding the redistricting plan’s respect for traditional districting principles, the legislators’ expressed motivations, and the methods used in the redistricting process ...

These findings—that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data—together weigh in favor of the application of strict scrutiny. We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape, see *Shaw I* (1993), and the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*. *Miller* (1995). Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself.

...

Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny ... And we have recognized incumbency protection, at least in the limited form of “avoiding contests between incumbent[s],” as a legitimate state goal ... Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court’s conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.

[The Court determines that strict scrutiny applies for Districts 18, 29 and 30.]

Having concluded that strict scrutiny applies, we must determine whether the racial classifications embodied in any of the three districts are narrowly tailored to further a compelling state interest. Appellants point to three compelling interests: the interest in avoiding liability under the “results” test of VRA § 2(b), the interest in remedying past and present racial discrimination, and the “non retrogression” principle of VRA § 5 (for District 18 only) ...

A State’s interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, “identified discrimination”; second, the State “must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, ‘before it embarks on an affirmative action program.’” *Shaw II*, ante, at 910 (citations omitted). Here, the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA § 2 compliance defense, which we have assumed to be valid for purposes of this opinion. We have indicated that such problems will not justify race-based districting unless “the State employ[s] sound districting principles, and... the affected racial group’s residential patterns afford the opportunity of creating districts in which they will be in the majority.” *Shaw I* (1993), (internal quotation marks omitted). Once that standard is applied, our agreement with the District Court’s finding that these districts are not narrowly tailored to comply with § 2 forecloses this line of defense ...

Our legitimacy requires, above all, that we adhere to stare decisis, especially in such sensitive political contexts as the present, where partisan controversy abounds. Legislators and district courts nationwide have modified their practices-or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census-in response to *Shaw I*. Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter. Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes ...

We decline to retreat from that commitment today.

The judgment of the District Court is

Affirmed.

Excerpted by Kimberly Clairmont



Cooper v. Harris

532 U.S. 234 (2016)

Vote: 5-3

Decision: Affirmed

Majority: Kagan, joined by Thomas, Ginsburg, Breyer, and Sotomayor

Concurrence: Thomas

Dissent: Alito, joined by Roberts, and Kennedy

JUSTICE KAGAN delivered the opinion of the Court.

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of “sufficient justification,” from “separating its citizens into different voting districts on the basis of race.” ...

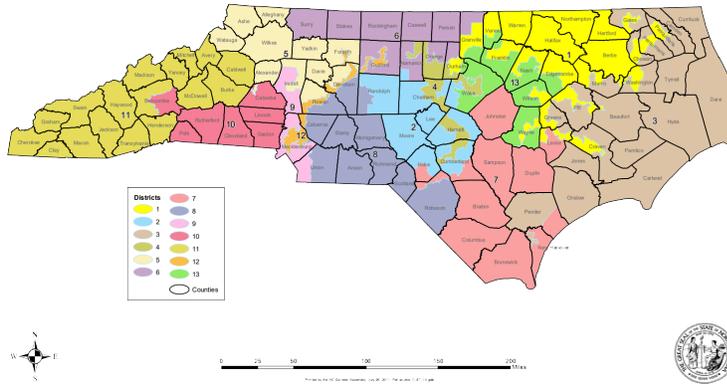
When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis ...

First, the plaintiff must prove that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Miller v. Johnson* (1995). That entails demonstrating that the legislature “subordinated” other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to “racial considerations.” *Ibid.* The plaintiff may make the required showing through “direct evidence” of legislative intent, “circumstantial evidence of a district’s shape and demographics,” or a mix of both ...

Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune-Hill* (2017). The burden thus shifts to the State to prove that its race-based sorting of voters serves a “compelling interest” and is “narrowly tailored” to that end. *Ibid.* This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act) ...

This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State’s northern border ...

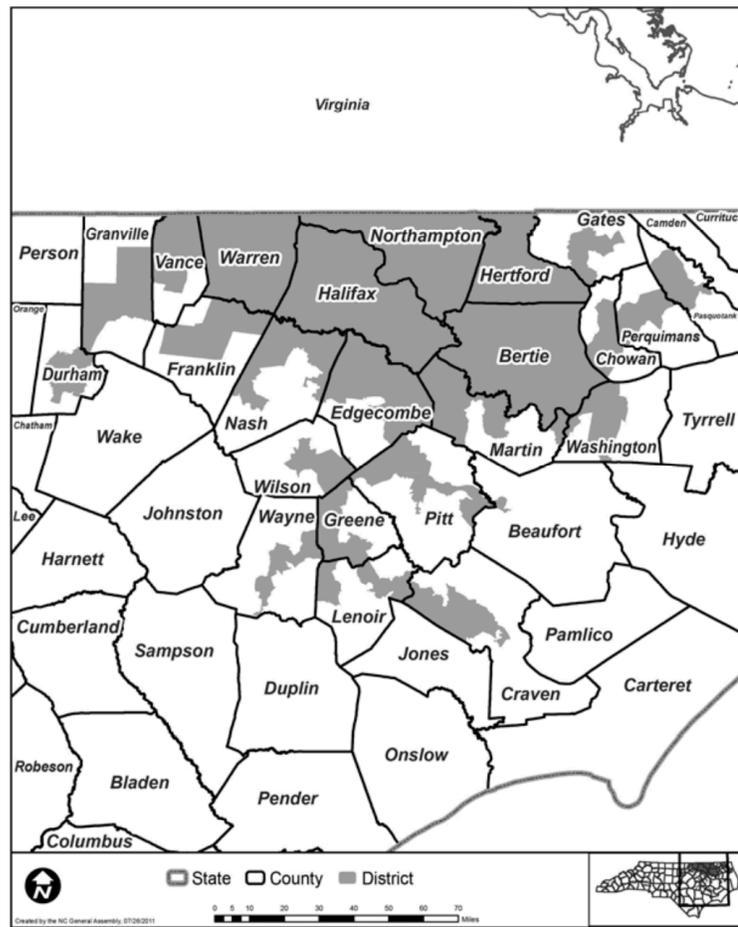
[From the Opinion’s appendix]



Congressional map
(Enacted 2011)



Congressional District 12
(Enacted 2011)



Congressional District 1
(Enacted 2011)

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district’s redesign. See *supra*, at 6–7. And it held that the State’s interest in complying with the VRA could not justify that consideration of race. See *supra*, at 7. We uphold both conclusions.

Uncontested evidence in the record shows that the State’s mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 “must include a sufficient number of African-Americans” to make it “a majority black district.” Similarly, Lewis informed the House and Senate redistricting committees that the district must have “a majority black voting age population.” And that objective was communicated in no uncertain terms to the legislators’ consultant. Dr. Hofeller testified multiple times at trial that Rucho and Lewis instructed him “to draw [District 1] with a [BVAP] in excess of 50 percent.” ...

Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but ...

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. And we have held that race-based districting is narrowly tailored to that objective if a State had “good reasons” for thinking that the Act demanded such steps.

North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had “good reasons to believe it needed to draw [District 1] as a majority-minority district to avoid Section 2 liability” for vote dilution. We now turn to that defense ...

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means “insist that a state legislature, when redistricting, determine precisely what percent minority population [§2 of the VRA] demands.” *Ibid.* But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d’être* is a legal mistake. Accordingly, we uphold the District Court’s conclusion that North Carolina’s use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

We now look west to District 12, making its fifth (!) appearance before this Court. This time, the district’s legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12’s BVAP in the name of ensuring preclearance under the VRA’s §5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that §5’s requirements in fact justified race-based changes to District 12—perhaps because §5 could not reasonably be understood to have done so ... Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12’s redesign. According to the State’s version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a “strictly” political gerrymander, without regard to race. 6 Record 1011. The mapmakers drew their lines, in other words, to “pack” District 12 with Democrats, not African-Americans. After hearing evidence supporting both parties’ accounts, the District Court accepted the plaintiffs’ ...

Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district’s conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II*, for example, this Court emphasized the “highly irregular” shape of then-District 12 in concluding that race predominated in its design. But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a “political motivation” as well as a racial one. And crucially, political and racial reasons are capable of yielding

similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines ...

Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses. That is proper, we have explained, because the various cues that "bear so heavily on the listener's understanding of and belief in what is said" are lost on an appellate court later sifting through a paper record ...

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent ...

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." Brief for Appellants 31 (emphasis deleted). That is true, the State says, irrespective of what other evidence is in the case—so even if the plaintiff offers powerful direct proof that the legislature adopted the map it did for racial reasons. Because the plaintiffs here (as all agree) did not present such a counter-map, North Carolina concludes that they cannot prevail. The dissent echoes that argument ...

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were really sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—this. Such would-have, could-have, and (to round out the set) should-have arguments are a familiar means of undermining a claim that an action was based on a permissible, rather than a prohibited, ground ...

But they are hardly the only means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof.

In *Bush v. Vera*, for example, this Court upheld a finding of racial predominance based on “substantial direct evidence of the legislature’s racial motivations”—including credible testimony from political figures and statements made in a §5 preclearance submission—plus circumstantial evidence that redistricters had access to racial, but not political, data at the “block-by-block level” needed to explain their “intricate” designs. See 517 U. S., at 960–963 (plurality opinion). Not a single Member of the Court thought that the absence of a counter-map made any difference. Similarly, it does not matter in this case, where the plaintiffs’ introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question ...

North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Cromartie II* imposed a non-negotiable “alternative-map requirement.”

According to North Carolina, that passage [*in Cromartie II*] alone settles this case, because it makes an alternative map “essential” to a finding that District 12 (a majority-minority district in which race and partisanship are correlated) was a racial gerrymander. Reply Brief 11. Once again, the dissent says the same.

But the reasoning of *Cromartie II* belies that reading. The Court’s opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there. (Certainly, the dissent’s current defense of that rule was nowhere in evidence.) And given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim—we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were “adequate” to show “the predominance of race in the legislature’s line-drawing process.” 532 U. S., at 243–244. But that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail. Item by item, the Court discussed and dismantled the supposed proof, both direct and circumstantial, of race-based redistricting. All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim ...

In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day. But this case is most unlike *Cromartie II*, even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly’s intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs’ burden of debunking North Carolina’s “it was really politics” defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed ...

Applying a clear error standard, we uphold the District Court’s conclusions that racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Car-

olina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court's decision that §2 of the VRA gave North Carolina no good reason to reshuffle voters because of their race. We accordingly affirm the judgment of the District Court.

It is so ordered.

Excerpted by Kimberly Clairmont



Voting Districts and Partisan Gerrymandering

Rucho v. Common Cause

588 U.S. ____ (2019)

Vote: 5-4

Decision: Reversed

Majority: Roberts, joined by Thomas, Alito, Gorsuch, and Kavanaugh

Dissent: Kagan, joined by Ginsburg, Breyer, and Sotomayor

Chief Justice ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. ...

These cases require us to consider once again whether claims of excessive partisanship in districting are “justiciable” —that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.” He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did “not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” One Democratic state senator objected that entrenching the 10-3 advantage for Republicans was not “fair, reasonable, [or] balanced” because, as recently as 2012, “Democratic congressional candidates had received more votes on a statewide basis than Republican candidates.” The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliat-

ing against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of “the People” to elect their preferred candidates for Congress, in violation of the requirement in Article I, §2, of the Constitution that Members of the House of Representatives be chosen “by the People of the several States.” Finally, they alleged that the Plan violated the Elections Clause by exceeding the State’s delegated authority to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. *Common Cause v. Rucho* (2018). The defendants appealed directly to this Court under 28 U. S. C. §1253.

While that appeal was pending, we decided *Gill v. Whitford* (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly “cracked” or “packed” district. *Id.*, at ____ (slip op., at 17). A “cracked” district is one in which a party’s supporters are divided among multiple districts, so that they fall short of a majority in each; a “packed” district is one in which a party’s supporters are highly concentrated, so they win that district by a large margin, “wasting” many votes that would improve their chances in others.

... On the merits, the court found that “the General Assembly’s predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates,” and to “entrench Republican candidates” through widespread cracking and packing of Democratic voters. The court rejected the defendants’ arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan’s discriminatory effects. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. ...

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature —dominated by Democrats—undertook to redraw the lines of that State’s eight congressional districts. The Governor at the time, Democrat Martin O’Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a “serial gerrymanderer,” to advise the committee. The Governor later testified that his aim was to “use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping” one district. “[A] decision was made to go for the Sixth,” which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, §2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F. Supp. 3d 493 ...

... Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison* (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer* (2004) (plurality opinion). In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. *Baker v. Carr* (1962). Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].”

... The question here is whether there is an “appropriate role for the Federal Judiciary” in remedying the problem of partisan gerrymandering— whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.

In the leading case of *Baker v. Carr* (1962), voters in Tennessee complained that the State’s districting plan for state representatives “debase[d]” their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. ... [This Court] identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is “a lack of judicially discoverable and manageable standards for resolving it.” *Baker v. Carr* (1962). The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. ...

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot* (1960), concluding that a challenge to an “uncouth twenty-eight sided” municipal boundary line that excluded black voters from city elections stated a constitutional claim. *Gomillion v. Lightfoot* (1960) ...

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.”

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.” *Vieth* (2004).

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy’s counsel in *Vieth*: Any standard for resolving such claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” *Vieth* (2004). An important reason for those careful con-

straints is that, as a Justice with extensive experience in state and local politics put it, “[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.” *Bandemer* (1986). An expansive standard requiring “the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process,” *Vieth* (2004).

As noted, the question is one of degree: How to “provid[e] a standard for deciding how much partisan dominance is too much.” *LULAC* (2006). And it is vital in such circumstances that the Court act only in accord with especially clear standards: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Vieth* (2004). If federal courts are to “inject [themselves] into the most heated partisan issues” by adjudicating partisan gerrymandering claims, *Bandemer* (1986), they must be armed with a standard that can reliably differentiate unconstitutional from “constitutional political gerrymandering.” *Cromartie* (1999).

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.” *Bandemer* (1986).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O’Connor put it, such claims are based on “a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes.” “Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” ...

Unable to claim that the Constitution requires proportional representation out-right, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. ...

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, “[i]f all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” *Bandemer* (1986).

On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the “natural political geography” of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity “cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not.” *Vieth* (2004).

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. ...

And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should map drawers prioritize competing criteria? Should a court “reverse gerrymander” other parts of a State to counteract “natural” gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow. ...

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are “unguided and ill suited to the development of judicial standards,” *Vieth* (2004), and “results from one gerrymandering case to the next would likely be disparate and inconsistent,” (opinion of Kennedy, J.). ...

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” *Arizona State Legislature* (2015), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards

to limit and direct their decisions.”[J]udicial action must be governed by *standard*, by *rule*,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. *Vieth* (2004). Judicial review of partisan gerrymandering does not meet those basic requirements.

... What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority.”It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison* (1803). In this rare circumstance, that means our duty is to say “this is not law.”

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority’s own benchmarks. They do not require—indeed, they do

not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

... If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The “power,” James Madison wrote, “is in the people over the Government, and not in the Government over the people.”

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. ... Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to “rigging elections.” *Vieth v. Jubelirer* (2004) (Kennedy, J., concurring in judgment). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The “core principle of republican government,” this Court has recognized, is “that the voters should choose their representatives, not the other way around.” (omitted citation). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, “in the Government over the people.”

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us.

...

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude line-drawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. Just as important, advancements in computing

technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's —let alone the Framers'—gerrymanders.

... What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence— than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. *Reynolds v. Sims* (1964). And that opportunity “can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus “dilut[e] the weight of votes because of place of residence.” The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to “full[y] and effective[ly] participat[e] in the political process[.]” As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map “so as most to burden [the votes of] Party X's” supporters, it would violate the Equal Protection Clause. *Vieth* (2004). For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to “equal [electoral] participation.” *Reynolds* (1964).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. ... Once again, the majority never disagrees; it appears to accept the “principle that each person must have

an equal say in the election of representatives.” And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply. ...

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. ...

The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” ... Courts, the majority argues, will have to choose among contested notions of electoral fairness. ... And even once courts have chosen, the majority continues, they will have to decide “[h]ow much is too much?”—that is, how much deviation from the chosen “touchstone” to allow? ... In answering that question, the majority surmises, they will likely go far too far. So the whole thing is impossible, the majority concludes. But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge’s philosophizing but of the State’s own characteristics and judgments. The effects evidence in these cases accepted as a given the State’s physical geography (*e.g.*, where does the Chesapeake run?) and political geography (*e.g.*, where do the Democrats live on top of each other?). So the courts did not, in the majority’s words, try to “counteract ‘natural’ gerrymandering caused, for example, by the urban concentration of one party.” Still more, the courts’ analyses used the State’s own criteria for electoral fairness— except for naked par-

tisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office. ...

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10-3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these. ...

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds* (1964). Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill v. Whitford* (2018). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

... The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* (1803). That is what the courts below did. ... They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, “all political power flows from the people.” *Arizona State Legislature* (2015). And that means, as Alexander Hamilton once said, “that the people should choose whom they please to govern them.” But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Excerpted by Petar Jeknic



Contributors

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Petar Jeknic graduated in 2021 with a degree in political science with an emphasis on law & politics and a minor in history. He worked on this project his senior year at Oregon State and drafted chapter outlines before creating excerpts for the voting rights chapter. Before working on *Civil Rights & Liberties*, he was part of the American Politics Research Group and contributed to the paper “[Trump’s Judges & Diversity: Regression to the Mean or Remaking the Judiciary?](#)” which was published as part of *Open Judicial Politics*, version 2. After graduating, Petar volunteered in Denver, Colorado and Little Rock, Arkansas. He is applying to attend law school in 2023.

Sarah R. Mason studied Accounting at Oregon State University, minoring in political science. Her experience in Dr. Solberg’s constitutional law series provided the opportunity to work on this project. For the project, Sarah worked mostly on the free speech and expression chapter. Sarah graduated in 2022, and is working in Accounting in the Portland metro area. She plans to attend law school starting in fall of 2023.

Alexandria Metzdorf is a transgender alum of OSU with two BS degrees in economics and political science, and she plans to attend law school in 2024. She wants to help other trans people overcome unique challenges presented by the US legal system, breaking down barriers and shattering glass ceilings, with a particular focus on housing and discrimination. During COVID, she distributed \$250,000 in funding to families in need of rent relief through the OERAP program in Oregon. In her spare time, Alexandria enjoys taking care of her extensive aroid collection, mixing her own tea blends, making hot sauce from home grown peppers, watching esoteric narrative and documentary films, and listening to vinyl records.



Justices Serving on the Court 1790 - 1834

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1790

Justices serving on the Court, 1790

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Rutledge	Washington	None	1790-1791
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1791 – 1792

Justices serving on the Court, 1791 – 1792

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Johnson	Washington	None	1791-1793
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1793 – 1795

Justices serving on the Court, 1793 – 1795

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1796 – 1797

Justices serving on the Court, 1796 – 1797

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1798 – 1799

Justices serving on the Court, 1798 – 1799

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1800 – 1803

Justices serving on the Court, 1800 – 1803

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Moore	Adams	Federalist	1800-1804
Chase	Washington	None	1796-1811

1804 – 1805

Justices serving on the Court, 1804 – 1805

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1806

Justices serving on the Court, 1806

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1807 – 1810

Justices serving on the Court, 1807 – 1810

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811
Todd	Jefferson	Dem-Rep	1807-1826

1811

Justices serving on the Court, 1811

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826

1812 – 1822

Justices serving on the Court, 1812 – 1822

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

1823 – 1825

Justices serving on the Court, 1823 – 1825

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

1826 – 1828

Justices serving on the Court, 1826 – 1828

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Trimble	Adams, J.Q.	Jacksonian	1826-1828
Story	Madison	Dem-Rep	1812-1845

1829

Justices serving on the Court, 1829

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1830 – 1834

Justices serving on the Court, 1830 – 1834

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

[*Barron v. Baltimore*](#) 32 U.S. 243 (1833)

Justices Serving on the Court 1835 - 1889

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1835 – 1836

Justices serving on the Court, 1835 – 1836

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1837 – 1841

Justices serving on the Court, 1837 – 1841

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1842 – 1844

Justices serving on the Court, 1842 – 1844

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1845 – 1850

Justices serving on the Court, 1845 – 1850

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Woodbury	Polk	Democrat	1845-1851
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1851 – 1852

Justices serving on the Court, 1851 – 1852

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1853 – 1857

Justices serving on the Court, 1853 – 1857

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

1858 – 1861

Justices serving on the Court, 1858 – 1861

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

1862

Justices serving on the Court, 1862

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877

1863

Justices serving on the Court, 1863

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

1864 – 1869

Justices serving on the Court, 1864 – 1869

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

1870 – 1872

Justices serving on the Court, 1870 – 1872

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1873 – 1876

Justices serving on the Court, 1873 – 1876

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

[*Bradwell v. Illinois*](#) 83 U.S. 130 (1873)

[*Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.*](#) 111 U.S. 746 (1873)

[*United States v. Cruikshank*](#) 92 U.S. 542 (1876)

[*Minor v. Happersett*](#) 88 U.S. 162 (1876)

1877 – 1880

Justices serving on the Court, 1877 – 1880

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

[*Reynolds v. U.S.*](#) 8 U.S. 145 (1879)

[*Strauder v. W. Va.*](#) 100 U.S. 303 (1880)

1881

Justices serving on the Court, 1881

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1882 – 1887

Justices serving on the Court, 1882 – 1887

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Blatchford	Arthur	Republican	1882-1893
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

[*Hurtado v. California*](#) 110 U.S. 516 (1884)

[*Yick Wo v. Hopkins*](#) 118 U.S. 356 (1886)

[*Presser v. Illinois*](#) 116 U.S. 252 (1886)

1888 – 1889

Justices serving on the Court, 1888 – 1889

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

Justices Serving on the Court 1890 - 1937

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1890

Justices serving on the Court, 1890

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1891

Justices serving on the Court, 1891

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1892

Justices serving on the Court, 1892

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1893 – 1895

Justices serving on the Court, 1893 – 1895

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Jackson	Harrison	Republican	1893-1895
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1896 – 1897

Justices serving on the Court, 1896 – 1897

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

[*Plessy v. Ferguson*](#) 163 U.S. 537 (1896)

[*Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*](#) 166 U.S. 226 (1897)

1898 – 1901

Justices serving on the Court, 1898 – 1901

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

Maxwell v. Dow 176 U.S. 581 (1900)

1902

Justices serving on the Court, 1902

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

1903 – 1905

Justices serving on the Court, 1903 – 1905

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

[*Mass v. Jacobsen*](#) 197 U.S. 11 (1905)

1906 – 1909

Justices serving on the Court, 1906 – 1909

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Moody	Roosevelt	Republican	1906-1910
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

[*Mueller v. Oregon*](#) 208 U.S. 412 (1908)

1910

Justices serving on the Court, 1910

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Lurton	Taft	Republican	1910-1914
Moody	Roosevelt	Republican	1906-1910
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1911

Justices serving on the Court, 1911

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1912 – 1913

Justices serving on the Court, 1912 – 1913

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1914 – 1915

Justices serving on the Court, 1914 – 1915

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Guinn v. United States 238 U.S. 347 (1915)

1916 – 1921

Justices serving on the Court, 1916 – 1921

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Clarke	Wilson	Democrat	1916-1922
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

[*Schenck v. U.S.*](#) 249 U.S. 47 (1919)

[*Abrams v. United States*](#) 250 U.S. 216 (1919)

1922

Justices serving on the Court, 1922

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1923 – 1924

Justices serving on the Court, 1923 – 1924

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
McKenna	McKinley	Republican	1898-1925
Butler	Harding	Republican	1923-1939

[*Meyer v. Nebraska*](#) 262 U.S. 390 (1923)

1925 – 1929

Justices serving on the Court, 1925 – 1929

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

[*Gitlow v. NY*](#) 268 U.S. 652 (1925)

[*Pierce v. Society of Sisters*](#) 68 U.S. 510 (1925)

[*Whitney v. California*](#) 274 U.S. 357 (1925)

[*Buck v. Bell*](#) 274 U.S. 200 (1927)

[*Nixon v. Herndon*](#) 273 U.S. 536 (1927)

[*Olmstead v. U.S.*](#) 277 U.S. 438 (1928)

1930 – 1931

Justices serving on the Court, 1930 – 1931

Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

[*Near v. Minnesota*](#) 283 U.S. 697 (1931)

[*Stromberg v. People of the State of California*](#) 283 U.S. 359 (1931)

1932 – 1937

Justices serving on the Court, 1932 – 1937

Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Black	Roosevelt	Democrat	1937-1971
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Cardozo	Hoover	Republican	1932-1938
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

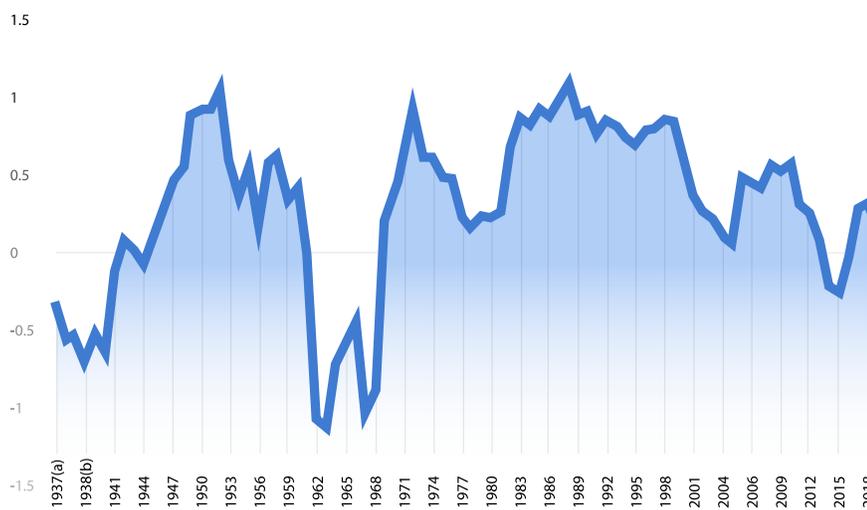
[*Nixon v. Condon*](#) 286 U.S. 73 (1932)

[*United States v. Miller*](#) 307 U.S. 174 (1934)

[*Grovey v. Townsend*](#) 265 U.S. 45 (1935)

Median Justice Scores Per Year 1937 - 2018

The following figure provides the Martin Quinn scores for the median (aka middle aka swing) justice for the years available. Positive scores are considered conservative and negative scores liberal. The higher the score, the further along the justice is on the ideological continuum. For more information on these scores, navigate to <https://mqscores.lsa.umich.edu/>.

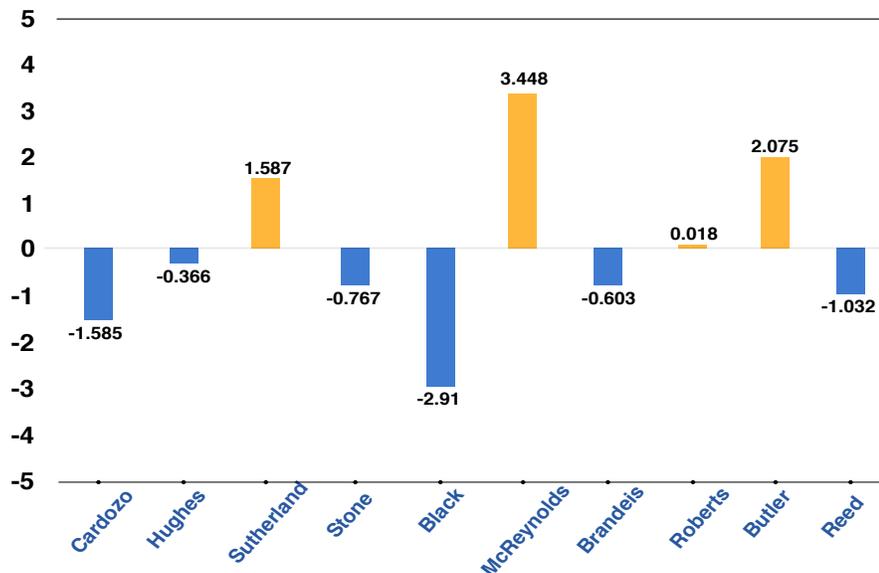


Median Justice Ideology scores per year, 1937 – 2018

Justices Serving on the Court 1937 - 1949

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1937



Justices serving on the Court and Martin Quinn Ideology scores, 1937

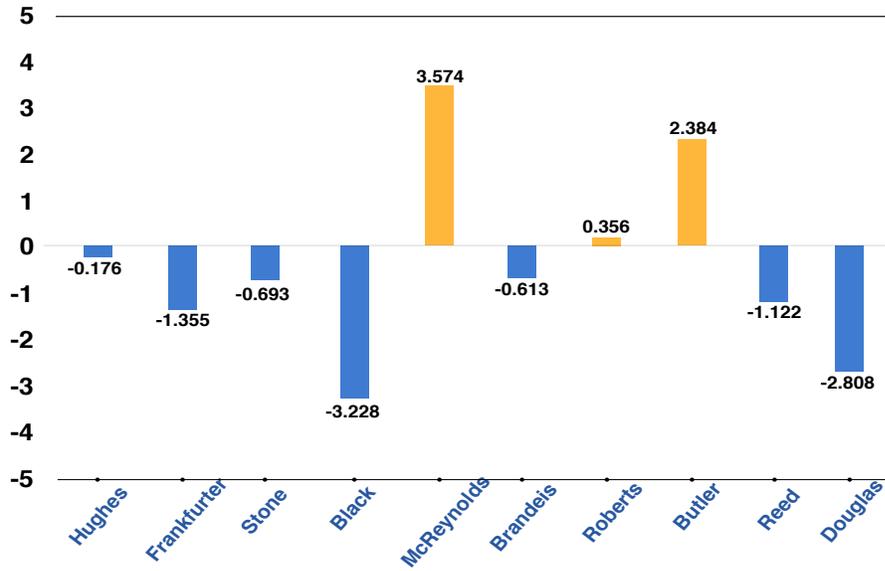
Justices serving on the Court, 1937

Justice	Mean	President	Party of President	Years Served
Cardozo	-1.585	Hoover	Republican	1932-1938
Hughes	-0.366	Hoover	Republican	1930-1941
Sutherland	1.587	Harding	Republican	1922-1938
Stone	-0.767	Coolidge	Republican	1925-1946
Black	-2.91	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.448	Wilson	Democrat	1914-1941
Brandeis	-0.603	Wilson	Democrat	1916-1939
Roberts	0.018	Hoover	Republican	1930-1945
Butler	2.075	Harding	Republican	1923-1939
Reed	-1.032	F.D. Roosevelt	Democrat	1938-1957

Chief Justice, 1937

Chief Justice	Median	Court Score
Hughes	-0.333	-0.01
Hughes	-0.559	-0.01

1938



Justices serving on the Court and Martin Quinn Ideology scores, 1938

Justices serving on the Court, 1938

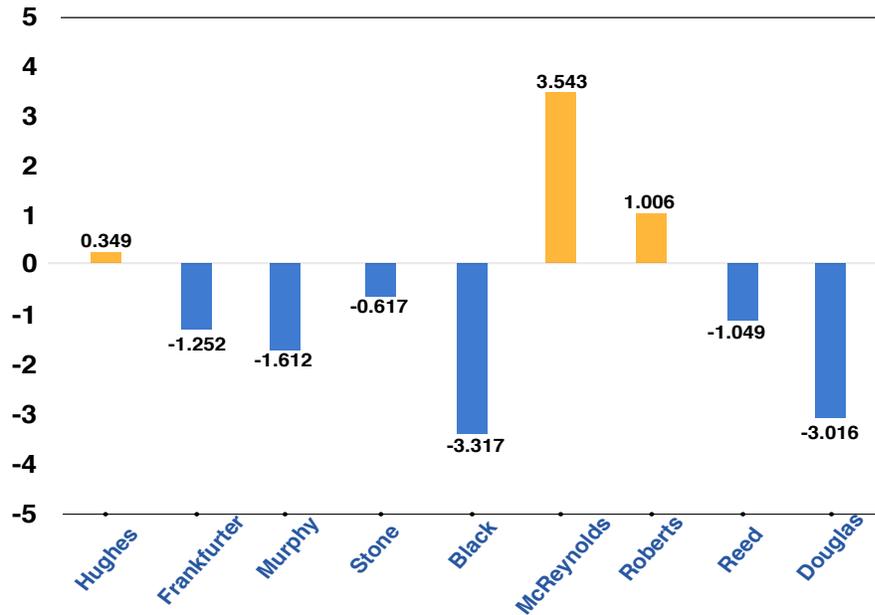
Justice	Mean	President	Party of President	Years Served
Hughes	-0.176	Hoover	Republican	1930-1941
Frankfurter	-1.355	F.D. Roosevelt	Democrat	1939-1962
Stone	-0.693	Coolidge	Republican	1925-1946
Black	-3.228	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.574	Wilson	Democrat	1914-1941
Brandeis	-0.613	Wilson	Democrat	1916-1939
Roberts	0.356	Hoover	Republican	1930-1945
Butler	2.384	Harding	Republican	1923-1939
Reed	-1.122	F.D. Roosevelt	Democrat	1938-1957
Douglas	-2.808	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1938

Chief Justice	Median	Court Score
Hughes	-0.526	-0.37
Hughes (2)	-0.681	-0.37

[*Missouri ex rel. Gaines v. Canada*](#) 305 U.S. 337 (1938)

1939



Justices serving on the Court and Martin Quinn Ideology scores, 1939

Justices serving on the Court, 1939

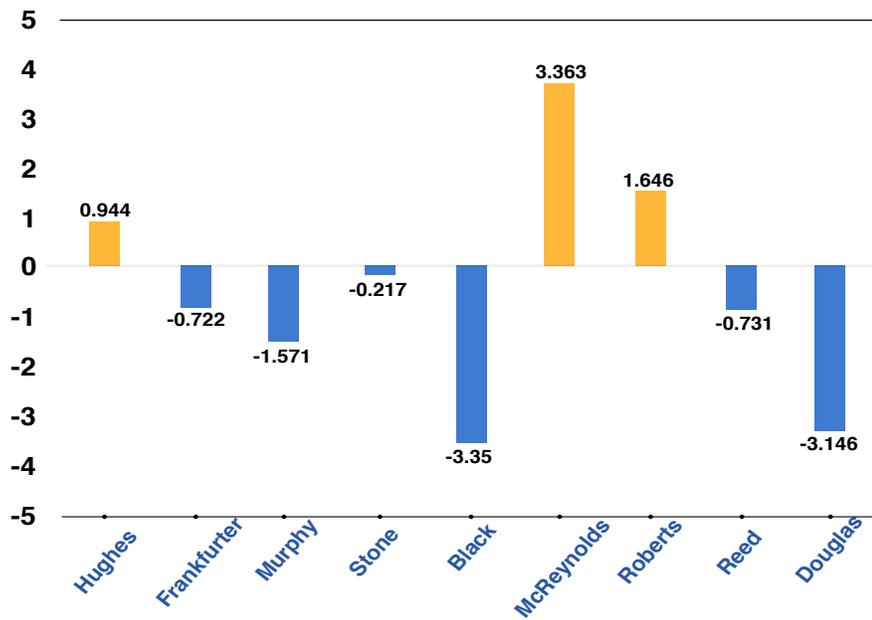
Justice	Mean	President	Party of President	Years Served
Hughes	0.349	Hoover	Republican	1930-1941
Frankfurter	-1.252	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.612	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.617	Coolidge	Republican	1925-1946
Black	-3.317	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.543	Wilson	Democrat	1914-1941
Roberts	1.006	Hoover	Republican	1930-1945
Reed	-1.049	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.016	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1939

Chief Justice	Median	Court Score
Hughes	-0.526	-0.66

[Lane v. Wilson](#) 307 U.S. 268 (1939)

1940



Justices serving on the Court and Martin Quinn Ideology scores, 1940

Justices serving on the Court, 1940

Justice	Mean	President	Party of President	Years Served
Hughes	0.944	Hoover	Republican	1930-1941
Frankfurter	-0.722	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.571	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.217	Coolidge	Republican	1925-1946
Black	-3.35	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.363	Wilson	Democrat	1914-1941
Roberts	1.646	Hoover	Republican	1930-1945
Reed	-0.731	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.146	F.D. Roosevelt	Democrat	1939-1975

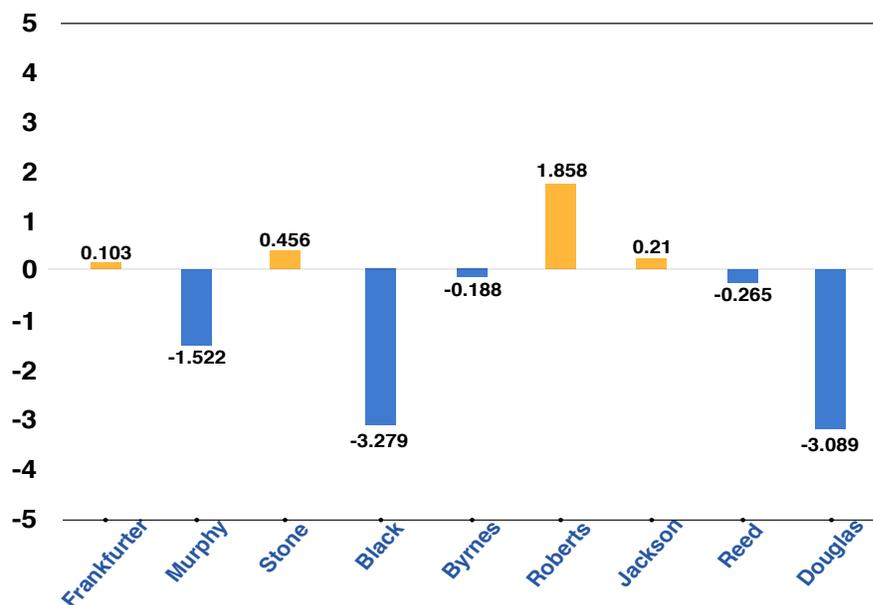
Chief Justice, 1940

Chief Justice	Median	Court Score
Hughes	-0.624	-0.42

[*Cantwell v. Connecticut*](#) 310 U.S. 296 (1940)

[*Minersville School Dist. et al. v. Gobitis et al.*](#) 310 U.S. 586 (1940)

1941



*Justices serving on the Court and Martin Quinn Ideology scores, 1941***Justices serving on the Court, 1941**

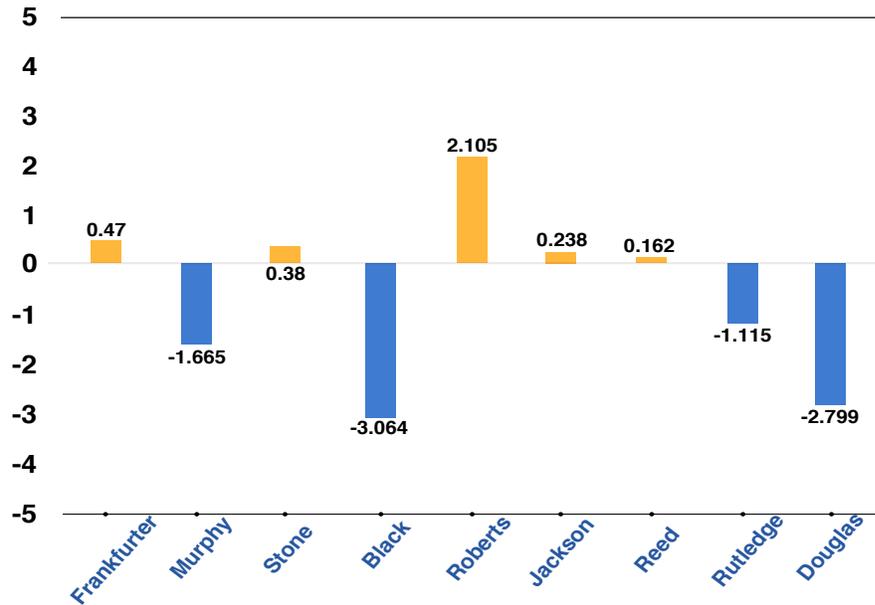
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.103	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.522	F.D. Roosevelt	Democrat	1940-1949
Stone	0.456	Coolidge	Republican	1925-1946
Black	-3.279	F.D. Roosevelt	Democrat	1937-1971
Byrnes	-0.188	F.D. Roosevelt	Democrat	1941-1942
Roberts	1.858	Hoover	Republican	1930-1945
Jackson	0.21	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.265	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.089	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1941

Chief Justice	Median	Court Score
Stone	-0.141	-0.64

[*U.S. v. Classic*](#) 313 U.S. 299 (1941)

1942



Justices serving on the Court and Martin Quinn Ideology scores, 1942

Justices serving on the Court, 1942

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.47	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.665	F.D. Roosevelt	Democrat	1940-1949
Stone	0.38	Coolidge	Republican	1925-1946
Black	-3.064	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.105	Hoover	Republican	1930-1945
Jackson	0.238	F.D. Roosevelt	Democrat	1941-1954
Reed	0.162	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.115	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.799	F.D. Roosevelt	Democrat	1939-1975

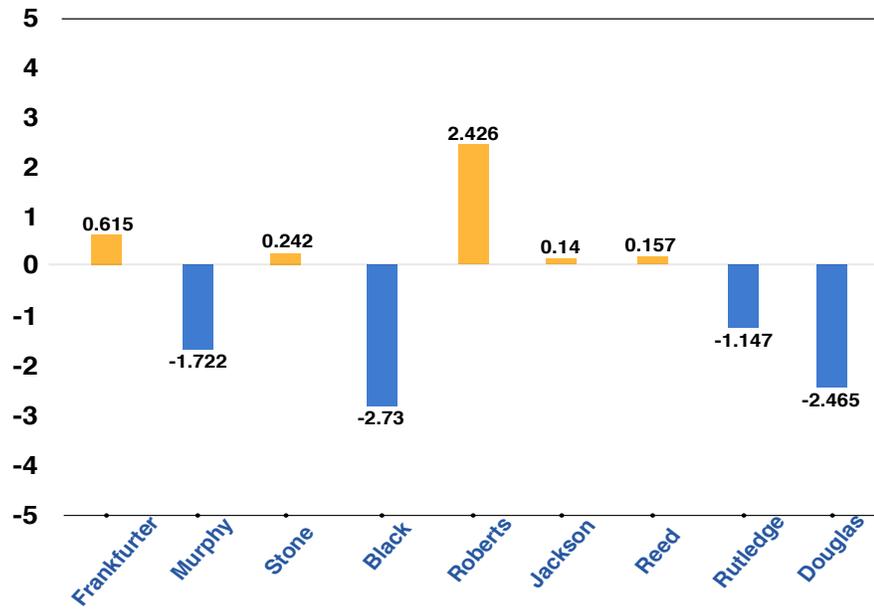
Chief Justice, 1942

Chief Justice	Median	Court Score
Stone	0.094	-0.59

[Chaplinsky v. New Hampshire](#) 315 U.S. 568 (1942)

Skinner v. Oklahoma 316 U.S. 535 (1942)

1943



Justices serving on the Court and Martin Quinn Ideology scores, 1943

Justices serving on the Court, 1943

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.615	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.722	F.D. Roosevelt	Democrat	1940-1949
Stone	0.242	Coolidge	Republican	1925-1946
Black	-2.73	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.426	Hoover	Republican	1930-1945
Jackson	0.14	F.D. Roosevelt	Democrat	1941-1954
Reed	0.157	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.147	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.465	F.D. Roosevelt	Democrat	1939-1975

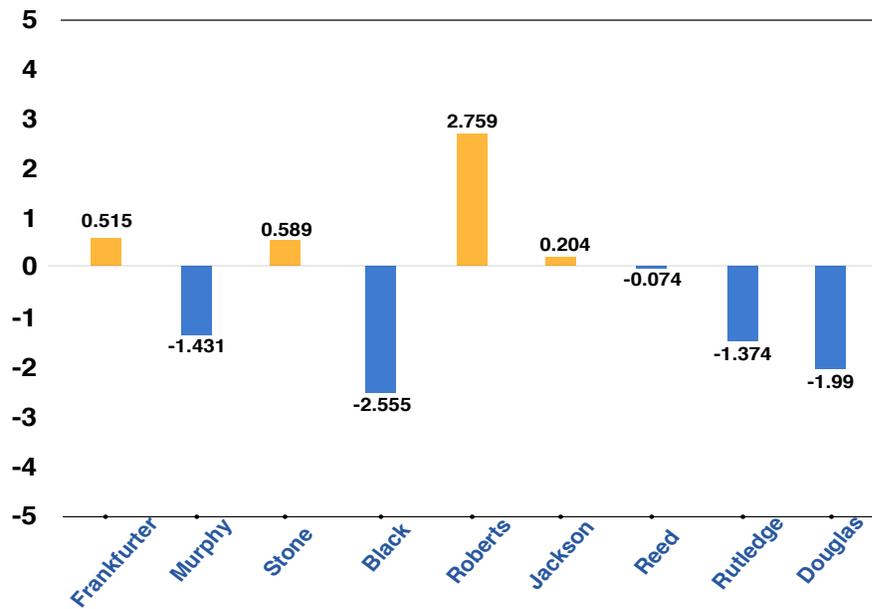
Chief Justice, 1943

Chief Justice	Median	Court Score
Stone	0.038	-0.50

[*Hirabayashi v. United States*](#) 320 U.S. 81 (1943)

[*West Virginia Board of Education v. Barnette*](#) 319 U.S. 624 (1943)

1944



Justices serving on the Court and Martin Quinn Ideology scores, 1944

Justices serving on the Court, 1944

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.515	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.431	F.D. Roosevelt	Democrat	1940-1949
Stone	0.589	Coolidge	Republican	1925-1946
Black	-2.555	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.759	Hoover	Republican	1930-1945
Jackson	0.204	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.074	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.374	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.99	F.D. Roosevelt	Democrat	1939-1975

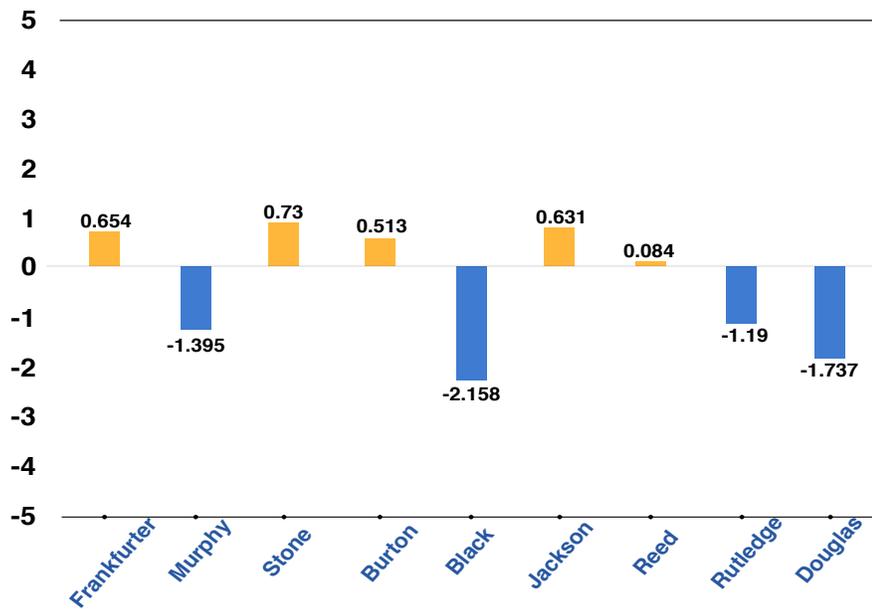
Chief Justice, 1944

Chief Justice	Median	Court Score
Stone	-0.084	-0.37

[*Korematsu v. United States*](#) 323 U.S. 214 (1944)

[*Smith v. Allwright*](#) 321 U.S. 649 (1944)

1945



Justices serving on the Court and Martin Quinn Ideology scores, 1945

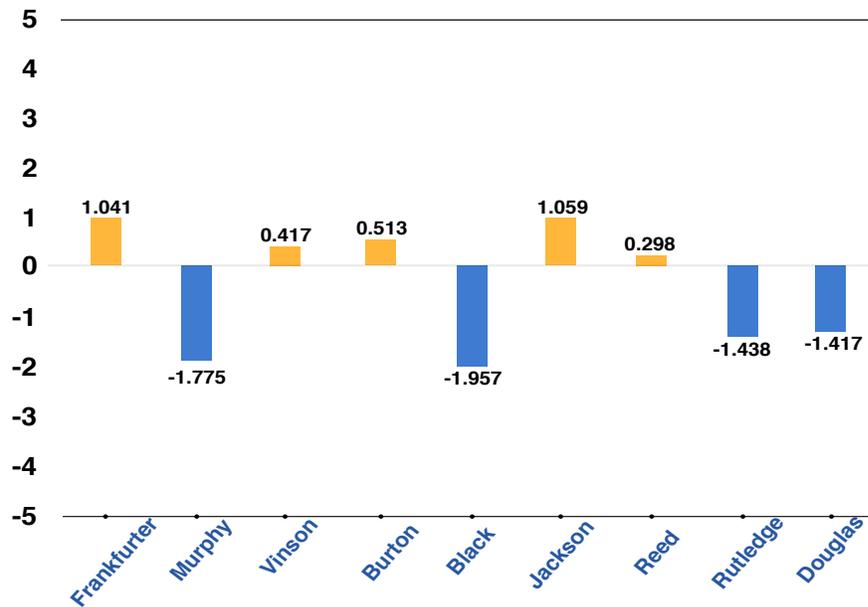
Justices serving on the Court, 1945

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.654	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.395	F.D. Roosevelt	Democrat	1940-1949
Stone	0.73	Coolidge	Republican	1925-1946
Burton	0.513	Truman	Democrat	1945-1958
Black	-2.158	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.631	F.D. Roosevelt	Democrat	1941-1954
Reed	0.084	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.19	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.737	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1945

Chief Justice	Median	Court Score
Stone	0.069	-0.43

1946



*Justices serving on the Court and Martin Quinn Ideology scores, 1946***Justices serving on the Court, 1946**

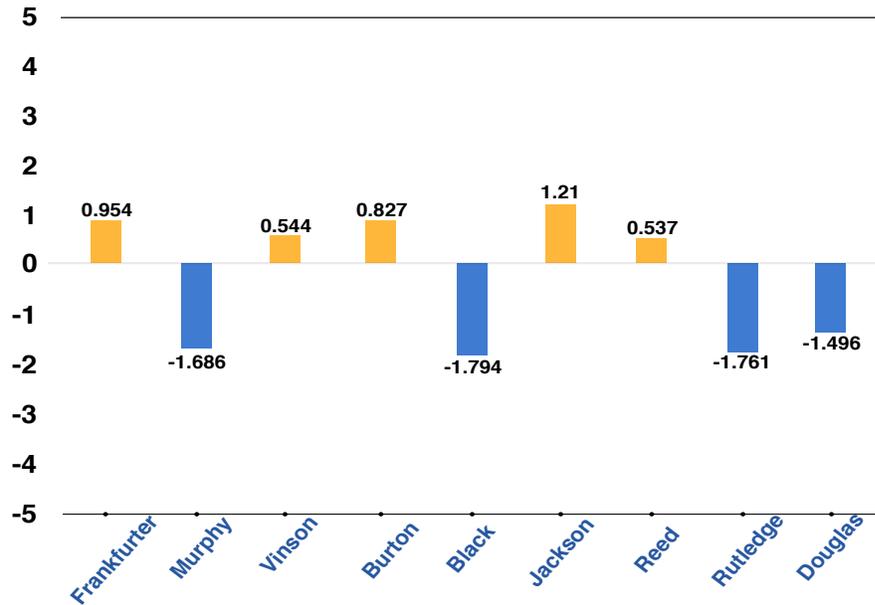
Justice	Mean	President	Party of President	Years Served
Frankfurter	1.041	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.775	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.417	Truman	Democrat	1946-1953
Burton	0.531	Truman	Democrat	1945-1958
Black	-1.957	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.059	F.D. Roosevelt	Democrat	1941-1954
Reed	0.298	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.438	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.417	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1946

Chief Justice	Median	Court Score
Vinson	0.245	-0.36

[*Colegrove v. Green*](#) 328 U.S. 549 (1946)

1947



Justices serving on the Court and Martin Quinn Ideology scores, 1947

Justices serving on the Court, 1947

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.954	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.686	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.544	Truman	Democrat	1946-1953
Burton	0.827	Truman	Democrat	1945-1958
Black	-1.794	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.21	F.D. Roosevelt	Democrat	1941-1954
Reed	0.537	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.761	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.496	F.D. Roosevelt	Democrat	1939-1975

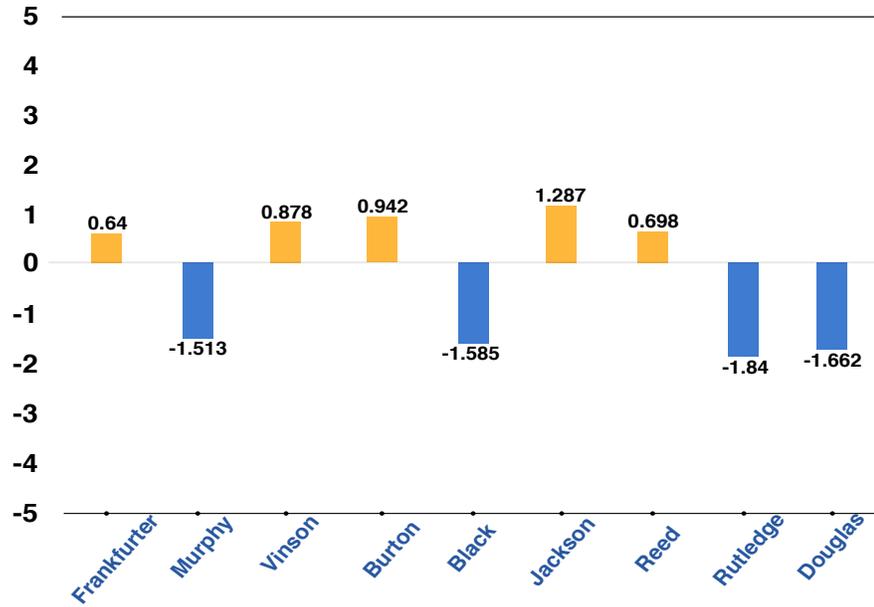
Chief Justice, 1947

Chief Justice	Median	Court Score
Vinson	0.448	-0.30

[*Everson v. Board of Education*](#) 330 U.S. 1 (1947)

Palko v. Connecticut 302 U.S. 319 (1947)

1948



Justices serving on the Court and Martin Quinn Ideology scores, 1948

Justices serving on the Court, 1948

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.64	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.513	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.878	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.585	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.287	F.D. Roosevelt	Democrat	1941-1954
Reed	0.698	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.84	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.662	F.D. Roosevelt	Democrat	1939-1975

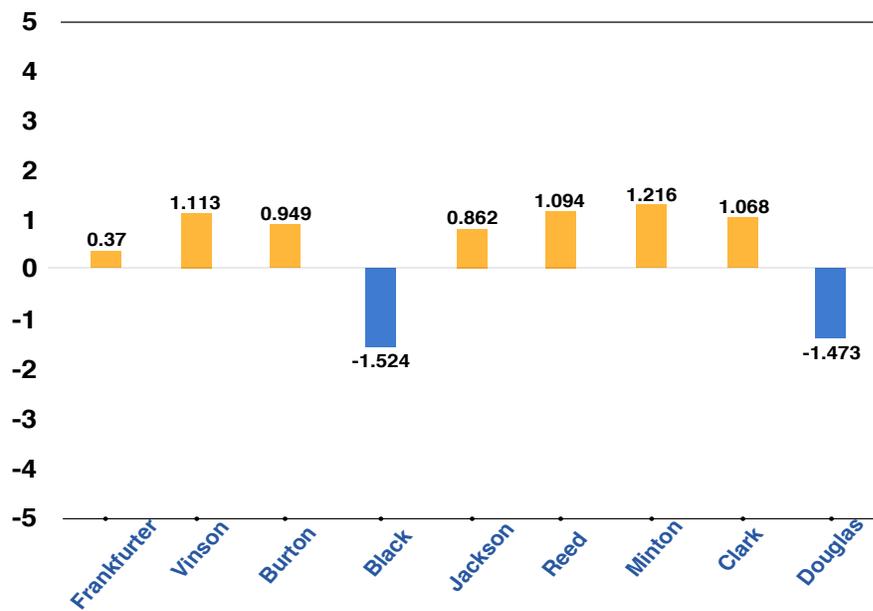
Chief Justice, 1948

Chief Justice	Median	Court Score
Vinson	0.549	-0.24

[*Goesaert v. Cleary*](#) 335 U.S. 464 (1948)

[*Shelley v. Kraemer*](#) 334 U.S. 1 (1948)

1949



Justices serving on the Court and Martin Quinn Ideology scores, 1949

Justices serving on the Court, 1949

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.37	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.113	Truman	Democrat	1946-1953
Burton	0.949	Truman	Democrat	1945-1958
Black	-1.524	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.862	F.D. Roosevelt	Democrat	1941-1954
Reed	1.094	F.D. Roosevelt	Democrat	1941-1954
Minton	1.216	Truman	Democrat	1949-1956
Clark	1.068	Truman	Democrat	1949-1967
Douglas	-1.473	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1949

Chief Justice	Median	Court Score
Vinson	0.88	0.41

[*Giboney et al. v. Empire Storage & Ice Co.*](#) 336 U.S. 490 (1949)

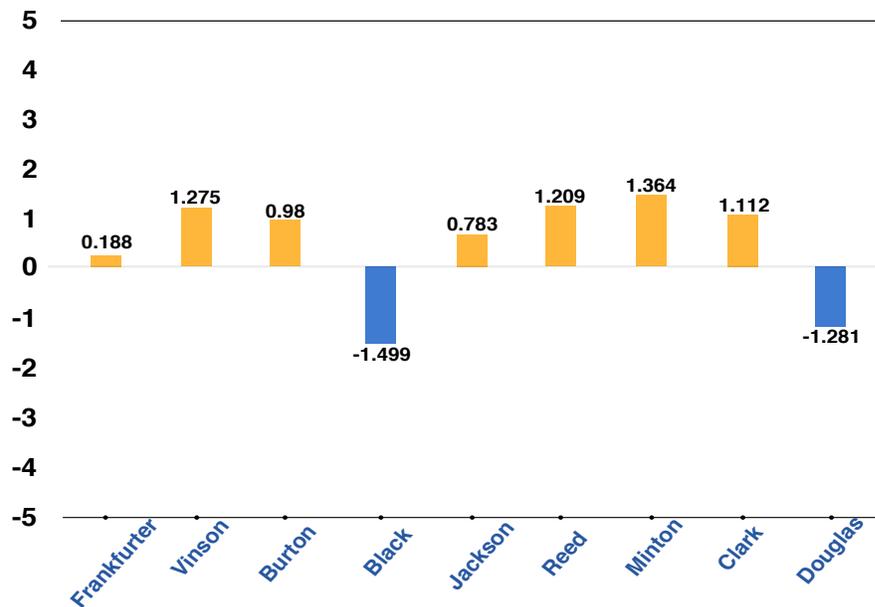
[*Terminiello v. Chicago*](#) 337 U.S. 1 (1949)

[*Wolf v. Colorado*](#) 338 U.S. 25 (1949)

Justices Serving on the Court 1950 - 1969

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1950



Justices serving on the Court and Martin Quinn Ideology scores, 1950

Justices serving on the Court, 1950

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.188	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.275	Truman	Democrat	1946-1953
Burton	0.98	Truman	Democrat	1945-1958
Black	-1.499	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.783	F.D. Roosevelt	Democrat	1941-1954
Reed	1.209	F.D. Roosevelt	Democrat	1941-1954
Minton	1.364	Truman	Democrat	1949-1956
Clark	1.112	Truman	Democrat	1949-1967
Douglas	-1.281	F.D. Roosevelt	Democrat	1939-1975

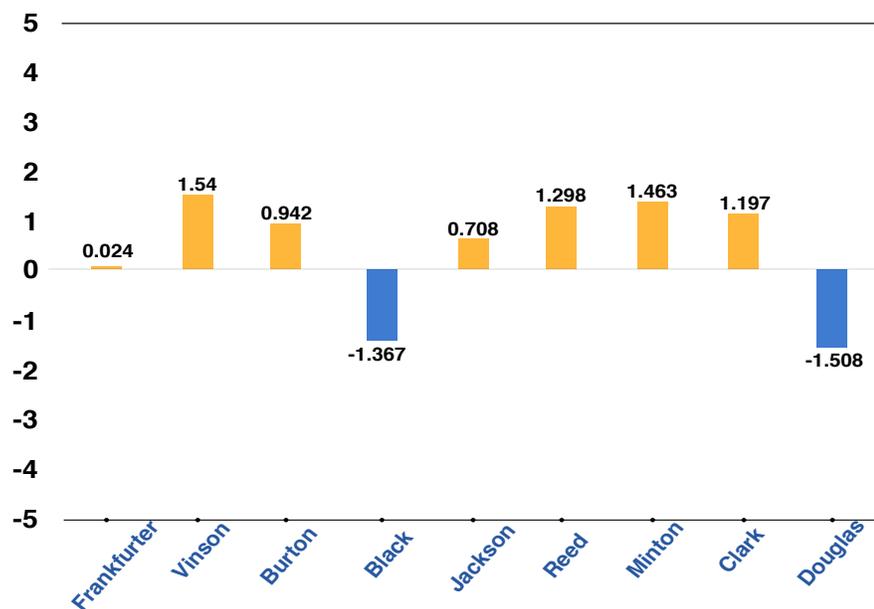
Chief Justice, 1950

Chief Justice	Median	Court Score
Vinson	0.923	0.46

[*McLaurin v. Oklahoma State Regents*](#) 339 U.S. 637 (1950)

[*Sweatt v. Painter*](#) 339 U.S. 629 (1950)

1951



*Justices serving on the Court and Martin Quinn Ideology scores, 1951***Justices serving on the Court, 1951**

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.024	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.54	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.367	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.708	F.D. Roosevelt	Democrat	1941-1954
Reed	1.298	F.D. Roosevelt	Democrat	1941-1954
Minton	1.463	Truman	Democrat	1949-1956
Clark	1.197	Truman	Democrat	1949-1967
Douglas	-1.508	F.D. Roosevelt	Democrat	1939-1975

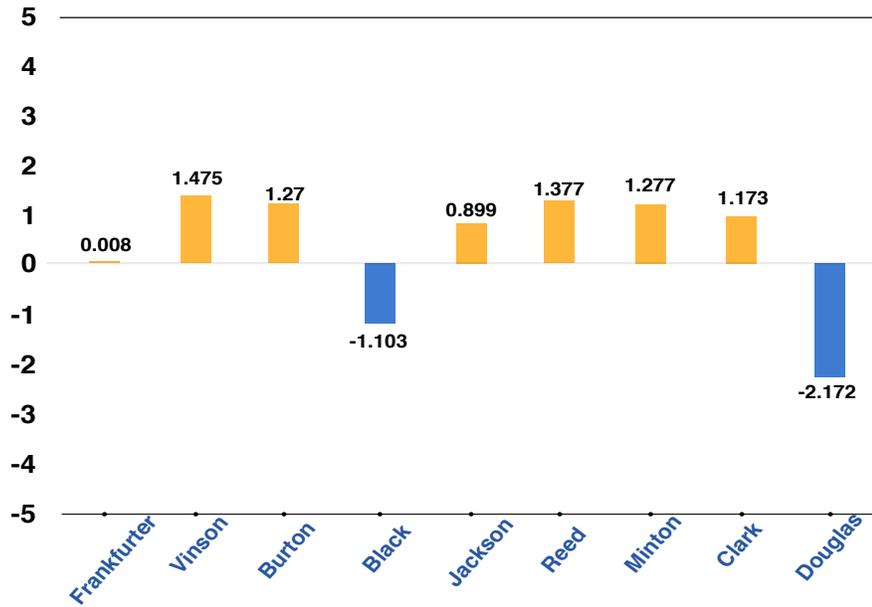
Chief Justice, 1951

Chief Justice	Median	Court Score
Vinson	0.929	0.48

[*Dennis v. U.S.*](#) 341 U.S. 494 (1951)

[*Feiner v. People of the State of New York*](#) 340 U.S. 315 (1951)

1952



Justices serving on the Court and Martin Quinn Ideology scores, 1952

Justices serving on the Court, 1952

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.008	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.475	Truman	Democrat	1946-1953
Burton	1.27	Truman	Democrat	1945-1958
Black	-1.103	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.899	F.D. Roosevelt	Democrat	1941-1954
Reed	1.377	F.D. Roosevelt	Democrat	1941-1954
Minton	1.277	Truman	Democrat	1949-1956
Clark	1.173	Truman	Democrat	1949-1967
Douglas	-2.172	F.D. Roosevelt	Democrat	1939-1975

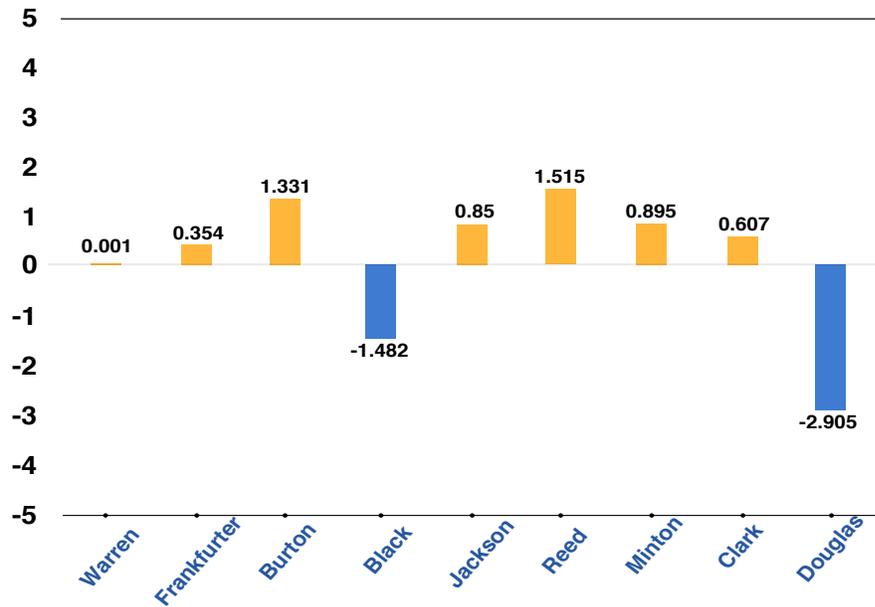
Chief Justice, 1952

Chief Justice	Median	Court Score
Vinson	1.064	0.47

[Rochin v. California](#) 342 U.S. 165 (1952)

Zorach v. Clauson 343 U.S. 306 (1952)

1953



Justices serving on the Court and Martin Quinn Ideology scores, 1953

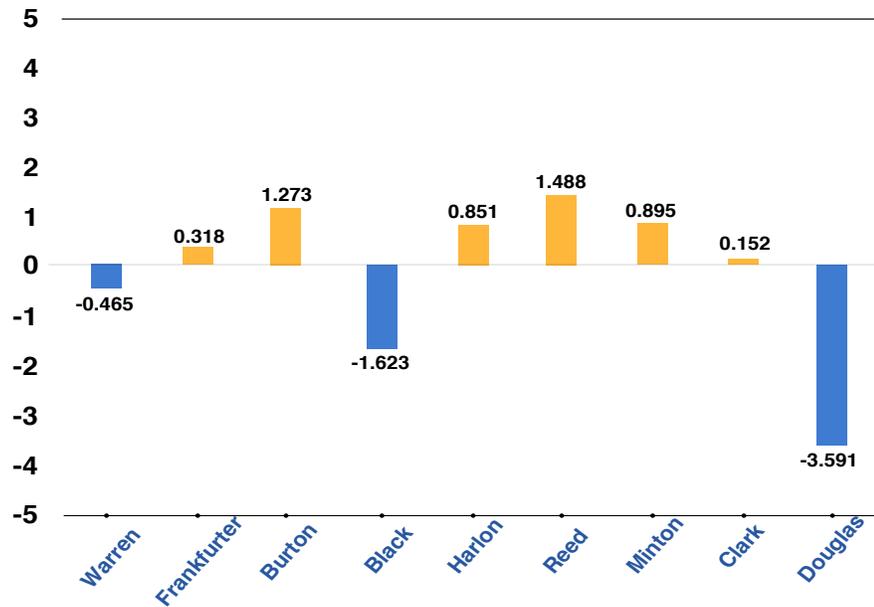
Justices serving on the Court, 1953

Justice	Mean	President	Party of President	Years Served
Warren	0.001	Eisenhower	Republican	1953-1969
Frankfurter	0.354	F.D. Roosevelt	Democrat	1939-1962
Burton	1.331	Truman	Democrat	1945-1958
Black	-1.482	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.85	F.D. Roosevelt	Democrat	1941-1954
Reed	1.515	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.607	Truman	Democrat	1949-1967
Douglas	-2.905	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1953

Chief Justice	Median	Court Score
Warren	0.574	0.13

1954



Justices serving on the Court and Martin Quinn Ideology scores, 1954

Justices serving on the Court, 1954

Justice	Mean	President	Party of President	Years Served
Warren	-0.465	Eisenhower	Republican	1953-1969
Frankfurter	0.318	F.D. Roosevelt	Democrat	1939-1962
Burton	1.273	Truman	Democrat	1945-1958
Black	-1.623	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.851	Eisenhower	Republican	1954-1971
Reed	1.488	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.152	Truman	Democrat	1949-1967
Douglas	-3.591	F.D. Roosevelt	Democrat	1939-1975

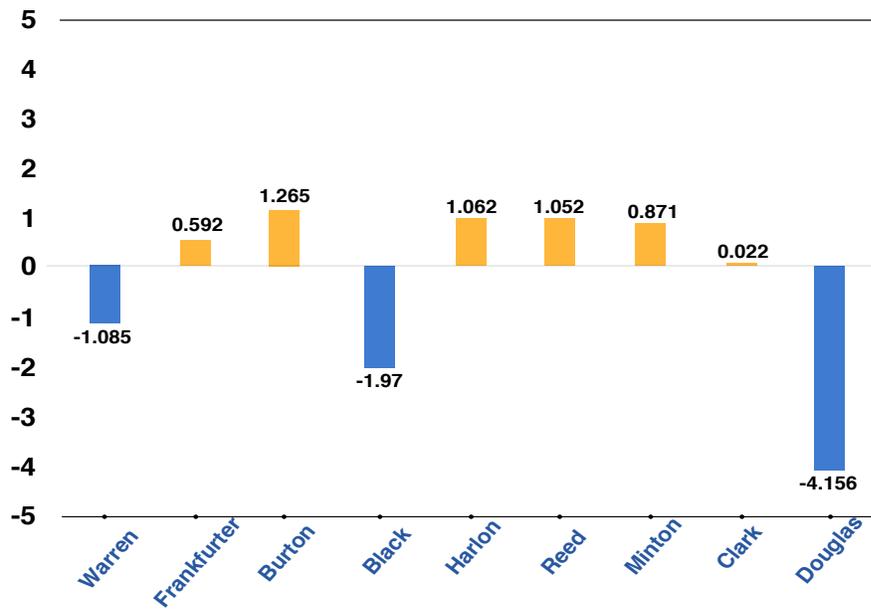
Chief Justice, 1954

Chief Justice	Median	Court Score
Warren	0.348	-0.08

[*Brown v. Board of Education of Topeka*](#) 347 U.S. 483 (1954)

[*Hernandez v. Texas*](#) 347 U.S. 475 (1954)

1955



Justices serving on the Court and Martin Quinn Ideology scores, 1955

Justices serving on the Court, 1955

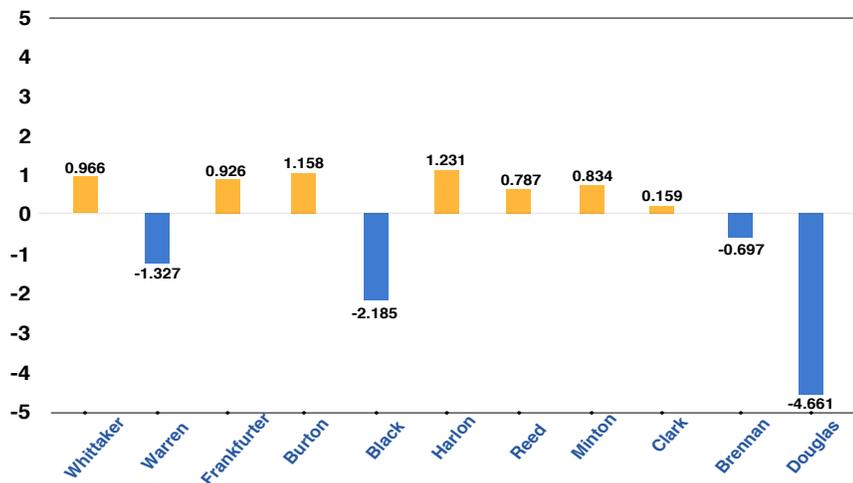
Justice	Mean	President	Party of President	Years Served
Warren	-1.085	Eisenhower	Republican	1953-1969
Frankfurter	0.592	F.D. Roosevelt	Democrat	1939-1962
Burton	1.265	Truman	Democrat	1945-1958
Black	-1.97	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.062	Eisenhower	Republican	1954-1971
Reed	1.052	F.D. Roosevelt	Democrat	1941-1954
Minton	0.871	Truman	Democrat	1949-1956
Clark	0.022	Truman	Democrat	1949-1967
Douglas	-4.156	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1955

Chief Justice	Median	Court Score
Warren	0.56	-0.26

[*Brown v. Board of Education of Topeka*](#) 349 U.S. 294 (1955)

1956



Justices serving on the Court and Martin Quinn Ideology scores, 1956

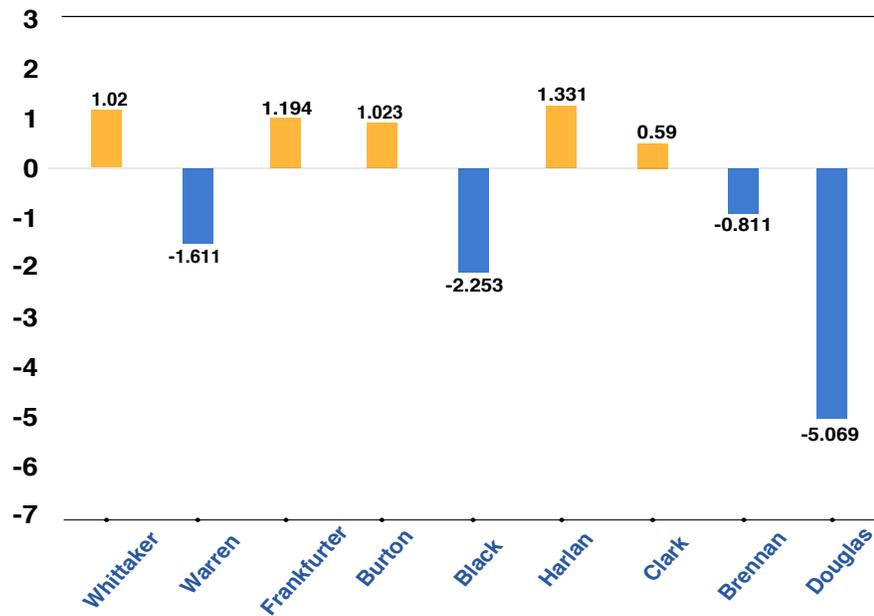
Justices serving on the Court, 1956

Justice	Mean	President	Party of President	Years Served
Whittaker	0.966	Eisenhower	Republican	1957-1962
Warren	-1.327	Eisenhower	Republican	1953-1969
Frankfurter	0.926	F.D. Roosevelt	Democrat	1939-1962
Burton	1.158	Truman	Democrat	1945-1958
Black	-2.185	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.231	Eisenhower	Republican	1954-1971
Reed	0.787	F.D. Roosevelt	Democrat	1941-1954
Minton	0.834	Truman	Democrat	1949-1956
Clark	0.159	Truman	Democrat	1949-1967
Brennan	-0.697	Eisenhower	Republican	1956-1990
Douglas	-4.661	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1956

Chief Justice	Median	Court Score
Warren	0.158	-0.26
Warren (2)	0.159	-0.26

1957



Justices serving on the Court and Martin Quinn Ideology scores, 1957

Justices serving on the Court, 1957

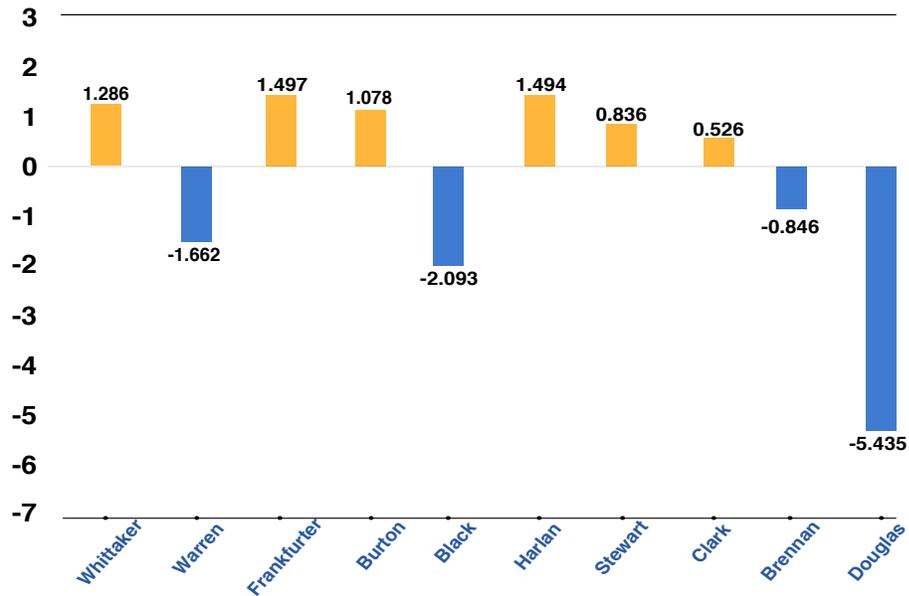
Justice	Mean	President	Party of President	Years Served
Whittaker	1.02	Eisenhower	Republican	1957-1962
Warren	-1.611	Eisenhower	Republican	1953-1969
Frankfurter	1.194	F.D. Roosevelt	Democrat	1939-1962
Burton	1.023	Truman	Democrat	1945-1958
Black	-2.253	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.331	Eisenhower	Republican	1954-1971
Clark	0.59	Truman	Democrat	1949-1967
Brennan	-0.811	Eisenhower	Republican	1956-1990
Douglas	-5.069	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1957

Chief Justice	Median	Court Score
Warren	0.585	-0.51

Roth v. United States [consolidated with *Alberts v. California*] 354 U.S. 476 (1957)

1958



Justices serving on the Court and Martin Quinn Ideology scores, 1958

Justices serving on the Court, 1958

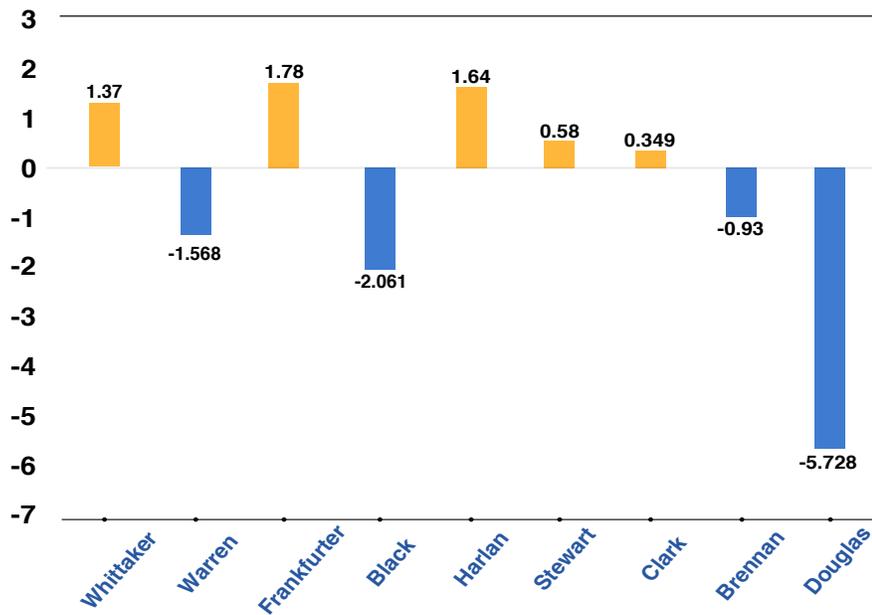
Justice	Mean	President	Party of President	Years Served
Whittaker	1.286	Eisenhower	Republican	1957-1962
Warren	-1.662	Eisenhower	Republican	1953-1969
Frankfurter	1.497	F.D. Roosevelt	Democrat	1939-1962
Burton	1.078	Truman	Democrat	1945-1958
Black	-2.093	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.494	Eisenhower	Republican	1954-1971
Stewart	0.836	Eisenhower	Republican	1958-1981
Clark	0.526	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-5.435	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1958

Chief Justice	Median	Court Score
Warren	0.643	-0.33

[*NAACP v. Alabama*](#) 357 U.S. 449 (1958)

1959



Justices serving on the Court and Martin Quinn Ideology scores, 1959

Justices serving on the Court, 1959

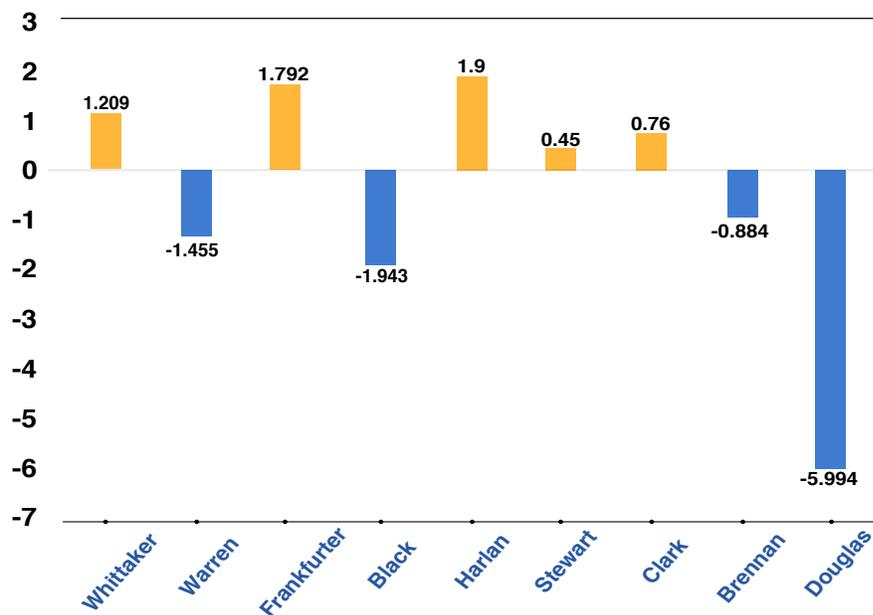
Justice	Mean	President	Party of President	Years Served
Whittaker	1.37	Eisenhower	Republican	1957-1962
Warren	-1.568	Eisenhower	Republican	1953-1969
Frankfurter	1.78	F.D. Roosevelt	Democrat	1939-1962
Black	-2.061	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.64	Eisenhower	Republican	1954-1971
Stewart	0.58	Eisenhower	Republican	1958-1981
Clark	0.349	Truman	Democrat	1949-1967
Brennan	-0.93	Eisenhower	Republican	1956-1990
Douglas	-5.728	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1959

Chief Justice	Median	Court Score
Warren	0.335	-0.51

[*Lassiter v. Northampton County Board of Elections*](#) 360 U.S. 45 (1959)

1960



*Justices serving on the Court and Martin Quinn Ideology scores, 1960***Justices serving on the Court, 1960**

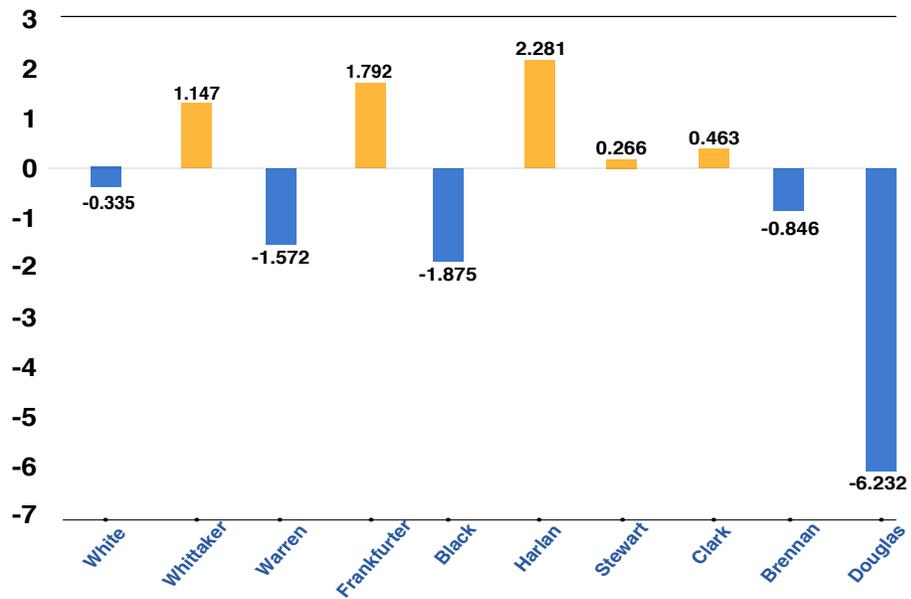
Justice	Mean	President	Party of President	Years Served
Whittaker	1.209	Eisenhower	Republican	1957-1962
Warren	-1.455	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.943	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.9	Eisenhower	Republican	1954-1971
Stewart	0.45	Eisenhower	Republican	1958-1981
Clark	0.76	Truman	Democrat	1949-1967
Brennan	-0.884	Eisenhower	Republican	1956-1990
Douglas	-5.994	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1960

Chief Justice	Median	Court Score
Warren	0.442	-0.46

[*Gomillion v. Lightfoot*](#) 364 U.S. 339 (1960)

1961



Justices serving on the Court and Martin Quinn Ideology scores, 1961

Justices serving on the Court, 1961

Justice	Mean	President	Party of President	Years Served
White	-0.335	Kennedy	Democrat	1961-1993
Whittaker	1.147	Eisenhower	Republican	1957-1962
Warren	-1.572	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.875	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.281	Eisenhower	Republican	1954-1971
Stewart	0.266	Eisenhower	Republican	1958-1981
Clark	0.463	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-6.232	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1961

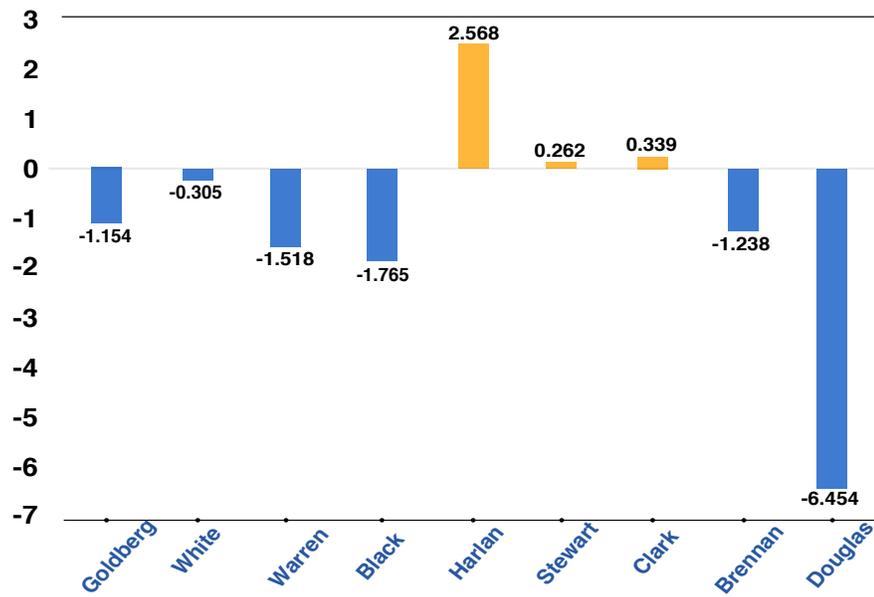
Chief Justice	Median	Court Score
Warren	-0.043	-0.49

[*Braunfeld v. Brown*](#) 366 U.S. 599 (1961)

[*Burton v. Wilmington Parking Authority*](#) 365 U.S. 715 (1961)

[*McGowan v. Maryland*](#) 366 U.S. 420 (1961)

1962



Justices serving on the Court and Martin Quinn Ideology scores, 1962

Justices serving on the Court, 1962

Justice	Mean	President	Party of President	Years Served
Goldberg	-1.154	Kennedy	Democrat	1962-1965
White	-0.305	Kennedy	Democrat	1961-1993
Warren	-1.518	Eisenhower	Republican	1953-1969
Black	-1.765	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.568	Eisenhower	Republican	1954-1971
Stewart	0.262	Eisenhower	Republican	1958-1981
Clark	0.339	Truman	Democrat	1949-1967
Brennan	-1.238	Eisenhower	Republican	1956-1990
Douglas	-6.454	F.D. Roosevelt	Democrat	1939-1975

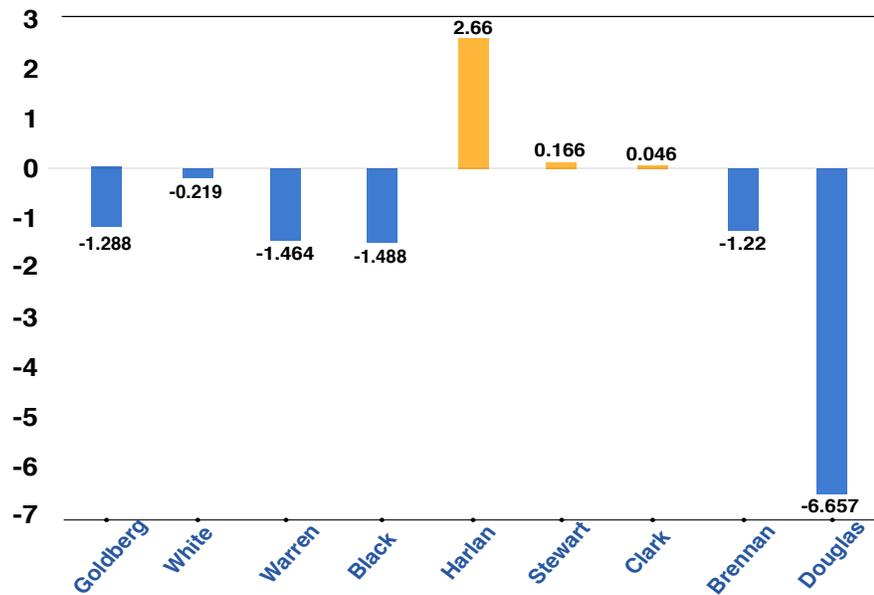
Chief Justice, 1962

Chief Justice	Median	Court Score
Warren	-1.078	-1.03

[*Baker v. Carr*](#) 369 U.S. 186 (1962)

[*Engel v. Vitale*](#) 370 U.S. 421 (1962)

1963



Justices serving on the Court and Martin Quinn Ideology scores, 1963

Justices serving on the Court, 1963

Justice	Mean	President	Party of President	Years Served
Goldberg	-1.288	Kennedy	Democrat	1962-1965
White	-0.219	Kennedy	Democrat	1961-1993
Warren	-1.464	Eisenhower	Republican	1953-1969
Black	-1.488	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.66	Eisenhower	Republican	1954-1971
Stewart	0.166	Eisenhower	Republican	1958-1981
Clark	0.046	Truman	Democrat	1949-1967
Brennan	-1.22	Eisenhower	Republican	1956-1990
Douglas	-6.657	F.D. Roosevelt	Democrat	1939-1975

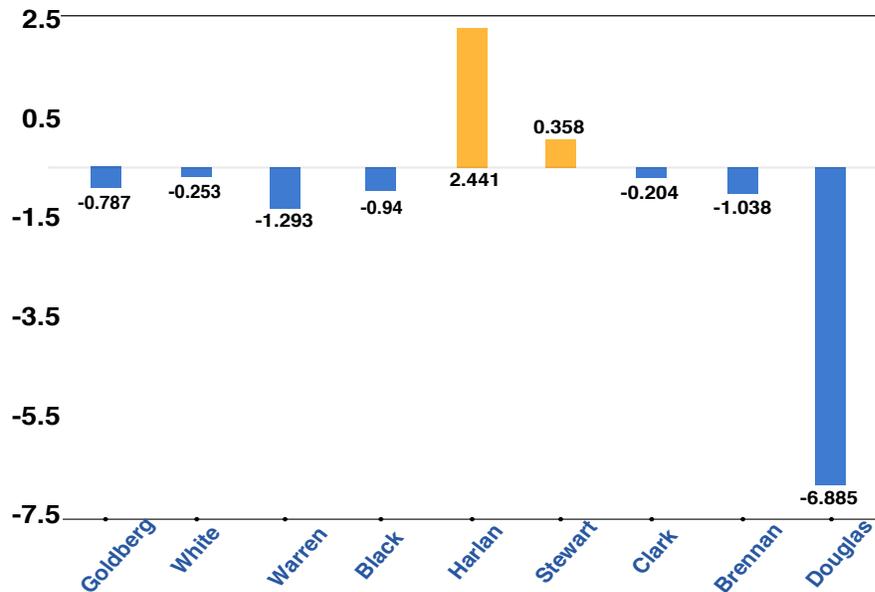
Chief Justice, 1963

Chief Justice	Median	Court Score
Warren	-1.131	-1.05

[*Gideon v. Wainwright*](#) 372 U.S. 335 (1963)

[*Sherbert v. Verner*](#) 374 U.S. 398 (1963)

1964



Justices serving on the Court and Martin Quinn Ideology scores, 1964

Justices serving on the Court, 1964

Justice	Mean	President	Party of President	Years Served
Goldberg	-0.787	Kennedy	Democrat	1962-1965
White	-0.253	Kennedy	Democrat	1961-1993
Warren	-1.293	Eisenhower	Republican	1953-1969
Black	-0.94	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.441	Eisenhower	Republican	1954-1971
Stewart	0.358	Eisenhower	Republican	1958-1981
Clark	-0.204	Truman	Democrat	1949-1967
Brennan	-1.038	Eisenhower	Republican	1956-1990
Douglas	-6.885	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1964

Chief Justice	Median	Court Score
Warren	-0.708	-0.96

[*Jacobellis v. Ohio*](#) 378 U.S. 184 (1964)

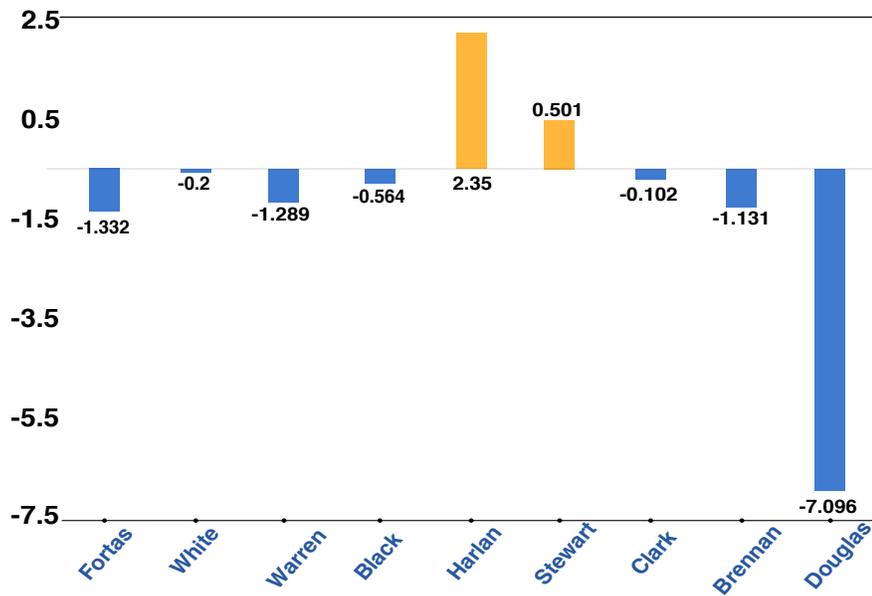
[*McLaughlin v. Florida*](#) 379 U.S. 182 (1964)

[*New York Times Co. V. Sullivan*](#) 376 U.S. 254 (1964)

[*Reynolds v. Sims*](#) 377 U.S. 533 (1964)

[*Wesberry v. Sanders*](#) 376 U.S. 1 (1964)

1965



Justices serving on the Court and Martin Quinn Ideology scores, 1965

Justices serving on the Court, 1965

Justice	Mean	President	Party of President	Years Served
Fortas	-1.332	Johnson	Democrat	1965-1969
White	-0.2	Kennedy	Democrat	1961-1993
Warren	-1.289	Eisenhower	Republican	1953-1969
Black	-0.564	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.35	Eisenhower	Republican	1954-1971
Stewart	0.501	Eisenhower	Republican	1958-1981
Clark	-0.102	Truman	Democrat	1949-1967
Brennan	-1.131	Eisenhower	Republican	1956-1990
Douglas	-7.096	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1965

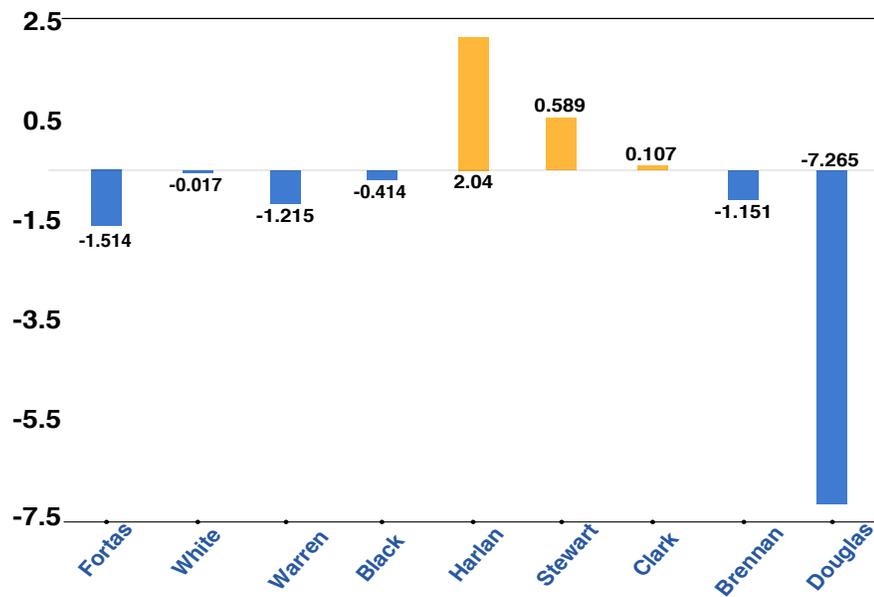
Chief Justice	Median	Court Score
Warren	-0.569	-0.98

[*Carrington v. Rash*](#) 380 U.S. 89 (1965)

[*Griswold v. Connecticut*](#) 381 U.S. 479 (1965)

[*Louisiana v. United States*](#) 380 U.S. 145 (1965)

1966



Justices serving on the Court and Martin Quinn Ideology scores, 1966

Justices serving on the Court, 1966

Justice	Mean	President	Party of President	Years Served
Fortas	-1.514	Johnson	Democrat	1965-1969
White	-0.017	Kennedy	Democrat	1961-1993
Warren	-1.215	Eisenhower	Republican	1953-1969
Black	-0.414	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.04	Eisenhower	Republican	1954-1971
Stewart	0.589	Eisenhower	Republican	1958-1981
Clark	0.107	Truman	Democrat	1949-1967
Brennan	-1.151	Eisenhower	Republican	1956-1990
Douglas	-7.265	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1966

Chief Justice	Median	Court Score
Warren	-0.416	-0.98

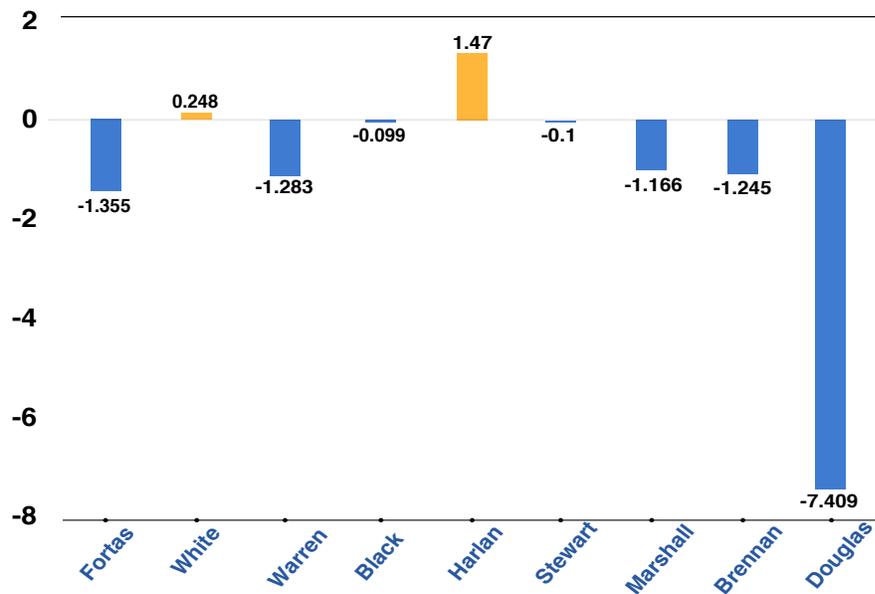
[*Epperson v. Arkansas*](#) 393 U.S. 97 (1966)

[*Harper v. Virginia Bd. of Elections*](#) 383 U.S. 663 (1966)

[*Sheppard v. Maxwell*](#) 384 U.S. 333 (1966)

[*South Carolina v. Katzenbach*](#) 383 U.S. 301 (1966)

1967



Justices serving on the Court and Martin Quinn Ideology scores, 1967

Justices serving on the Court, 1967

Justice	Mean	President	Party of President	Years Served
Fortas	-1.355	Johnson	Democrat	1965-1969
White	0.248	Kennedy	Democrat	1961-1993
Warren	-1.283	Eisenhower	Republican	1953-1969
Black	-0.099	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.47	Eisenhower	Republican	1954-1971
Stewart	-0.1	Eisenhower	Republican	1958-1981
Marshall	-1.166	Johnson	Democrat	1967-1991
Brennan	-1.245	Eisenhower	Republican	1956-1990
Douglas	-7.409	F.D. Roosevelt	Democrat	1939-1975

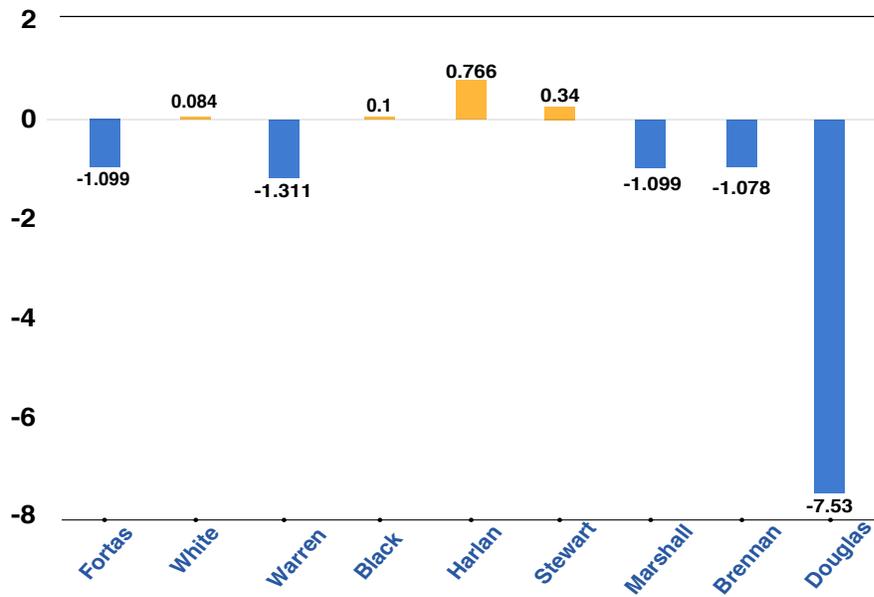
Chief Justice, 1967

Chief Justice	Median	Court Score
Warren	-1.046	-1.22

[*Loving v. Virginia*](#) 388 U.S. 1 (1967)

[*Reitman v. Mulkey*](#) 387 U.S. 369 (1967)

1968



Justices serving on the Court and Martin Quinn Ideology scores, 1968

Justices serving on the Court, 1968

Justice	Mean	President	Party of President	Years Served
Fortas	-1.099	Johnson	Democrat	1965-1969
White	0.084	Kennedy	Democrat	1961-1993
Warren	-1.311	Eisenhower	Republican	1953-1969
Black	0.1	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.766	Eisenhower	Republican	1954-1971
Stewart	0.34	Eisenhower	Republican	1958-1981
Marshall	-1.099	Johnson	Democrat	1967-1991
Brennan	-1.078	Eisenhower	Republican	1956-1990
Douglas	-7.53	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1968

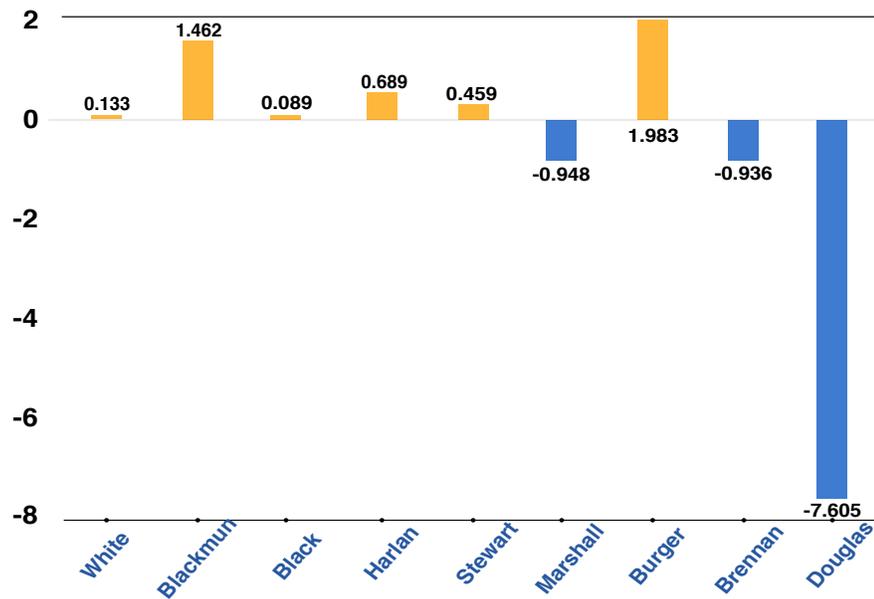
Chief Justice	Median	Court Score
Warren	-0.9	-1.20

[*Duncan v Louisiana*](#) 391 U.S. 145 (1968)

[*Green v. County Sch. Bd. of New Kent County*](#) 391 U.S. 430 (1968)

[*United States v. O'Brien*](#) 391 U.S. 367 (1968)

1969



Justices serving on the Court and Martin Quinn Ideology scores, 1969

Justices serving on the Court, 1969

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1969

Chief Justice	Median	Court Score
Burger	0.193	-0.52

[*Kramer v. Union Free Sch. Dist. No. 15*](#) 395 U.S. 621 (1969)

[*Brandenburg v. Ohio*](#) 395 U.S. 44 (1969)

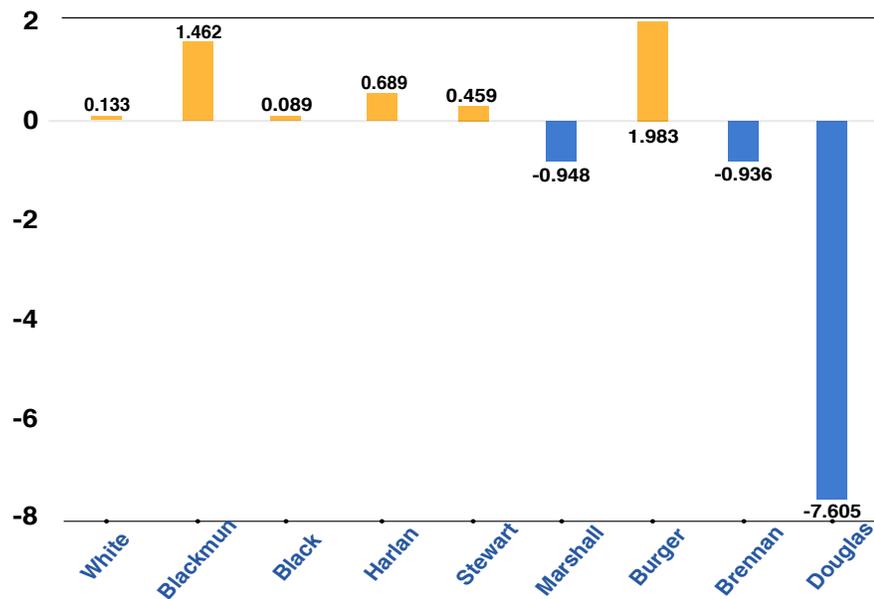
[*Red Lion Broadcasting Co. v. FCC*](#) 395 U.S. 367 (1969)

[*Tinker v. Des Moines Independent Community School District*](#) 393 U.S. 503 (1969)

Justices Serving on the Court 1970 - 1989

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1970



Justices serving on the Court and Martin Quinn Ideology scores, 1970

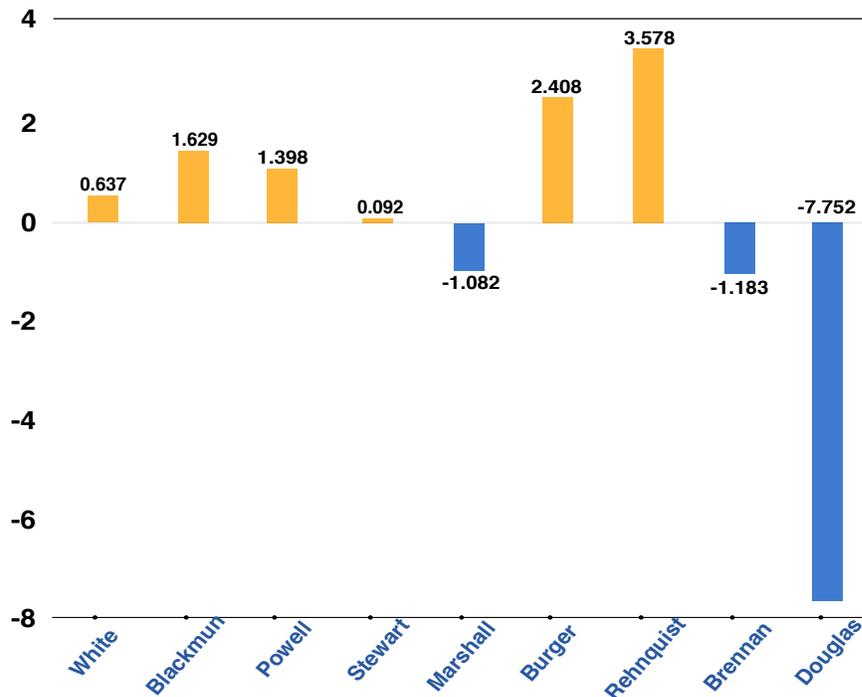
Justices serving on the Court, 1970

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1970

Chief Justice	Median	Court Score
Burger	0.378	-0.52

1971



Justices serving on the Court and Martin Quinn Ideology scores, 1971

Justices serving on the Court, 1971

Justice	Mean	President	Party of President	Years Served
White	0.637	Kennedy	Democrat	1961-1993
Blackmun	1.629	Nixon	Republican	1969-1994
Powell	1.398	Nixon	Republican	1971-1987
Stewart	0.092	Eisenhower	Republican	1958-1981
Marshall	-1.082	Johnson	Democrat	1967-1991
Burger	2.408	Nixon	Republican	1969-1986
Rehnquist	3.578	Nixon	Republican	1971-2005
Brennan	-1.183	Eisenhower	Republican	1956-1990
Douglas	-7.752	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1971

Chief Justice	Median	Court Score
Burger	0.637	-0.03

[*Cohen v. California*](#) 403 U.S. 15 (1971)

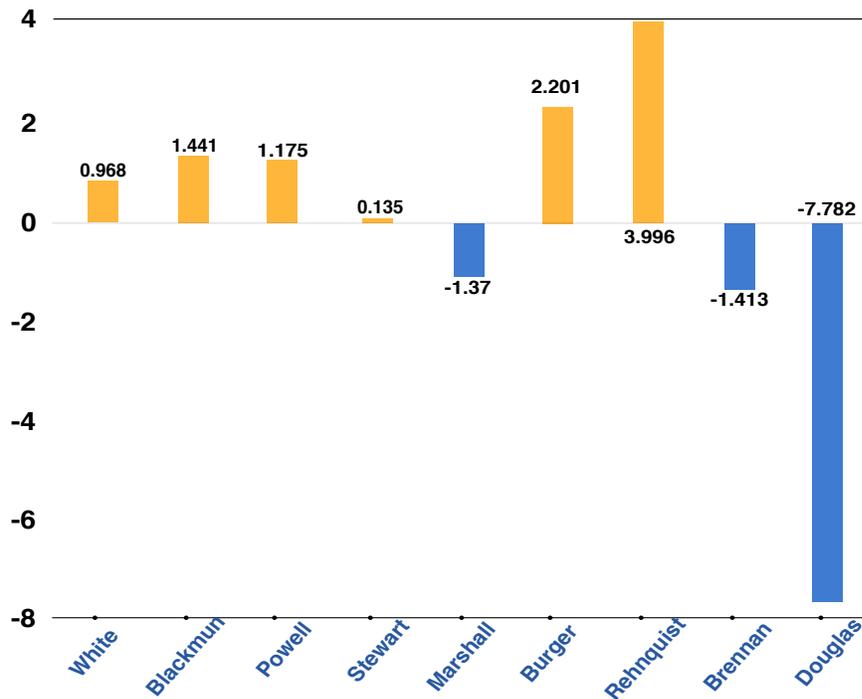
[*Lemon v. Kurtzman*](#) 403 U.S. 602 (1971)

[*New York Times v. United States*](#) 403 U.S. 713 (1971)

[*Reed v. Reed*](#) 404 U.S. 71 (1971)

[*Swann v. Charlotte-Mecklenburg Bd. of Educ.*](#) 402 U.S. 1 (1971)

1972



Justices serving on the Court and Martin Quinn Ideology scores, 1972

Justices serving on the Court, 1972

Justice	Mean	President	Party of President	Years Served
White	0.968	Kennedy	Democrat	1961-1993
Blackmun	1.441	Nixon	Republican	1969-1994
Powell	1.175	Nixon	Republican	1971-1987
Stewart	0.135	Eisenhower	Republican	1958-1981
Marshall	-1.37	Johnson	Democrat	1967-1991
Burger	2.201	Nixon	Republican	1969-1986
Rehnquist	3.996	Nixon	Republican	1971-2005
Brennan	-1.413	Eisenhower	Republican	1956-1990
Douglas	-7.782	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1972

Chief Justice	Median	Court Score
Burger	0.944	-0.07

[*Branzburg v. Hayes*](#) 480 U.S. 665 (1972)

[*Eisenstadt v. Baird*](#) 405 U.S. 438 (1972)

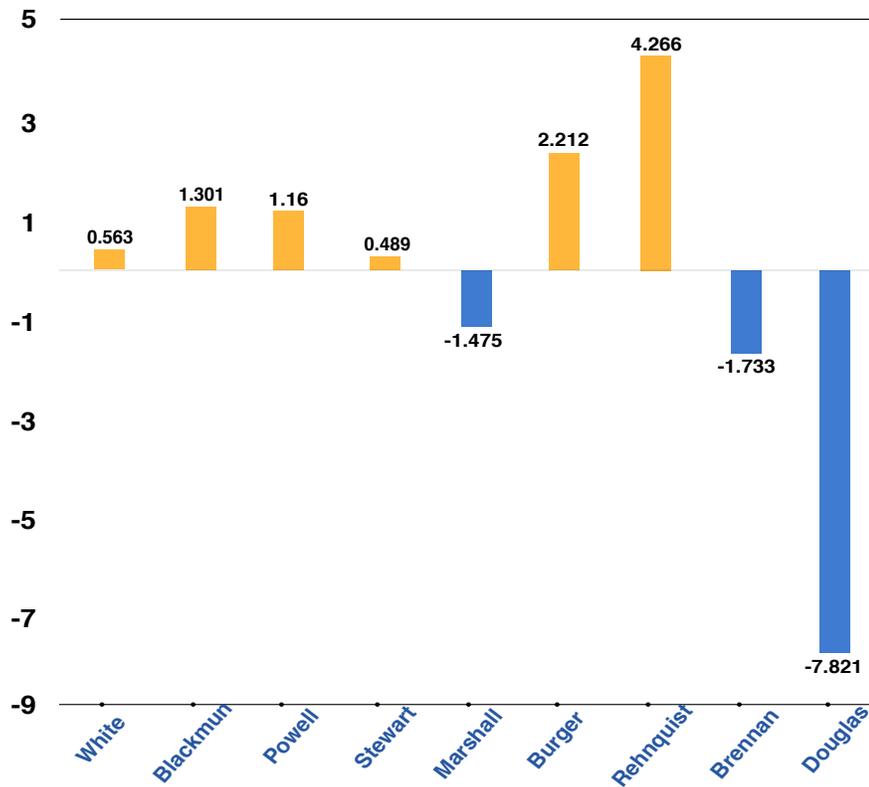
[*Healy v. James*](#) 408 U.S. 169 (1972)

[*Moose Lodge v. Irvis*](#) 407 U.S. 163 (1972)

[*Roe v. Wade*](#) 410 U.S. 113 (1972)

[*Wisconsin v. Yoder*](#) 406 U.S. 205 (1972)

1973



Justices serving on the Court and Martin Quinn Ideology scores, 1973

Justices serving on the Court, 1973

Justice	Mean	President	Party of President	Years Served
White	0.563	Kennedy	Democrat	1961-1993
Blackmun	1.301	Nixon	Republican	1969-1994
Powell	1.16	Nixon	Republican	1971-1987
Stewart	0.489	Eisenhower	Republican	1958-1981
Marshall	-1.475	Johnson	Democrat	1967-1991
Burger	2.212	Nixon	Republican	1969-1986
Rehnquist	4.266	Nixon	Republican	1971-2005
Brennan	-1.733	Eisenhower	Republican	1956-1990
Douglas	-7.821	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1973

Chief Justice	Median	Court Score
Burger	0.61	-0.12

[*Hess v. Indiana*](#) 414 U.S. 105 (1973)

[*Frontiero v. Richardson*](#) 411 U. S. 677 (1973)

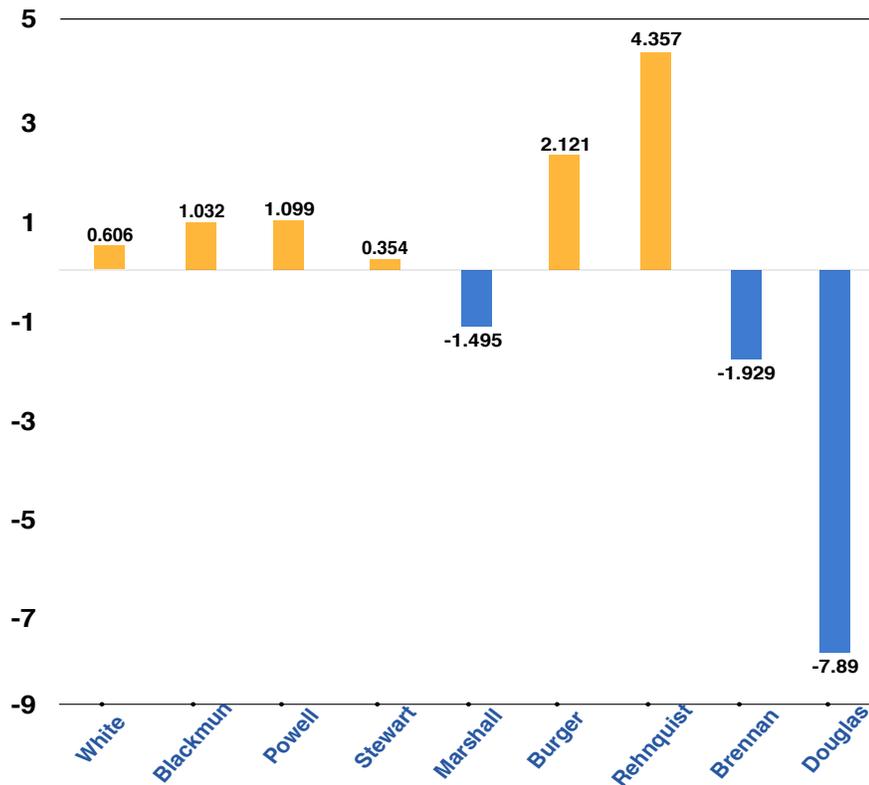
[*Miller v. California*](#) 413 U.S. 15 (1973)

[*Papish v. Board of Curators*](#) 410 U.S. 667 (1973)

[*San Antonio Independent School District v. Rodriguez*](#) 411 U.S. 1 (1973)

[*Wilfred Keyes v. School District No. 1, Denver, Colorado*](#) 413 U.S. 189 (1973)

1974



Justices serving on the Court and Martin Quinn Ideology scores, 1974

Justices serving on the Court, 1974

Justice	Mean	President	Party of President	Years Served
White	0.606	Kennedy	Democrat	1961-1993
Blackmun	1.032	Nixon	Republican	1969-1994
Powell	1.099	Nixon	Republican	1971-1987
Stewart	0.354	Eisenhower	Republican	1958-1981
Marshall	-1.495	Johnson	Democrat	1967-1991
Burger	2.121	Nixon	Republican	1969-1986
Rehnquist	4.357	Nixon	Republican	1971-2005
Brennan	-1.929	Eisenhower	Republican	1956-1990
Douglas	-7.89	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1974

Chief Justice	Median	Court Score
Burger	0.614	-0.19

[*Gertz v. Robert-Welch Inc.*](#) 418 U.S. 323 (1974)

[*Kahn v. Shavin*](#) 416 U.S. 351 (1974)

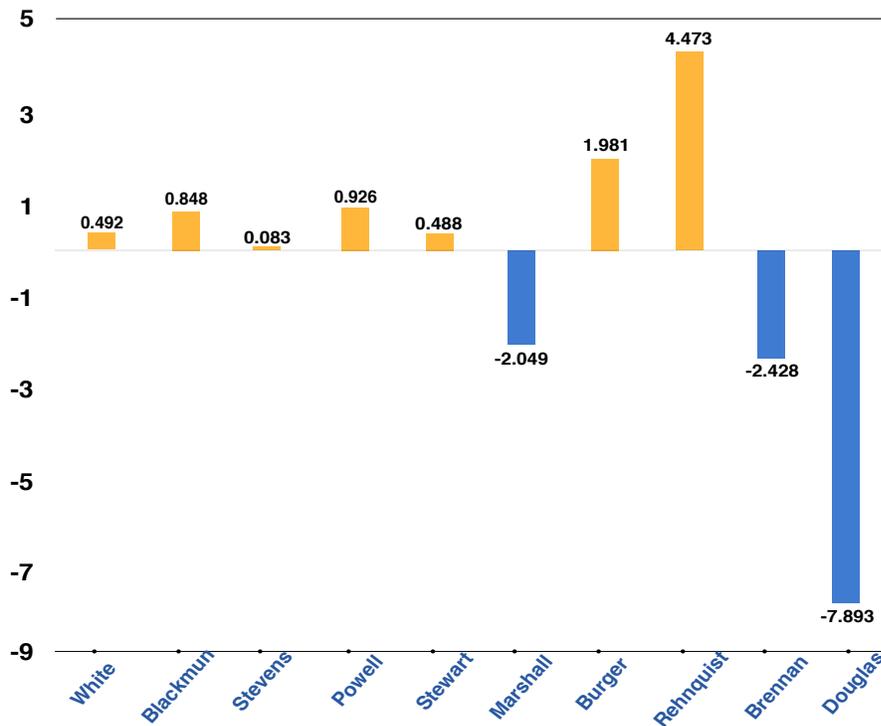
[*Miami Herald Publishing Co. v. Tornillo*](#) 418 U.S. 241 (1974)

[*Milliken v. Bradley*](#) 418 U.S. 717 (1974)

[*Richardson v. Ramirez*](#) 418 U.S. 24 (1974)

[*Spence v. Washington*](#) 418 U.S. 405 (1974)

1975



Justices serving on the Court and Martin Quinn Ideology scores, 1975

Justices serving on the Court, 1975

Justice	Mean	President	Party of President	Years Served
White	0.492	Kennedy	Democrat	1961-1993
Blackmun	0.848	Nixon	Republican	1969-1994
Stevens	0.083	Ford	Republican	1975-2010
Powell	0.926	Nixon	Republican	1971-1987
Stewart	0.488	Eisenhower	Republican	1958-1981
Marshall	-2.049	Johnson	Democrat	1967-1991
Burger	1.981	Nixon	Republican	1969-1986
Rehnquist	4.473	Nixon	Republican	1971-2005
Brennan	-2.428	Eisenhower	Republican	1956-1990
Douglas	-7.893	F.D. Roosevelt	Democrat	1939-1975

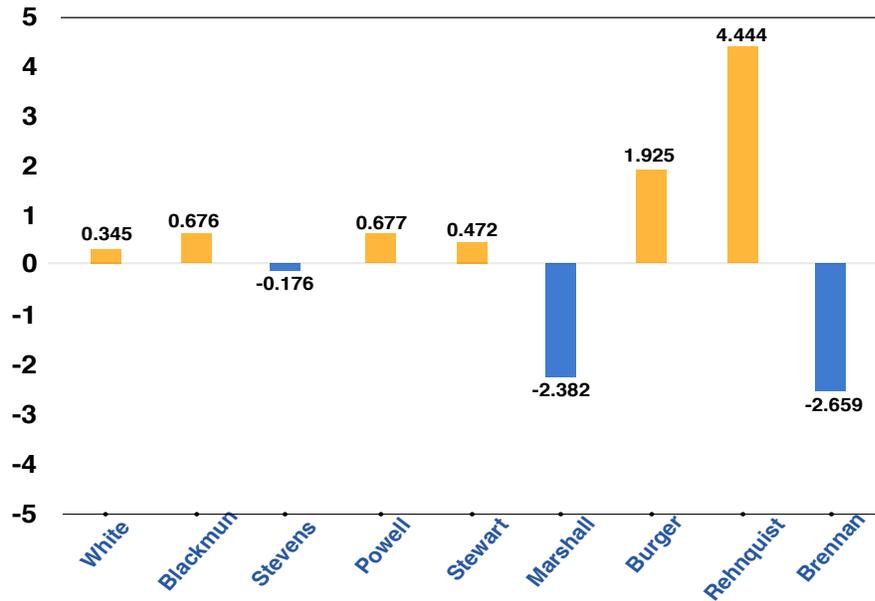
Chief Justice, 1975

Chief Justice	Median	Court Score
Burger	0.489	-0.36

[*Stanton v. Stanton*](#) 421 U.S. 7 (1975)

[*Weinberger v. Wisenfeld*](#) 420 U.S. 636 (1975)

1976



Justices serving on the Court and Martin Quinn Ideology scores, 1976

Justices serving on the Court, 1976

Justice	Mean	President	Party of President	Years Served
White	0.345	Kennedy	Democrat	1961-1993
Blackmun	0.676	Nixon	Republican	1969-1994
Stevens	-0.176	Ford	Republican	1975-2010
Powell	0.677	Nixon	Republican	1971-1987
Stewart	0.472	Eisenhower	Republican	1958-1981
Marshall	-2.382	Johnson	Democrat	1967-1991
Burger	1.925	Nixon	Republican	1969-1986
Rehnquist	4.444	Nixon	Republican	1971-2005
Brennan	-2.659	Eisenhower	Republican	1956-1990

Chief Justice, 1976

Chief Justice	Median	Court Score
Burger	0.474	0.37

[Buckley v. Valeo](#) 424 U.S. 1 (1976)

[*Craig v. Boren*](#) 429 U.S. 190 (1976)

[*Hills v. Gautreaux*](#) 425 U.S. 284 (1976)

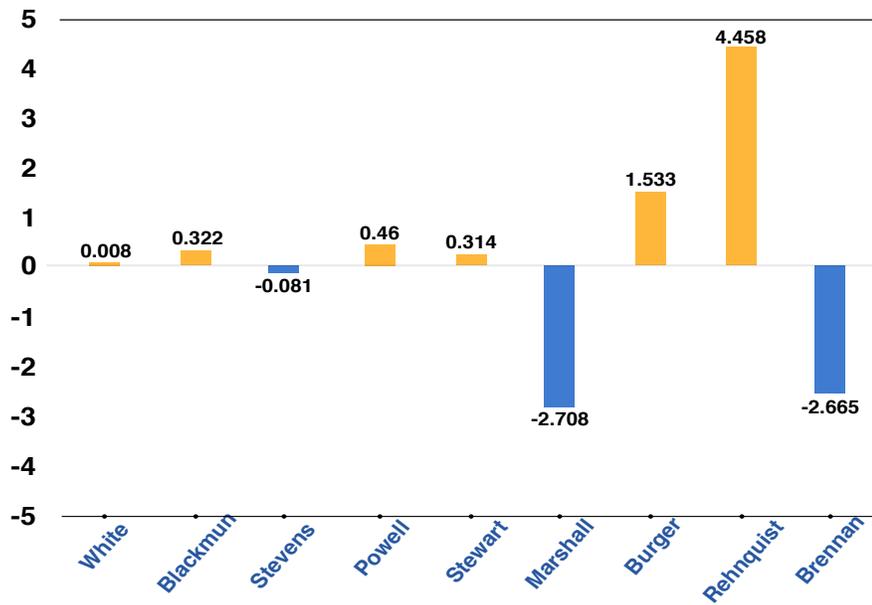
[*Massachusetts Board of Retirement v. Murgia*](#) 427 U.S. 307 (1976)

[*Nebraska Press Assn. v. Stuart*](#) 427 U.S. 539 (1976)

[*Pasadena City Bd. of Educ. v. Spangler*](#) 427 U.S. 424 (1976)

[*Washington v. Davis*](#) 426 U.S. 229 (1976)

1977



Justices serving on the Court and Martin Quinn Ideology scores, 1977

Justices serving on the Court, 1977

Justice	Mean	President	Party of President	Years Served
White	0.008	Kennedy	Democrat	1961-1993
Blackmun	0.322	Nixon	Republican	1969-1994
Stevens	-0.081	Ford	Republican	1975-2010
Powell	0.46	Nixon	Republican	1971-1987
Stewart	0.314	Eisenhower	Republican	1958-1981
Marshall	-2.708	Johnson	Democrat	1967-1991
Burger	1.533	Nixon	Republican	1969-1986
Rehnquist	4.458	Nixon	Republican	1971-2005
Brennan	-2.665	Eisenhower	Republican	1956-1990

Chief Justice, 1977

Chief Justice	Median	Court Score
Burger	0.234	0.18

[*Arlington Heights v. Metropolitan Housing Dev. Corp.*](#) 429 U.S. 252 (1977)

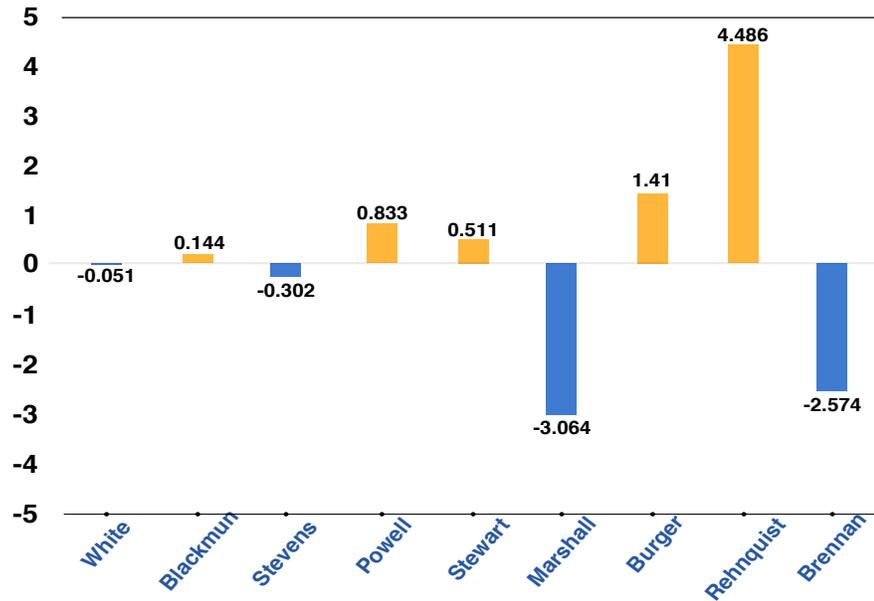
[*Bellotti v. Baird \(Bellotti II\)*](#) 443 U.S. 622 (1977)

[*Carey v. Population Services International*](#) 431 U.S. 678 (1977)

[*Neal R. Wooley etc., et al. v. George Maynard et ux.*](#) 430 U.S. 705 (1977)

[*Vorchheimer v. School Dist. of Philadelphia*](#) 430 U.S. 703 (1977)

1978



Justices serving on the Court and Martin Quinn Ideology scores, 1978

Justices serving on the Court, 1978

Justice	Mean	President	Party of President	Years Served
White	-0.051	Kennedy	Democrat	1961-1993
Blackmun	0.144	Nixon	Republican	1969-1994
Stevens	-0.302	Ford	Republican	1975-2010
Powell	0.833	Nixon	Republican	1971-1987
Stewart	0.511	Eisenhower	Republican	1958-1981
Marshall	-3.064	Johnson	Democrat	1967-1991
Burger	1.41	Nixon	Republican	1969-1986
Rehnquist	4.486	Nixon	Republican	1971-2005
Brennan	-2.574	Eisenhower	Republican	1956-1990

Chief Justice, 1978

Chief Justice	Median	Court Score
Burger	0.156	0.15

[FCC v. Pacifica Foundation](#) 438 U.S. 726 (1978)

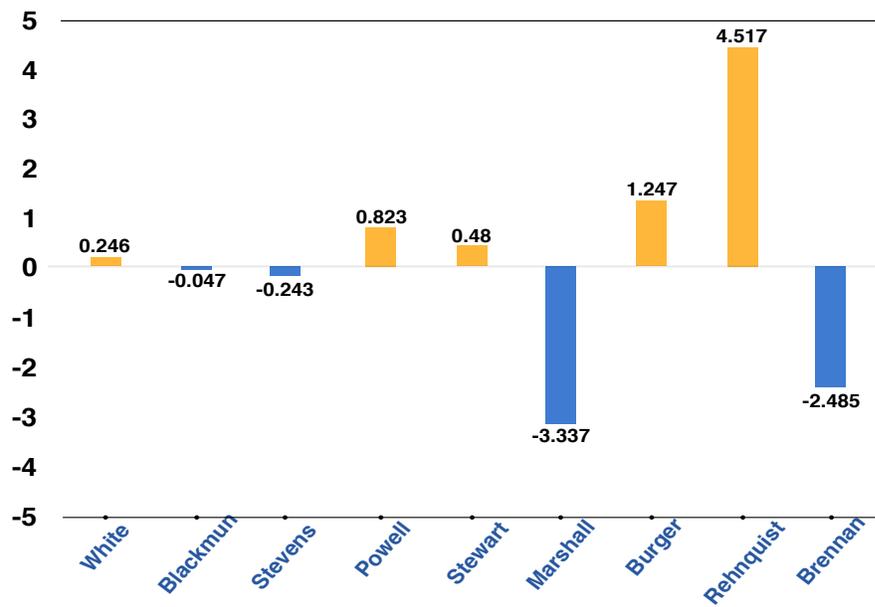
[*First Nat'l Bank of Boston v. Bellotti*](#) 435 U.S. 765 (1978)

[*Houchins v. KQED*](#) 438 U.S. 1 (1978)

[*Regents of the Univ. of Calif. v. Bakke*](#) 438 U.S. 265 (1978)

[*Zurcher v. Stanford Daily*](#) 436 U.S. 547 (1978)

1979



Justices serving on the Court and Martin Quinn Ideology scores, 1979

Justices serving on the Court, 1979

Justice	Mean	President	Party of President	Years Served
White	0.246	Kennedy	Democrat	1961-1993
Blackmun	-0.047	Nixon	Republican	1969-1994
Stevens	-0.243	Ford	Republican	1975-2010
Powell	0.823	Nixon	Republican	1971-1987
Stewart	0.48	Eisenhower	Republican	1958-1981
Marshall	-3.337	Johnson	Democrat	1967-1991
Burger	1.247	Nixon	Republican	1969-1986
Rehnquist	4.517	Nixon	Republican	1971-2005
Brennan	-2.485	Eisenhower	Republican	1956-1990

Chief Justice, 1979

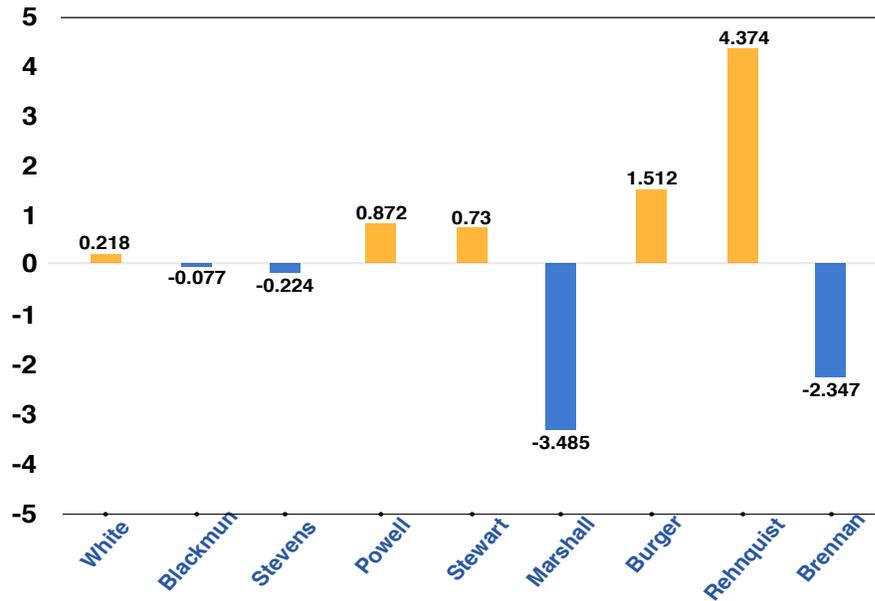
Chief Justice	Median	Court Score
Burger	0.239	0.13

[*Administrators of Mass. v. Feeney*](#) 442 U.S. 256 (1979)

[*Orr v. Orr*](#) 440 U.S. 268 (1979)

[*Smith v. Daily Mail Publishing Co*](#) 443 U.S. 97 (1979)

1980



Justices serving on the Court and Martin Quinn Ideology scores, 1980

Justices serving on the Court, 1980

Justice	Mean	President	Party of President	Years Served
White	0.218	Kennedy	Democrat	1961-1993
Blackmun	-0.077	Nixon	Republican	1969-1994
Stevens	-0.224	Ford	Republican	1975-2010
Powell	0.872	Nixon	Republican	1971-1987
Stewart	0.73	Eisenhower	Republican	1958-1981
Marshall	-3.485	Johnson	Democrat	1967-1991
Burger	1.512	Nixon	Republican	1969-1986
Rehnquist	4.374	Nixon	Republican	1971-2005
Brennan	-2.347	Eisenhower	Republican	1956-1990

Chief Justice, 1980

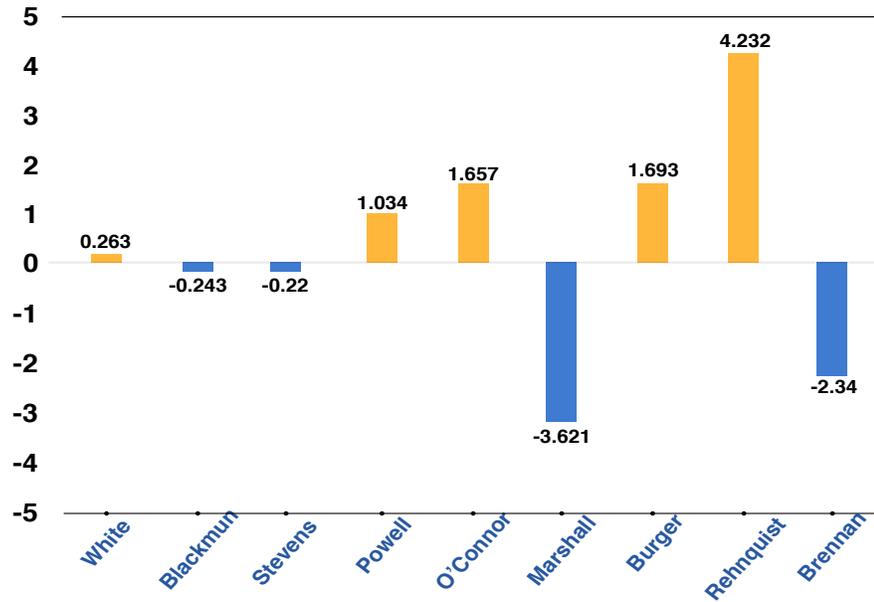
Chief Justice	Median	Court Score
Burger	0.224	0.17

[Fullilove v. Klutznick](#) 448 U.S. 448 (1980)

[Richmond Newspapers v. Virginia](#) 448 U.S. 555 (1980)

[Stone v. Graham](#) 449 U.S. 39 (1980)

1981



Justices serving on the Court and Martin Quinn Ideology scores, 1981

Justices serving on the Court, 1981

Justice	Mean	President	Party of President	Years Served
White	0.263	Kennedy	Democrat	1961-1993
Blackmun	-0.243	Nixon	Republican	1969-1994
Stevens	-0.22	Ford	Republican	1975-2010
Powell	1.034	Nixon	Republican	1971-1987
O'Connor	1.657	Reagan	Republican	1981-2006
Marshall	-3.621	Johnson	Democrat	1967-1991
Burger	1.693	Nixon	Republican	1969-1986
Rehnquist	4.232	Nixon	Republican	1971-2005
Brennan	-2.34	Eisenhower	Republican	1956-1990

Chief Justice, 1981

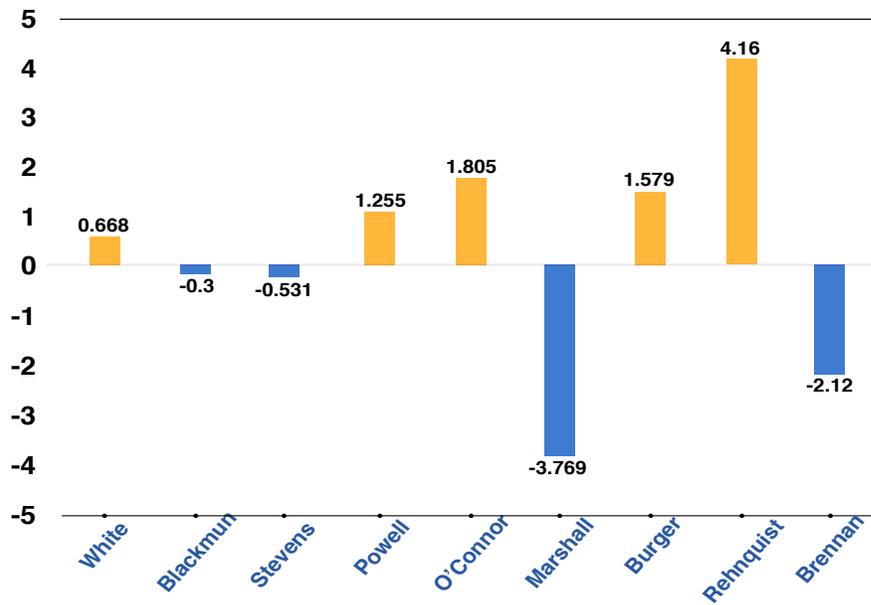
Chief Justice	Median	Court Score
Burger	0.263	0.27

[*Citizens Against Rent Control v. Berkeley*](#) 454 U.S. 290 (1981)

[*Michael M. v. Superior Court of Sonoma Cnty*](#) 450 U.S. 464 (1981)

[*Roskter v. Goldberg*](#) 453 U.S. 57 (1981)

1982



Justices serving on the Court and Martin Quinn Ideology scores, 1982

Justices serving on the Court, 1982

Justice	Mean	President	Party of President	Years Served
White	0.668	Kennedy	Democrat	1961-1993
Blackmun	-0.3	Nixon	Republican	1969-1994
Stevens	-0.531	Ford	Republican	1975-2010
Powell	1.255	Nixon	Republican	1971-1987
O'Connor	1.805	Reagan	Republican	1981-2006
Marshall	-3.796	Johnson	Democrat	1967-1991
Burger	1.579	Nixon	Republican	1969-1986
Rehnquist	4.16	Nixon	Republican	1971-2005
Brennan	-2.12	Eisenhower	Republican	1956-1990

Chief Justice, 1982

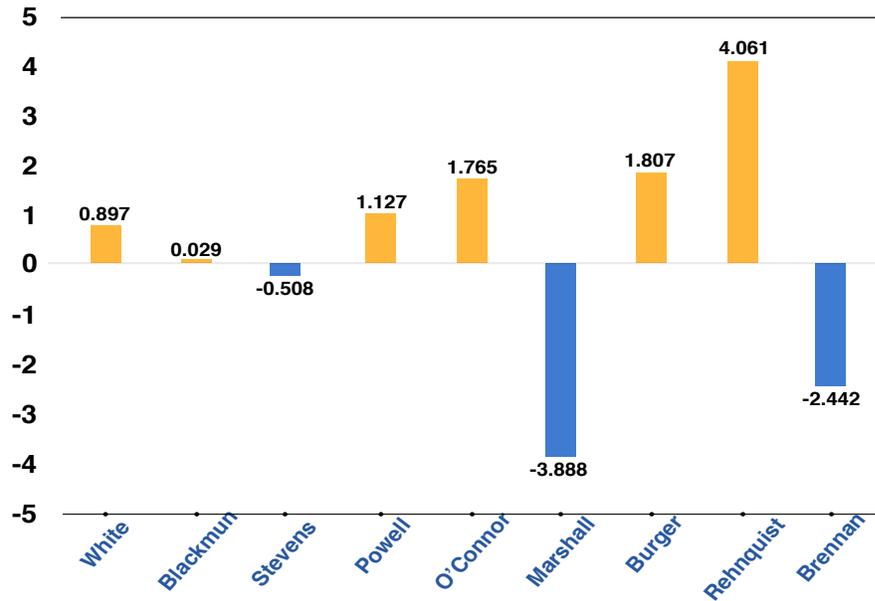
Chief Justice	Median	Court Score
Burger	0.667	0.30

[*Island Trees School District v. Pico*](#) 457 U.S. 853 (1982)

[*Miss. Univ. for Women v. Hogan*](#) 458 U.S. 718 (1982)

[*New York v. Ferber*](#) 458 U.S. 747 (1982)

1983



Justices serving on the Court and Martin Quinn Ideology scores, 1983

Justices serving on the Court, 1983

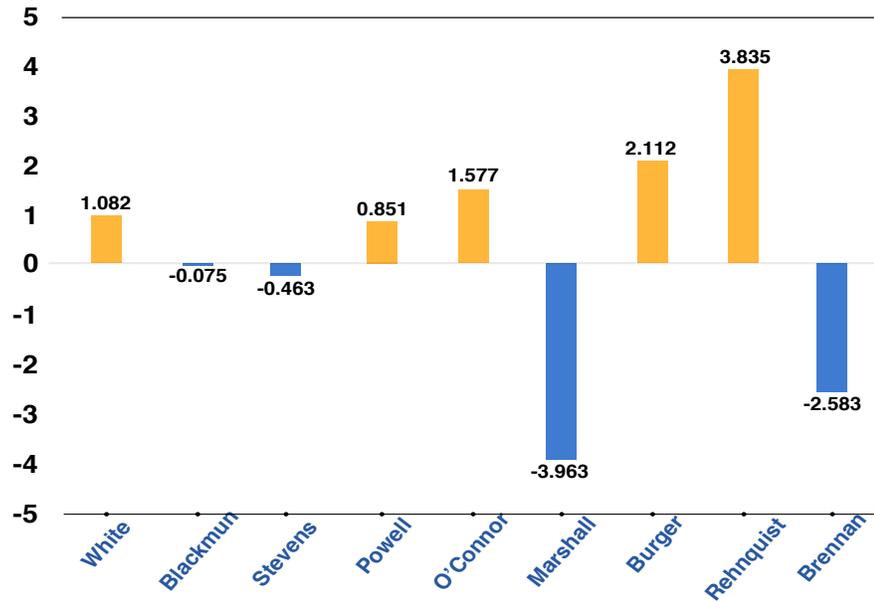
Justice	Mean	President	Party of President	Years Served
White	0.897	Kennedy	Democrat	1961-1993
Blackmun	0.029	Nixon	Republican	1969-1994
Stevens	-0.508	Ford	Republican	1975-2010
Powell	1.127	Nixon	Republican	1971-1987
O'Connor	1.765	Reagan	Republican	1981-2006
Marshall	-3.888	Johnson	Democrat	1967-1991
Burger	1.807	Nixon	Republican	1969-1986
Rehnquist	4.061	Nixon	Republican	1971-2005
Brennan	-2.442	Eisenhower	Republican	1956-1990

Chief Justice, 1983

Chief Justice	Median	Court Score
Burger	0.875	0.32

[Marsh v. Chambers](#) 463 U.S. 783 (1983)

1984



Justices serving on the Court and Martin Quinn Ideology scores, 1984

Justices serving on the Court, 1984

Justice	Mean	President	Party of President	Years Served
White	1.082	Kennedy	Democrat	1961-1993
Blackmun	-0.075	Nixon	Republican	1969-1994
Stevens	-0.463	Ford	Republican	1975-2010
Powell	0.851	Nixon	Republican	1971-1987
O'Connor	1.577	Reagan	Republican	1981-2006
Marshall	-3.963	Johnson	Democrat	1967-1991
Burger	2.112	Nixon	Republican	1969-1986
Rehnquist	3.835	Nixon	Republican	1971-2005
Brennan	-2.583	Eisenhower	Republican	1956-1990

Chief Justice, 1984

Chief Justice	Median	Court Score
Burger	0.824	0.26

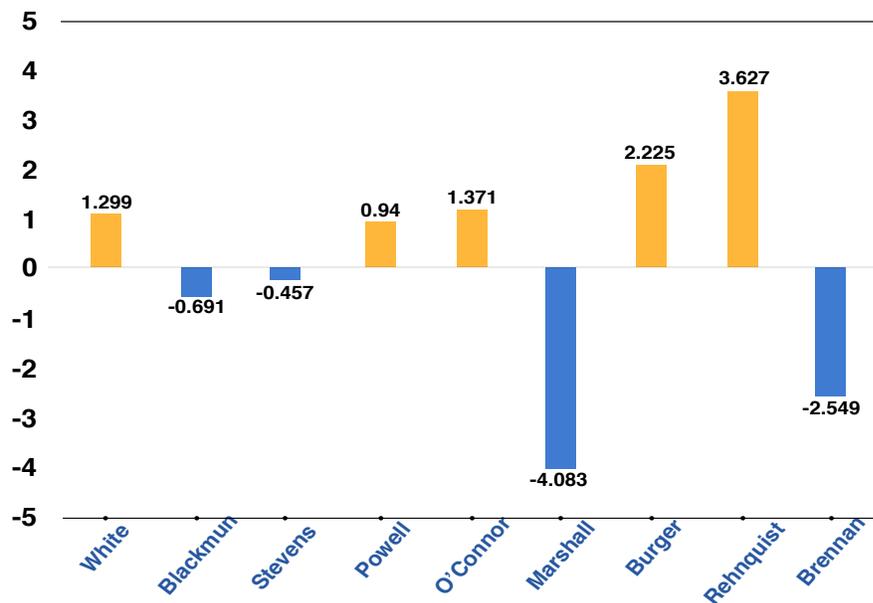
[City Council v. Taxpayers for Vincent](#) (1984)

[*Palmore v. Sidoti*](#) 466 U.S. 429 (1984)

[*Seattle Times v. Rhinehart*](#) 476 U.S. 20 (1984)

[*William P. Clarke, Secretary of the Interior, et al. v. Community for Creative Non-Violence et al.*](#) 468 U.S. 288 (1984)

1985



Justices serving on the Court and Martin Quinn Ideology scores, 1985

Justices serving on the Court, 1985

Justice	Mean	President	Party of President	Years Served
White	1.299	Kennedy	Democrat	1961-1993
Blackmun	-0.691	Nixon	Republican	1969-1994
Stevens	-0.457	Ford	Republican	1975-2010
Powell	0.94	Nixon	Republican	1971-1987
O'Connor	1.371	Reagan	Republican	1981-2006
Marshall	-4.083	Johnson	Democrat	1967-1991
Burger	2.225	Nixon	Republican	1969-1986
Rehnquist	3.627	Nixon	Republican	1971-2005
Brennan	-2.549	Eisenhower	Republican	1956-1990

Chief Justice, 1985

Chief Justice	Median	Court Score
Burger	0.93	0.19

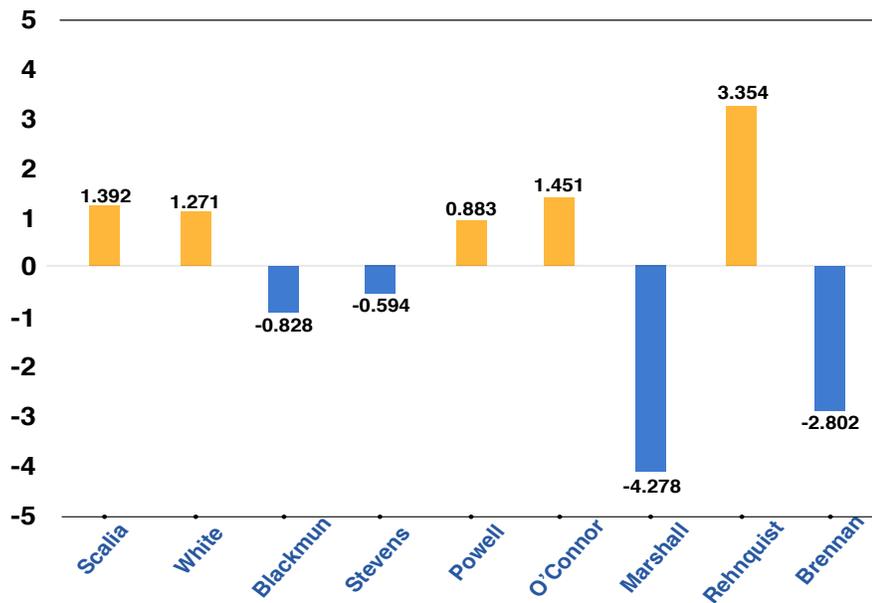
[*City of Cleburne v. Cleburne Living Center*](#) 473 U.S. 432 (1985)

[*Hunter v. Underwood*](#) 471 U.S. 222 (1985)

[*Plyler v. Doe*](#) 457 U.S. 202 (1985)

[*Wallace v. Jaffree*](#) 472 U.S. 38 (1985)

1986



Justices serving on the Court and Martin Quinn Ideology scores, 1986

Justices serving on the Court, 1986

Justice	Mean	President	Party of President	Years Served
Scalia	1.392	Reagan	Republican	1986-2016
White	1.271	Kennedy	Democrat	1961-1993
Blackmun	-0.828	Nixon	Republican	1969-1994
Stevens	-0.594	Ford	Republican	1975-2010
Powell	0.883	Nixon	Republican	1971-1987
O'Connor	1.451	Reagan	Republican	1981-2006
Marshall	-4.278	Johnson	Democrat	1967-1991
Rehnquist	3.354	Nixon	Republican	1971-2005
Brennan	-2.802	Eisenhower	Republican	1956-1990

Chief Justice, 1986

Chief Justice	Median	Court Score
Rehnquist	0.875	-0.02

[*Akron v. Akron Health Center*](#) 462 U.S. 416 (1986)

[*Bethel School District No. 403 v. Fraser*](#) 478 U.S. 675 (1986)

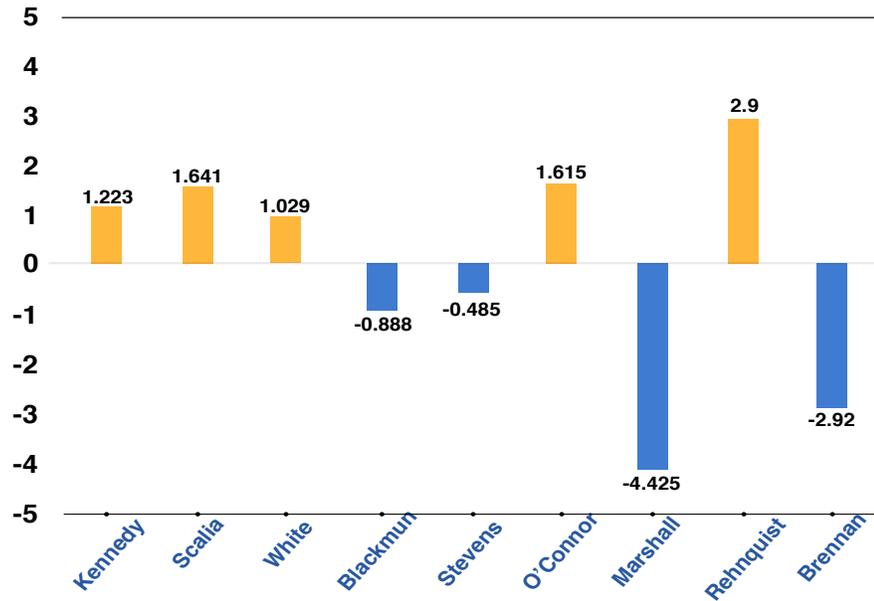
[*Bowers v. Hardwick*](#) 478 U.S. 186 (1986)

[*Planned Parenthood v. Danforth*](#) 428 U.S. 52 (1986)

[*Thornburgh v. Gingles*](#) 478 U.S. 30 (1986)

[*Wygant v. Jackson Board of Ed.*](#) 476 U.S. 267 (1986)

1987



Justices serving on the Court and Martin Quinn Ideology scores, 1987

Justices serving on the Court, 1987

Justice	Mean	President	Party of President	Years Served
Kennedy	1.223	Reagan	Republican	1987-2018
Scalia	1.641	Reagan	Republican	1986-2016
White	1.029	Kennedy	Democrat	1961-1993
Blackmun	-0.888	Nixon	Republican	1969-1994
Stevens	-0.485	Ford	Republican	1975-2010
O'Connor	1.615	Reagan	Republican	1981-2006
Marshall	-4.425	Johnson	Democrat	1967-1991
Rehnquist	2.9	Nixon	Republican	1971-2005
Brennan	-2.92	Eisenhower	Republican	1956-1990

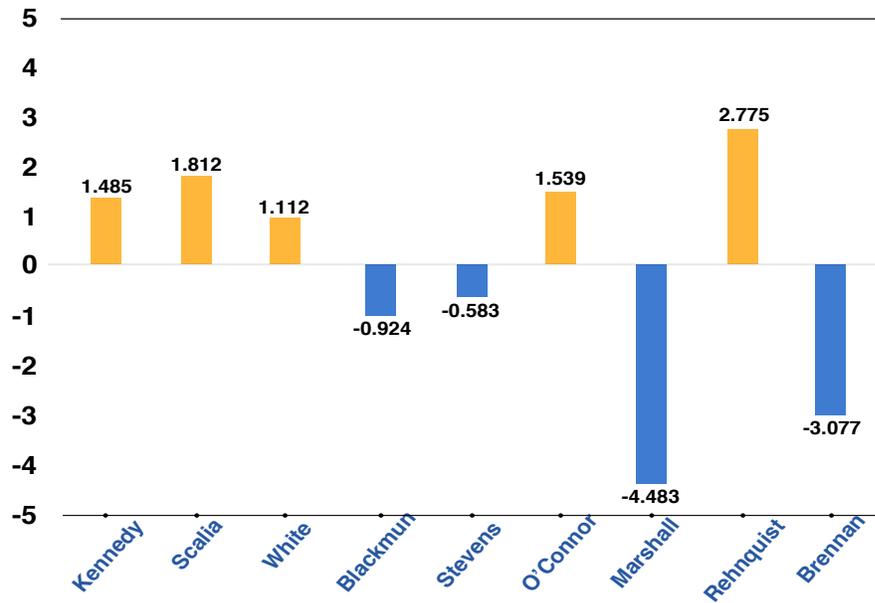
Chief Justice, 1987

Chief Justice	Median	Court Score
Rehnquist	0.974	-0.03

[Edwards v. Aguillard](#) 482 U.S. 578 (1987)

Goldman v. Weinberger 475 U.S. 503 (1987)

1988

*Justices serving on the Court and Martin Quinn Ideology scores, 1988***Justices serving on the Court, 1988**

Justice	Mean	President	Party of President	Years Served
Kennedy	1.485	Reagan	Republican	1987-2018
Scalia	1.812	Reagan	Republican	1986-2016
White	1.112	Kennedy	Democrat	1961-1993
Blackmun	-0.924	Nixon	Republican	1969-1994
Stevens	-0.583	Ford	Republican	1975-2010
O'Connor	1.539	Reagan	Republican	1981-2006
Marshall	-4.483	Johnson	Democrat	1967-1991
Rehnquist	2.775	Nixon	Republican	1971-2005
Brennan	-3.077	Eisenhower	Republican	1956-1990

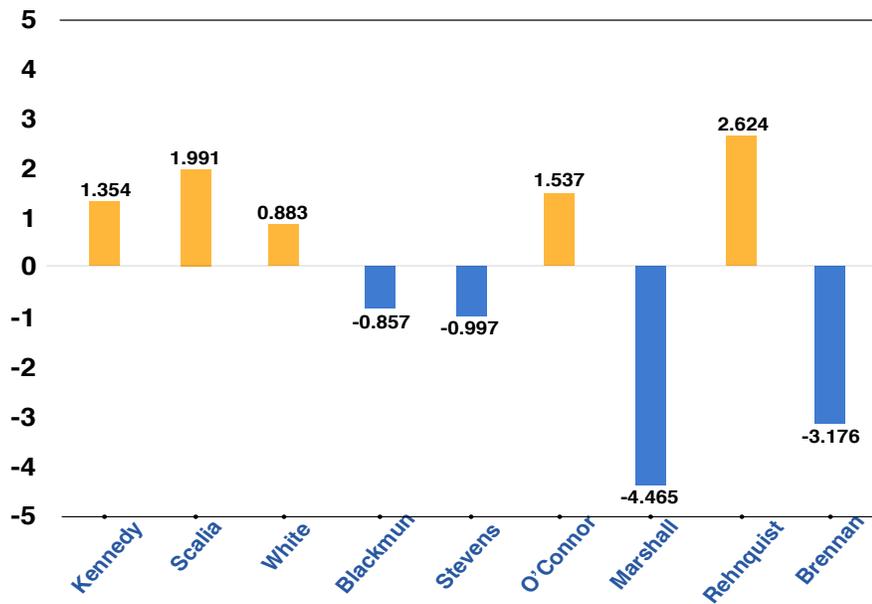
Chief Justice, 1988

Chief Justice	Median	Court Score
Rehnquist	1.094	-0.04

[*Clark v. Jeter*](#) 486 U.S. 456 (1988)

[*Hazelwood School District v. Kuhlmeier*](#) 484 U.S. 260 (1988)

1989



Justices serving on the Court and Martin Quinn Ideology scores, 1989

Justices serving on the Court, 1989

Justice	Mean	President	Party of President	Years Served
Kennedy	1.354	Reagan	Republican	1987-2018
Scalia	1.991	Reagan	Republican	1986-2016
White	0.883	Kennedy	Democrat	1961-1993
Blackmun	-0.857	Nixon	Republican	1969-1994
Stevens	-0.997	Ford	Republican	1975-2010
O'Connor	1.537	Reagan	Republican	1981-2006
Marshall	-4.465	Johnson	Democrat	1967-1991
Rehnquist	2.624	Nixon	Republican	1971-2005
Brennan	-3.176	Eisenhower	Republican	1956-1990

Chief Justice, 1989

Chief Justice	Median	Court Score
Rehnquist	0.88	-0.12

[*Alleghany County v. Pittsburgh ACLU*](#) 492 U.S. 573 (1989)

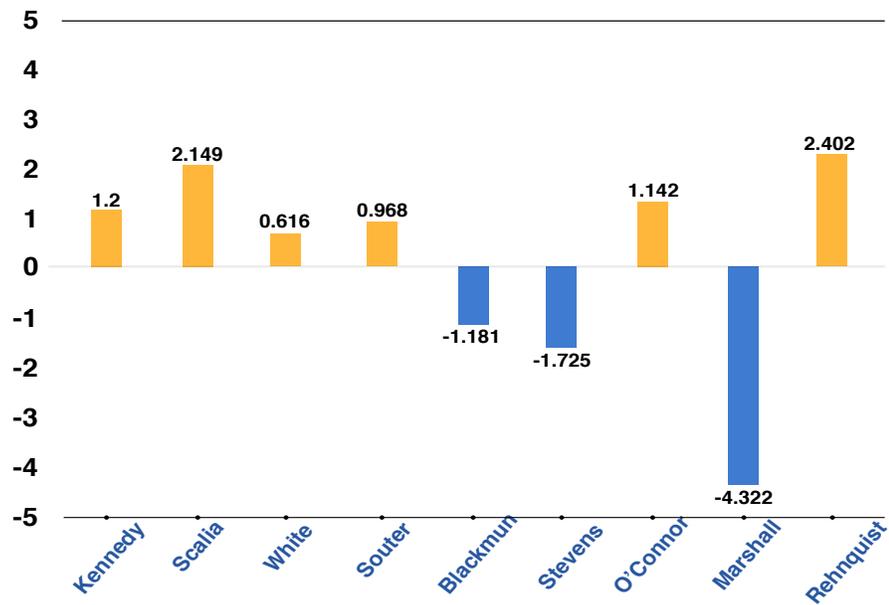
[*City of Richmond v. J.A. Croson Co*](#) 488 U.S. 469 (1989)

[*Texas v. Johnson*](#) 491 U.S. 397 (1989)

Justices Serving on the Court 1990 - 2009

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1990



Justices serving on the Court and Martin Quinn Ideology scores, 1990

Justices serving on the Court, 1990

Justice	Mean	President	Party of President	Years Served
Kennedy	1.2	Reagan	Republican	1987-2018
Scalia	2.149	Reagan	Republican	1986-2016
White	0.616	Kennedy	Democrat	1961-1993
Souter	0.968	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.181	Nixon	Republican	1969-1994
Stevens	-1.725	Ford	Republican	1975-2010
O'Connor	1.142	Reagan	Republican	1981-2006
Marshall	-4.322	Johnson	Democrat	1967-1991
Rehnquist	2.402	Nixon	Republican	1971-2005

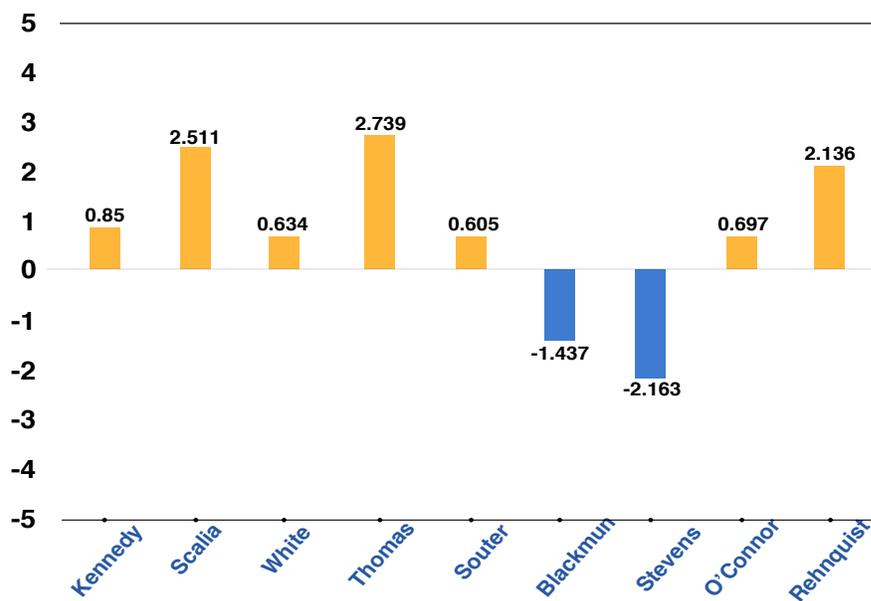
Chief Justice, 1990

Chief Justice	Median	Court Score
Rehnquist	0.916	0.14

[Oregon v. Smith](#) 494 U.S. 872 (1990)

[United States v. Eichman](#) 496 U.S. 310 (1990)

1991



Justices serving on the Court and Martin Quinn Ideology scores, 1991

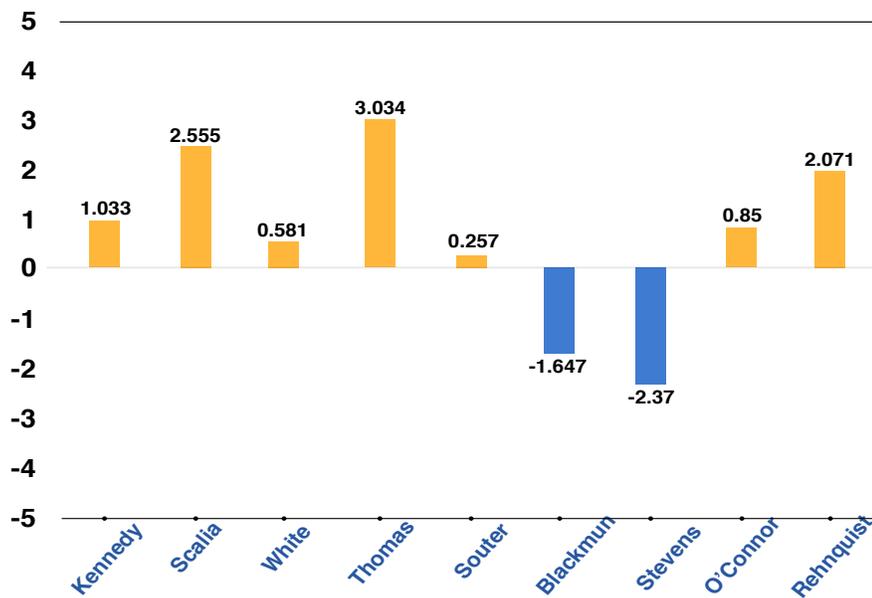
Justices serving on the Court, 1991

Justice	Mean	President	Party of President	Years Served
Kennedy	0.85	Reagan	Republican	1987-2018
Scalia	2.511	Reagan	Republican	1986-2016
White	0.634	Kennedy	Democrat	1961-1993
Thomas	2.739	Bush, G.H.W	Republican	1991-
Souter	0.605	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.437	Nixon	Republican	1969-1994
Stevens	-2.163	Ford	Republican	1975-2010
O'Connor	0.697	Reagan	Republican	1981-2006
Rehnquist	2.136	Nixon	Republican	1971-2005

Chief Justice, 1991

Chief Justice	Median	Court Score
Rehnquist	0.753	0.73

1992



*Justices serving on the Court and Martin Quinn Ideology scores, 1992***Justices serving on the Court, 1992**

Justice	Mean	President	Party of President	Years Served
Kennedy	1.033	Reagan	Republican	1987-2018
Scalia	2.555	Reagan	Republican	1986-2016
White	0.581	Kennedy	Democrat	1961-1993
Thomas	3.034	Bush, G.H.W	Republican	1991-
Souter	0.257	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.647	Nixon	Republican	1969-1994
Stevens	-2.37	Ford	Republican	1975-2010
O'Connor	0.85	Reagan	Republican	1981-2006
Rehnquist	2.071	Nixon	Republican	1971-2005

Chief Justice, 1992

Chief Justice	Median	Court Score
Rehnquist	0.853	0.71

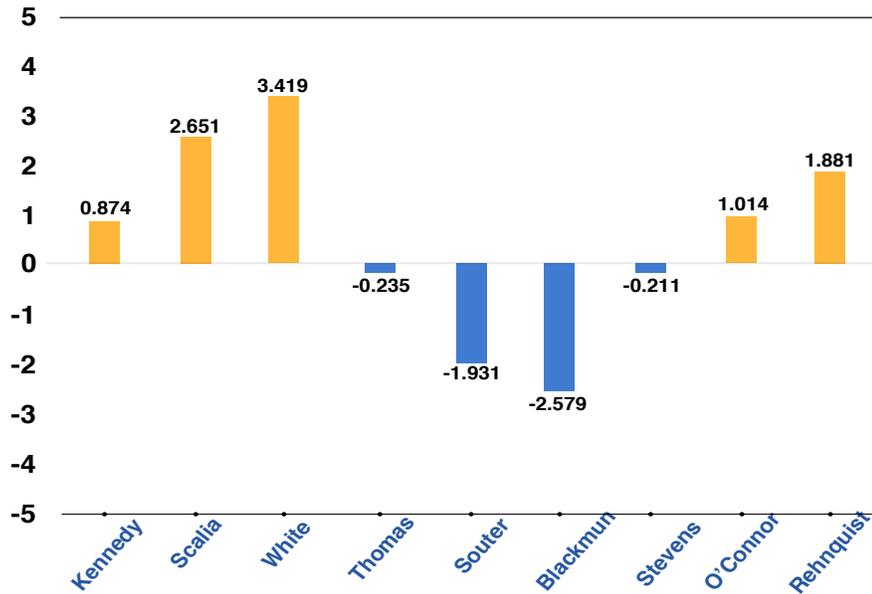
[*Freeman v. Pitts*](#) 503 U.S. 467 (1992)

[*Planned Parenthood v. Casey*](#) 505 U.S. 833 (1992)

[*R.A.V. v. St Paul*](#) 505 U.S. 377 (1992)

[*Ward v. Rock Against Racism*](#) 491 U.S. 781 (1992)

1993



Justices serving on the Court and Martin Quinn Ideology scores, 1993

Justices serving on the Court, 1993

Justice	Mean	President	Party of President	Years Served
Kennedy	0.874	Reagan	Republican	1987-2018
Scalia	2.651	Reagan	Republican	1986-2016
Thomas	3.419	Bush, G.H.W	Republican	1991-
Souter	-0.235	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.931	Nixon	Republican	1969-1994
Stevens	-2.579	Ford	Republican	1975-2010
Ginsburg	-0.211	Clinton	Democrat	1993-2020
O'Connor	1.014	Reagan	Republican	1981-2006
Rehnquist	1.881	Nixon	Republican	1971-2005

Chief Justice, 1993

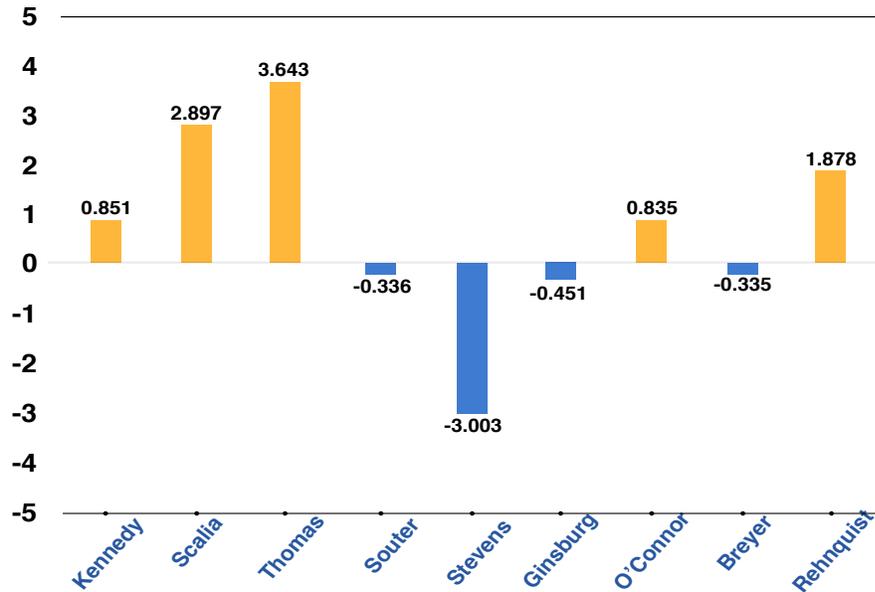
Chief Justice	Median	Court Score
Rehnquist	0.82	0.54

[Church of Lukumi Babalu Aye, Inc. v. City of Hialeah](#) 508 U.S. 520 (1993)

[*Shaw v. Reno*](#) 509 U.S. 630 (1993)

[*Wisconsin v. Mitchell*](#) 508 U.S. 476 (1993)

1994



Justices serving on the Court and Martin Quinn Ideology scores, 1994

Justices serving on the Court, 1994

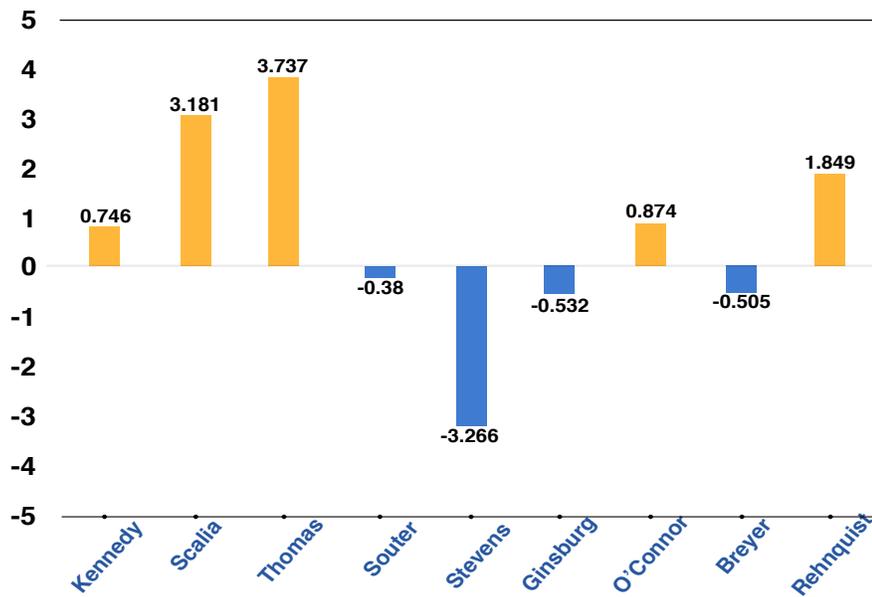
Justice	Mean	President	Party of President	Years Served
Kennedy	0.851	Reagan	Republican	1987-2018
Scalia	2.897	Reagan	Republican	1986-2016
Thomas	3.643	Bush, G.H.W	Republican	1991-
Souter	-0.336	Bush, G.H.W	Republican	1990-2009
Stevens	-3.003	Ford	Republican	1975-2010
Ginsburg	-0.451	Clinton	Democrat	1993-2020
O'Connor	0.835	Reagan	Republican	1981-2006
Breyer	-0.335	Clinton	Democrat	1994-2022
Rehnquist	1.878	Nixon	Republican	1971-2005

Chief Justice, 1994

Chief Justice	Median	Court Score
Rehnquist	0.735	0.66

Turner Broadcasting System, Inc v. FCC 512 U.S. 622 (1994)

1995



Justices serving on the Court and Martin Quinn Ideology scores, 1995

Justices serving on the Court, 1995

Justice	Mean	President	Party of President	Years Served
Kennedy	0.746	Reagan	Republican	1987-2018
Scalia	3.181	Reagan	Republican	1986-2016
Thomas	3.737	Bush, G.H.W	Republican	1991-
Souter	-0.38	Bush, G.H.W	Republican	1990-2009
Stevens	-3.266	Ford	Republican	1975-2010
Ginsburg	-0.532	Clinton	Democrat	1993-2020
O'Connor	0.874	Reagan	Republican	1981-2006
Breyer	-0.505	Clinton	Democrat	1994-2022
Rehnquist	1.849	Nixon	Republican	1971-2005

Chief Justice, 1995

Chief Justice	Median	Court Score
Rehnquist	0.689	0.63

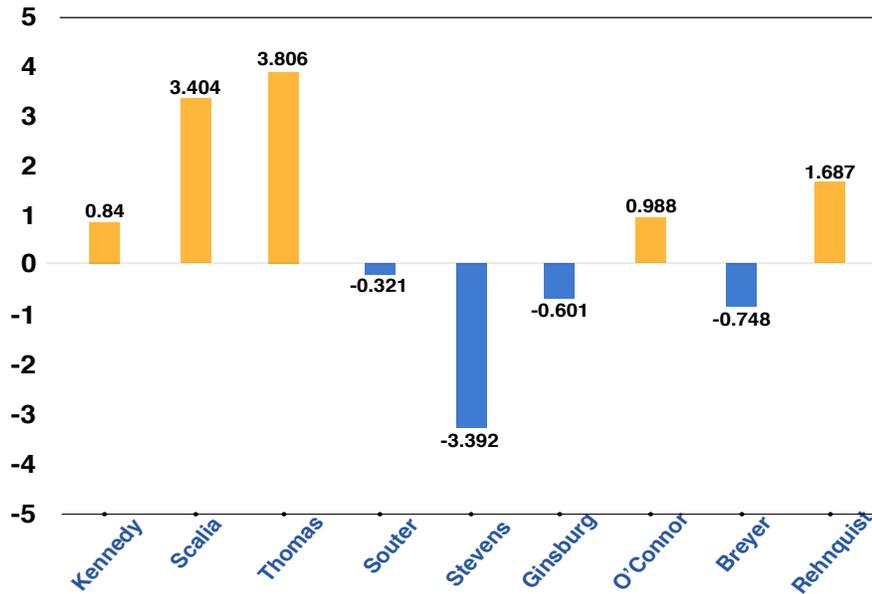
[*Adarand Constructors, Inc. v. Peña*](#) 515 U.S. 200 (1995)

[*Hurley v. Irish GLB of Boston*](#) 515 U.S. 557 (1995)

[*Miller v. Johnson*](#) 515 U.S. 900 (1995)

[*Rosenberger v. Rector and Visitors of the University of Virginia*](#) 515 U.S. 819 (1995)

1996



Justices serving on the Court and Martin Quinn Ideology scores, 1996

Justices serving on the Court, 1996

Justice	Mean	President	Party of President	Years Served
Kennedy	0.84	Reagan	Republican	1987-2018
Scalia	3.404	Reagan	Republican	1986-2016
Thomas	3.806	Bush, G.H.W	Republican	1991-
Souter	-0.321	Bush, G.H.W	Republican	1990-2009
Stevens	-3.392	Ford	Republican	1975-2010
Ginsburg	-0.601	Clinton	Democrat	1993-2020
O'Connor	0.988	Reagan	Republican	1981-2006
Breyer	-0.748	Clinton	Democrat	1994-2022
Rehnquist	1.687	Nixon	Republican	1971-2005

Chief Justice, 1996

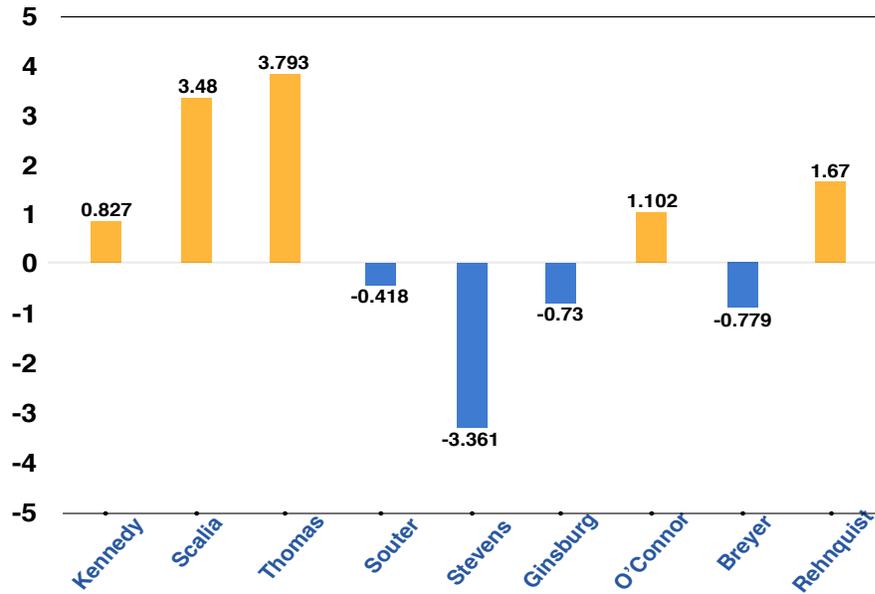
Chief Justice	Median	Court Score
Rehnquist	0.788	0.63

[Bush v. Vera](#) 517 U.S. 952 (1996)

[Romer v. Evans](#) 517 U.S. 620 (1996)

[U.S. v. Virginia](#) 518 U.S. 515 (1996)

1997



Justices serving on the Court and Martin Quinn Ideology scores, 1997

Justices serving on the Court, 1997

Justice	Mean	President	Party of President	Years Served
Kennedy	0.827	Reagan	Republican	1987-2018
Scalia	3.48	Reagan	Republican	1986-2016
Thomas	3.793	Bush, G.H.W	Republican	1991-
Souter	-0.418	Bush, G.H.W	Republican	1990-2009
Stevens	-3.361	Ford	Republican	1975-2010
Ginsburg	-0.73	Clinton	Democrat	1993-2020
O'Connor	1.102	Reagan	Republican	1981-2006
Breyer	-0.779	Clinton	Democrat	1994-2022
Rehnquist	1.67	Nixon	Republican	1971-2005

Chief Justice, 1997

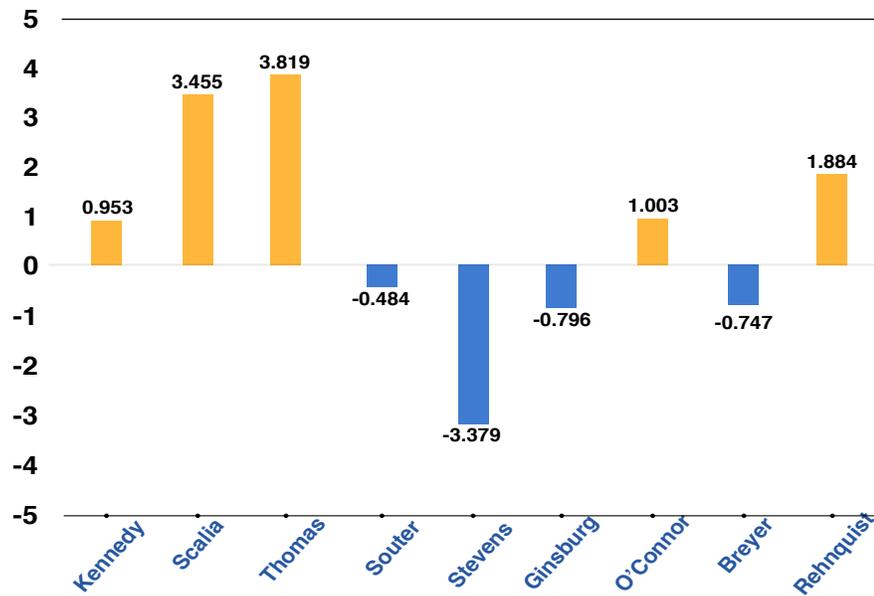
Chief Justice	Median	Court Score
Rehnquist	0.8	0.62

[*Mazurek v. Armstrong*](#) 520 U.S. 968 (1997)

[*Reno v. American Civil Liberties Union*](#) 521 U.S. 844 (1997)

[*Washington v. Glucksberg*](#) 521 U.S. 702 (1997)

1998



Justices serving on the Court and Martin Quinn Ideology scores, 1998

Justices serving on the Court, 1998

Justice	Mean	President	Party of President	Years Served
Kennedy	0.953	Reagan	Republican	1987-2018
Scalia	3.455	Reagan	Republican	1986-2016
Thomas	3.819	Bush, G.H.W	Republican	1991-
Souter	-0.484	Bush, G.H.W	Republican	1990-2009
Stevens	-3.379	Ford	Republican	1975-2010
Ginsburg	-0.796	Clinton	Democrat	1993-2020
O'Connor	1.003	Reagan	Republican	1981-2006
Breyer	-0.747	Clinton	Democrat	1994-2022
Rehnquist	1.884	Nixon	Republican	1971-2005

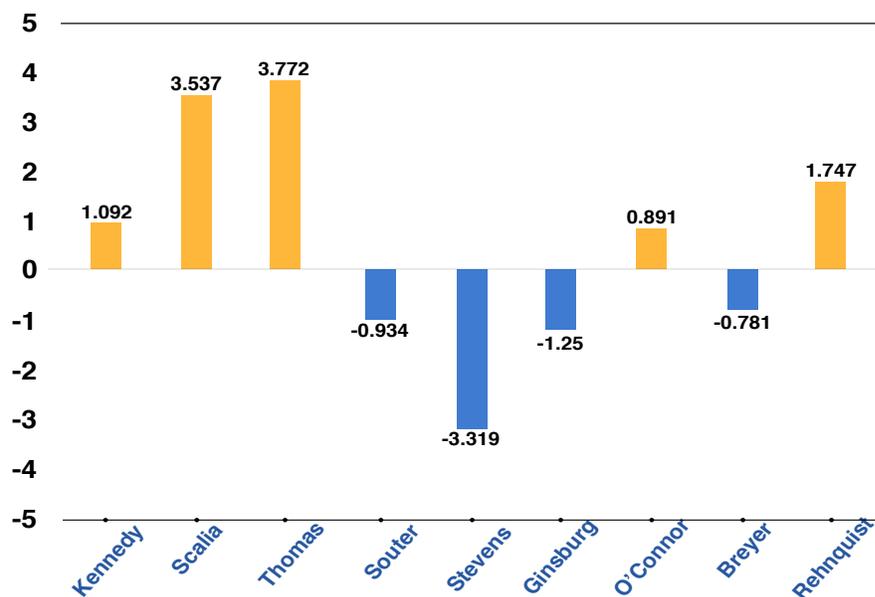
Chief Justice, 1998

Chief Justice	Median	Court Score
Rehnquist	0.863	0.63

[*Hustler Magazine v. Falwell*](#) 485 U.S. 46 (1998)

[*National Endowment for the Arts v. Finley*](#) 524 U.S. 569 (1998)

1999



*Justices serving on the Court and Martin Quinn Ideology scores, 1999***Justices serving on the Court, 1999**

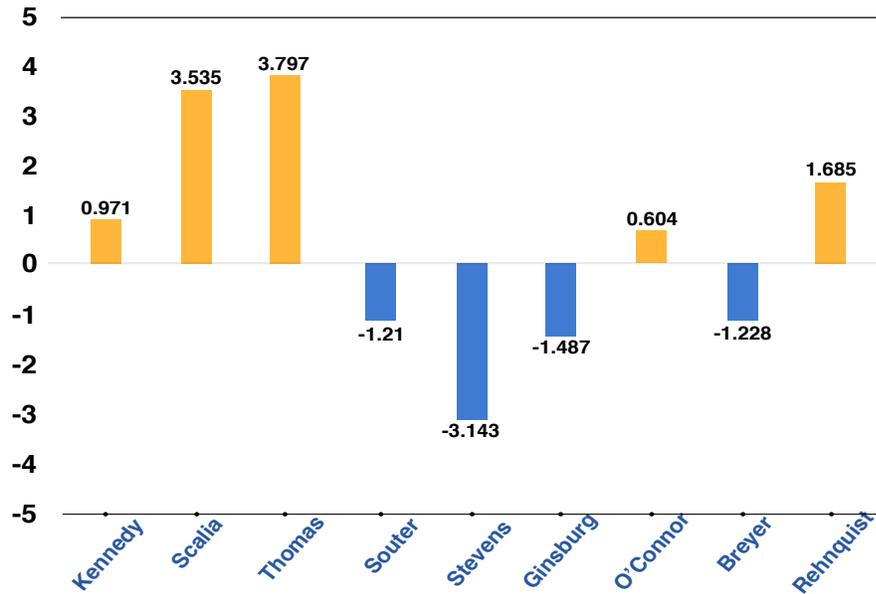
Justice	Mean	President	Party of President	Years Served
Kennedy	1.092	Reagan	Republican	1987-2018
Scalia	3.537	Reagan	Republican	1986-2016
Thomas	3.772	Bush, G.H.W	Republican	1991-
Souter	-0.934	Bush, G.H.W	Republican	1990-2009
Stevens	-3.319	Ford	Republican	1975-2010
Ginsburg	-1.25	Clinton	Democrat	1993-2020
O'Connor	0.891	Reagan	Republican	1981-2006
Breyer	-0.781	Clinton	Democrat	1994-2022
Rehnquist	1.747	Nixon	Republican	1971-2005

Chief Justice, 1999

Chief Justice	Median	Court Score
Rehnquist	0.85	0.53

[*Saenz v. Roe*](#) 526 U.S. 489 (1999)

2000



Justices serving on the Court and Martin Quinn Ideology scores, 2000

Justices serving on the Court, 2000

Justice	Mean	President	Party of President	Years Served
Kennedy	0.971	Reagan	Republican	1987-2018
Scalia	3.535	Reagan	Republican	1986-2016
Thomas	3.797	Bush, G.H.W	Republican	1991-
Souter	-1.21	Bush, G.H.W	Republican	1990-2009
Stevens	-3.143	Ford	Republican	1975-2010
Ginsburg	-1.487	Clinton	Democrat	1993-2020
O'Connor	0.604	Reagan	Republican	1981-2006
Breyer	-1.228	Clinton	Democrat	1994-2022
Rehnquist	1.685	Nixon	Republican	1971-2005

Chief Justice, 2000

Chief Justice	Median	Court Score
Rehnquist	0.594	0.39

[Board of Regents of the University of Wisconsin System v. Southworth](#) 529 U.S. 217 (2000)

[*BSA v. Dale*](#) 530 U.S. 640 (2000)

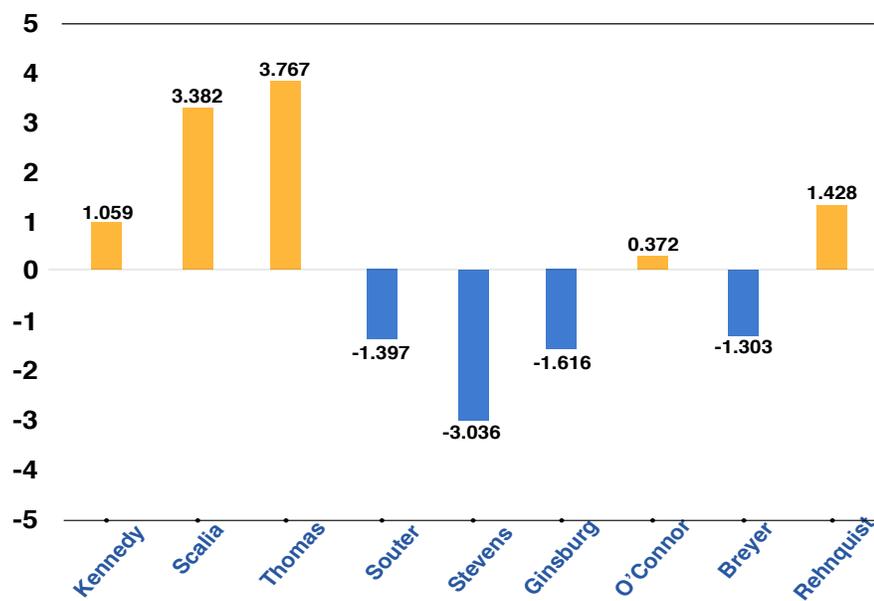
[*Hill v. CO*](#) 530 U.S. 703 (2000)

[*Rice v. Cayetano*](#) 528 U.S. 495 (2000)

[*Sante Fe Independent School District v. Doe*](#) 530 U.S. 290 (2000)

[*United States et. al v. Playboy Entertainment Group, Inc.*](#) 529 U.S. 803 (2000)

2001



Justices serving on the Court and Martin Quinn Ideology scores, 2001

Justices serving on the Court, 2001

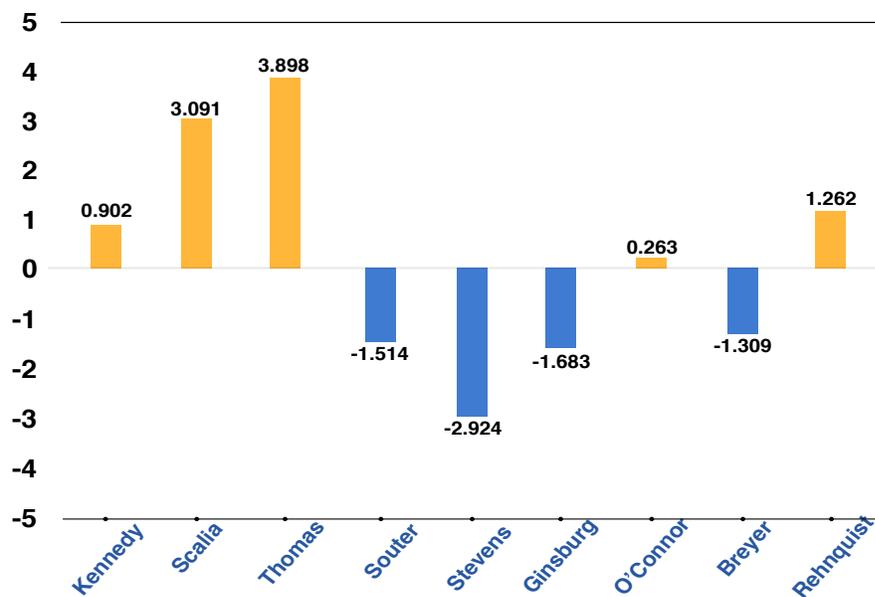
Justice	Mean	President	Party of President	Years Served
Kennedy	1.059	Reagan	Republican	1987-2018
Scalia	3.382	Reagan	Republican	1986-2016
Thomas	3.767	Bush, G.H.W	Republican	1991-
Souter	-1.397	Bush, G.H.W	Republican	1990-2009
Stevens	-3.036	Ford	Republican	1975-2010
Ginsburg	-1.616	Clinton	Democrat	1993-2020
O'Connor	0.372	Reagan	Republican	1981-2006
Breyer	-1.303	Clinton	Democrat	1994-2022
Rehnquist	1.428	Nixon	Republican	1971-2005

Chief Justice, 2001

Chief Justice	Median	Court Score
Rehnquist	0.371	0.30

[United States v. Emerson](#) 270 F.3d 203 (2001)

2002



*Justices serving on the Court and Martin Quinn Ideology scores, 2002***Justices serving on the Court, 2002**

Justice	Mean	President	Party of President	Years Served
Kennedy	0.902	Reagan	Republican	1987-2018
Scalia	3.091	Reagan	Republican	1986-2016
Thomas	3.898	Bush, G.H.W	Republican	1991-
Souter	-1.514	Bush, G.H.W	Republican	1990-2009
Stevens	-2.924	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.263	Reagan	Republican	1981-2006
Breyer	-1.309	Clinton	Democrat	1994-2022
Rehnquist	1.262	Nixon	Republican	1971-2005

Chief Justice, 2002

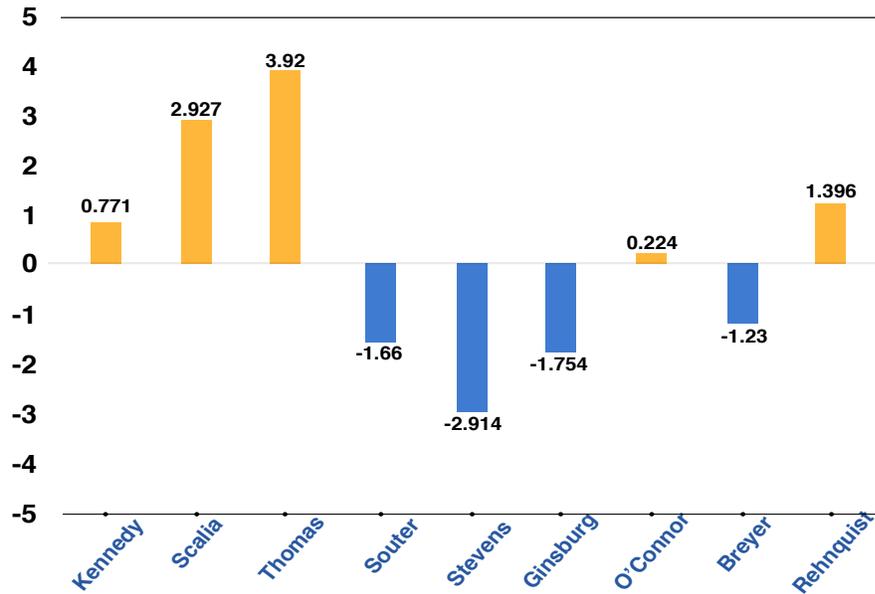
Chief Justice	Median	Court Score
Rehnquist	0.262	0.22

[*Republican Party of Minnesota v. White*](#) 536 U.S. 765 (2002)

[*Watchtower v. Stratton*](#) 536 U.S. 150 (2002)

[*Zelman v. Simmons-Harris*](#) 536 U.S. 639 (2002)

2003



Justices serving on the Court and Martin Quinn Ideology scores, 2003

Justices serving on the Court, 2003

Justice	Mean	President	Party of President	Years Served
Kennedy	0.771	Reagan	Republican	1987-2018
Scalia	2.927	Reagan	Republican	1986-2016
Thomas	3.92	Bush, G.H.W	Republican	1991-
Souter	-1.66	Bush, G.H.W	Republican	1990-2009
Stevens	-2.914	Ford	Republican	1975-2010
Ginsburg	-1.754	Clinton	Democrat	1993-2020
O'Connor	0.224	Reagan	Republican	1981-2006
Breyer	-1.23	Clinton	Democrat	1994-2022
Rehnquist	1.396	Nixon	Republican	1971-2005

Chief Justice, 2003

Chief Justice	Median	Court Score
Rehnquist	0.222	0.19

[FEC v. Beaumont](#) 539 U.S. 146 (2003)

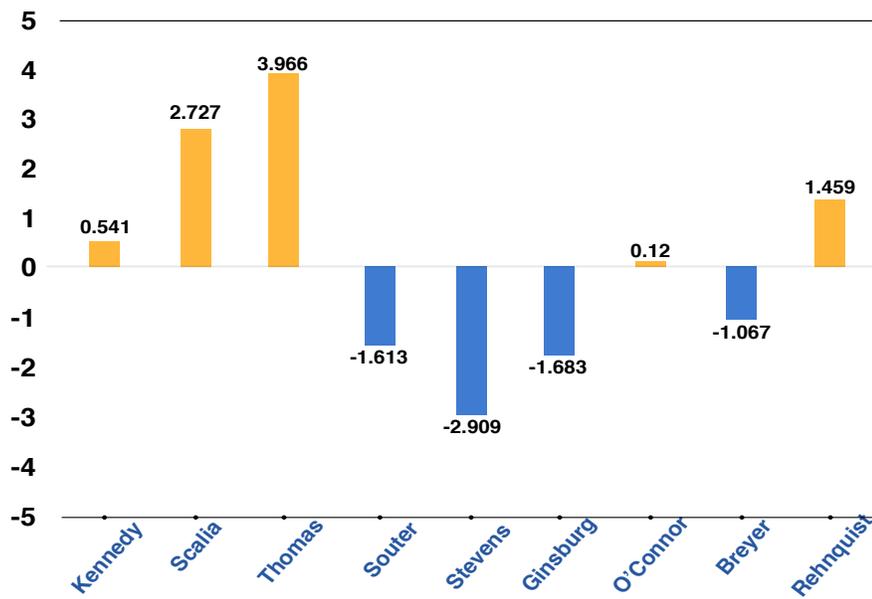
[*Gratz v. Bollinger*](#) 539 U.S. 244 (2003)

[*Grutter v. Bollinger*](#) 539 U.S. 306 (2003)

[*Lawrence v. Texas*](#) 539 U.S. 558 (2003)

[*Virginia v. Black*](#) 538 U.S. 343 (2003)

2004



Justices serving on the Court and Martin Quinn Ideology scores, 2004

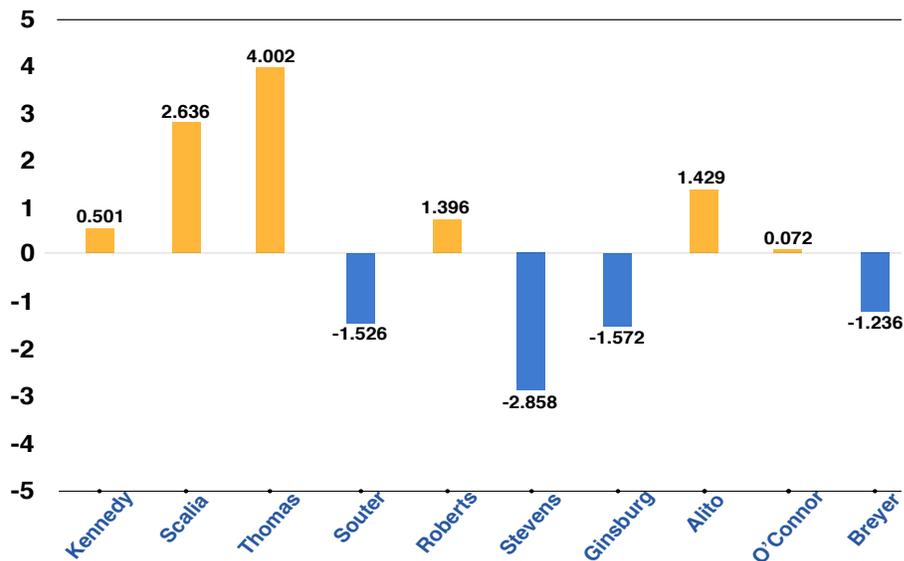
Justices serving on the Court, 2004

Justice	Mean	President	Party of President	Years Served
Kennedy	0.541	Reagan	Republican	1987-2018
Scalia	2.727	Reagan	Republican	1986-2016
Thomas	3.966	Bush, G.H.W	Republican	1991-
Souter	-1.613	Bush, G.H.W	Republican	1990-2009
Stevens	-2.909	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.12	Reagan	Republican	1981-2006
Breyer	-1.067	Clinton	Democrat	1994-2022
Rehnquist	1.459	Nixon	Republican	1971-2005

Chief Justice, 2004

Chief Justice	Median	Court Score
Rehnquist	0.111	0.17

2005



Justices serving on the Court and Martin Quinn Ideology scores, 2005

Justices serving on the Court, 2005

Justice	Mean	President	Party of President	Years Served
Kennedy	0.501	Reagan	Republican	1987-2018
Scalia	2.636	Reagan	Republican	1986-2016
Thomas	4.002	Bush, G.H.W	Republican	1991-
Souter	-1.526	Bush, G.H.W	Republican	1990-2009
Roberts	1.396	Bush, G.W	Republican	2005-
Stevens	-2.858	Ford	Republican	1975-2010
Ginsburg	-1.572	Clinton	Democrat	1993-2020
Alito	1.429	Bush, G.W	Republican	2005-
O'Connor	0.072	Reagan	Republican	1981-2006
Breyer	-1.236	Clinton	Democrat	1994-2022

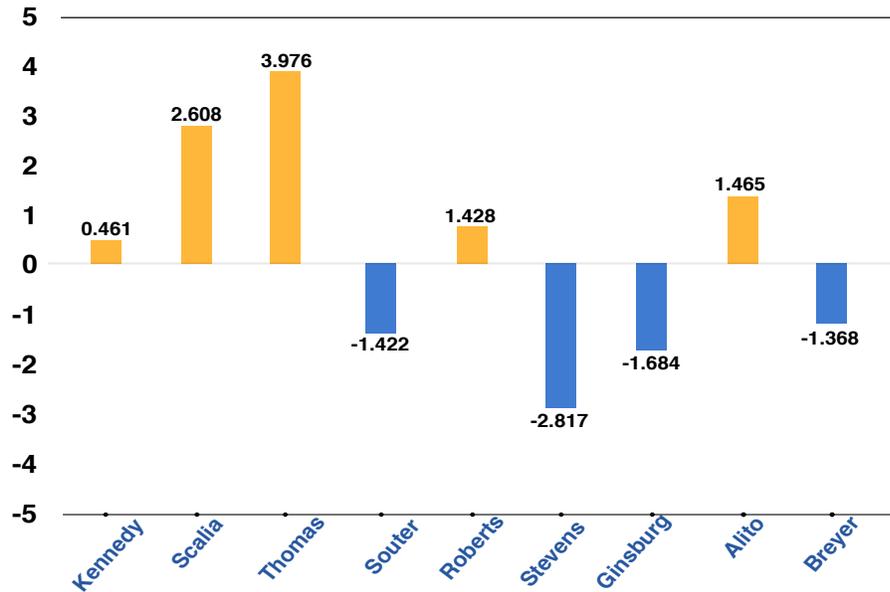
Chief Justice, 2005

Chief Justice	Median	Court Score
Roberts (a)	0.044	0.28
Roberts (b)	0.499	

[*McCreary County v. ACLU of Kentucky et al.*](#) 545 U.S. 844 (2005)

[*Van Orden v. Perry*](#) 545 U.S. 677 (2005)

2006



Justices serving on the Court and Martin Quinn Ideology scores, 2006

Justices serving on the Court, 2006

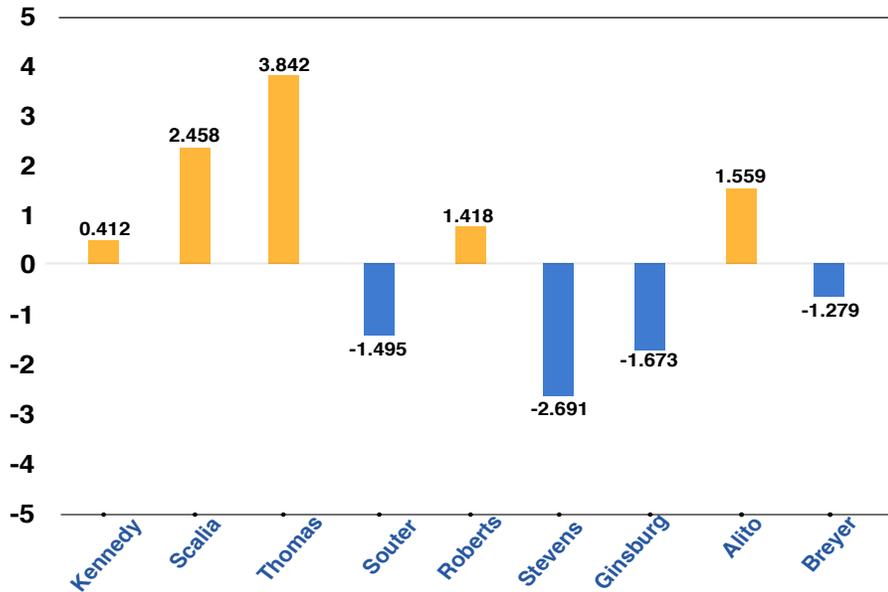
Justice	Mean	President	Party of President	Years Served
Kennedy	0.461	Reagan	Republican	1987-2018
Scalia	2.608	Reagan	Republican	1986-2016
Thomas	3.976	Bush, G.H.W	Republican	1991-
Souter	-1.422	Bush, G.H.W	Republican	1990-2009
Roberts	1.428	Bush, G.W	Republican	2005-
Stevens	-2.817	Ford	Republican	1975-2010
Ginsburg	-1.684	Clinton	Democrat	1993-2020
Alito	1.465	Bush, G.W	Republican	2005-
Breyer	-1.368	Clinton	Democrat	1994-2022

Chief Justice, 2006

Chief Justice	Median	Court Score
Roberts	0.461	0.29

[Donald H. Rumsfeld, Secretary of Defense, et al. v. Forum for Academic and Institutional Rights et al.](#) 547 U.S. 47 (2006)

2007



Justices serving on the Court and Martin Quinn Ideology scores, 2007

Justices serving on the Court, 2007

Justice	Mean	President	Party of President	Years Served
Kennedy	0.412	Reagan	Republican	1987-2018
Scalia	2.458	Reagan	Republican	1986-2016
Thomas	3.842	Bush, G.H.W	Republican	1991-
Souter	-1.495	Bush, G.H.W	Republican	1990-2009
Roberts	1.418	Bush, G.W	Republican	2005-
Stevens	-2.691	Ford	Republican	1975-2010
Ginsburg	-1.673	Clinton	Democrat	1993-2020
Alito	1.559	Bush, G.W	Republican	2005-
Breyer	-1.279	Clinton	Democrat	1994-2022

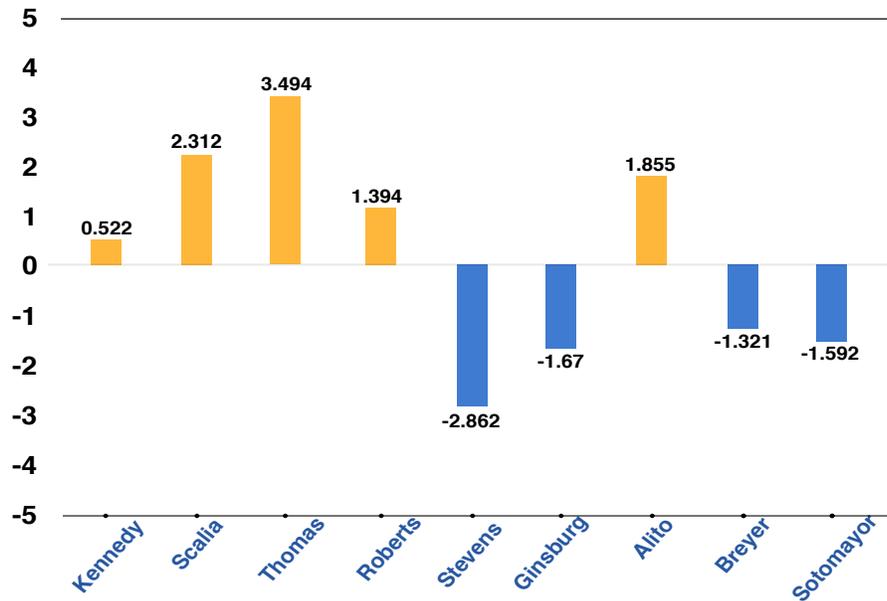
Chief Justice, 2007

Chief Justice	Median	Court Score
Roberts	0.412	0.28

[Morse v. Frederick](#) 551 U.S. 393 (2007)

Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 (2007)

2008



Justices serving on the Court and Martin Quinn Ideology scores, 2008

Justices serving on the Court, 2008

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

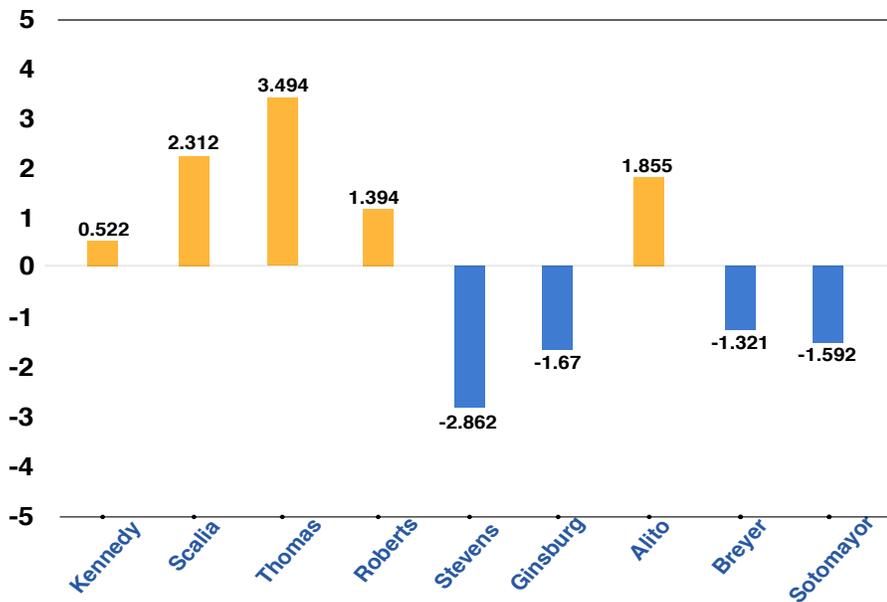
Chief Justice, 2008

Chief Justice	Median	Court Score
Roberts	0.579	0.24

[*Crawford v. Marion County Election Board et al Indiana Democratic Party, et al v. Todd Rokita, Indiana Secretary of State, et al*](#) 553 U.S. 181 (2008)

[*District of Columbia v. Heller*](#) 554 U.S. 570 (2008)

2009



Justices serving on the Court and Martin Quinn Ideology scores, 2009

Justices serving on the Court, 2009

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

Chief Justice, 2009

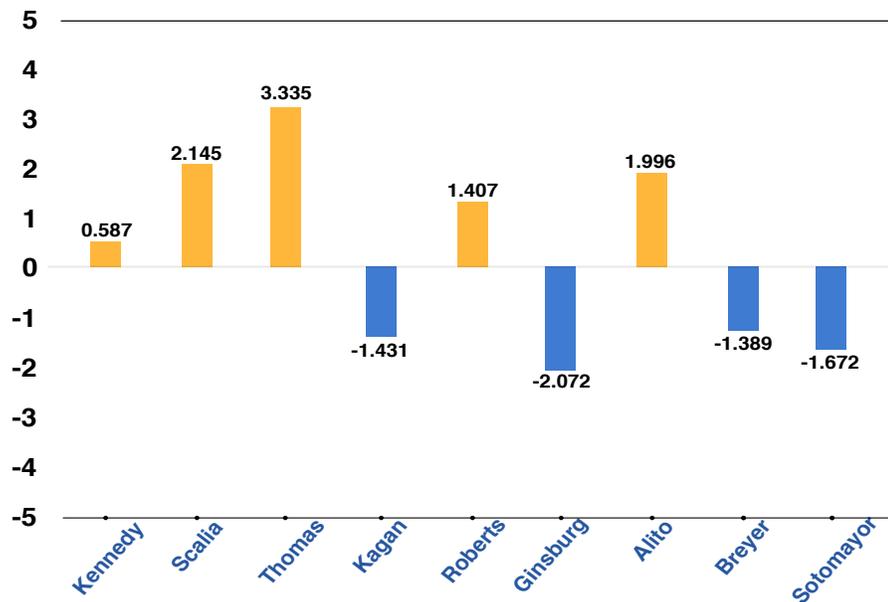
Chief Justice	Median	Court Score
Roberts	0.522	0.24

[*Pleasant Grove City v. Summum*](#) 555 U.S. 460 (2009)

Justices Serving on the Court 2010 - 2021

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

2010



Justices serving on the Court and Martin Quinn Ideology scores, 2010

Justices serving on the Court, 2010

Justice	Mean	President	Party of President	Years Served
Kennedy	0.587	Reagan	Republican	1987-2018
Scalia	2.145	Reagan	Republican	1986-2016
Thomas	3.335	Bush, G.H.W	Republican	1991-
Kagan	-1.431	Obama	Democrat	2010-
Roberts	1.407	Bush, G.W	Republican	2005-
Ginsburg	-2.072	Clinton	Democrat	1993-2020
Alito	1.996	Bush, G.W	Republican	2005-
Breyer	-1.389	Clinton	Democrat	1994-2022
Sotomayor	-1.672	Obama	Democrat	2008-

Chief Justice, 2010

Chief Justice	Median	Court Score
Roberts	0.587	0.32

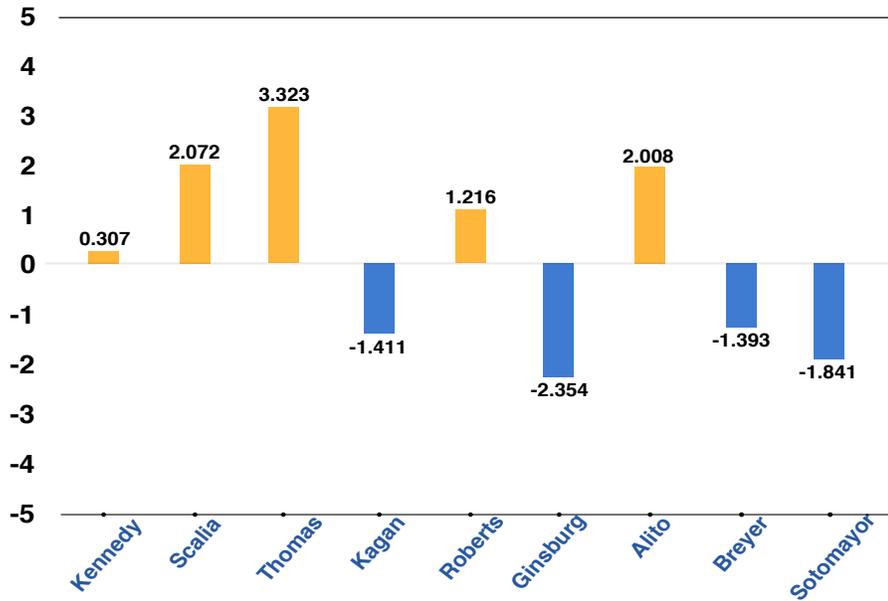
[*Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*](#) 561 U.S. 661 (2010)

[*Citizens United v. FEC*](#) 558 U.S. 310 (2010)

[*McCutcheon v. FEC*](#) 572 U.S. 185 (2010)

[*McDonald v. Chicago*](#) 561 U.S. 742 (2010)

2011



Justices serving on the Court and Martin Quinn Ideology scores, 2011

Justices serving on the Court, 2011

Justice	Mean	President	Party of President	Years Served
Kennedy	0.307	Reagan	Republican	1987-2018
Scalia	2.072	Reagan	Republican	1986-2016
Thomas	3.323	Bush, G.H.W	Republican	1991-
Kagan	-1.411	Obama	Democrat	2010-
Roberts	1.216	Bush, G.W	Republican	2005-
Ginsburg	-2.354	Clinton	Democrat	1993-2020
Alito	2.008	Bush, G.W	Republican	2005-
Breyer	-1.393	Clinton	Democrat	1994-2022
Sotomayor	-1.841	Obama	Democrat	2008-

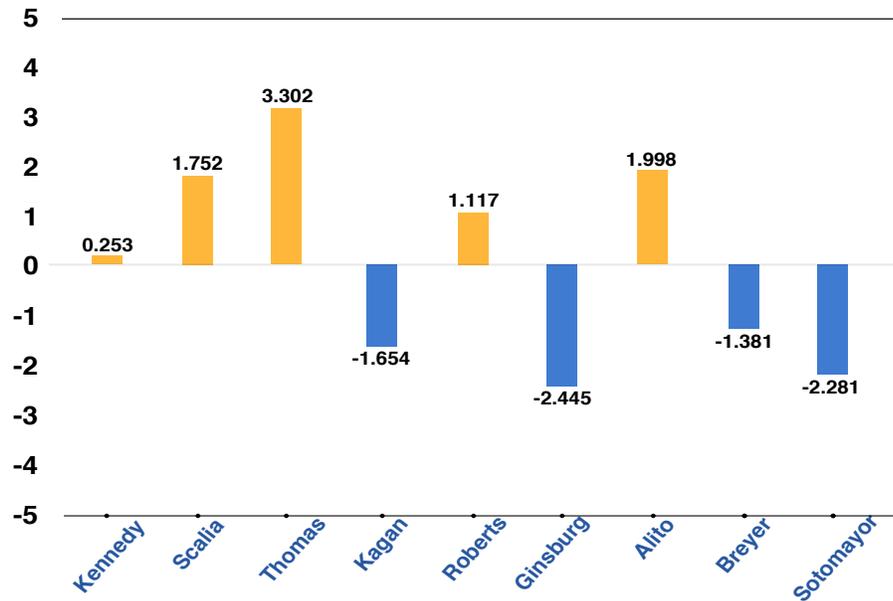
Chief Justice, 2011

Chief Justice	Median	Court Score
Roberts	0.307	0.21

[*Brown v. Entertainment Merchants Association*](#) 564 U.S. 786 (2011)

Snyder v. Phelps 562 U.S. 443 (2011)

2012



Justices serving on the Court and Martin Quinn Ideology scores, 2012

Justices serving on the Court, 2012

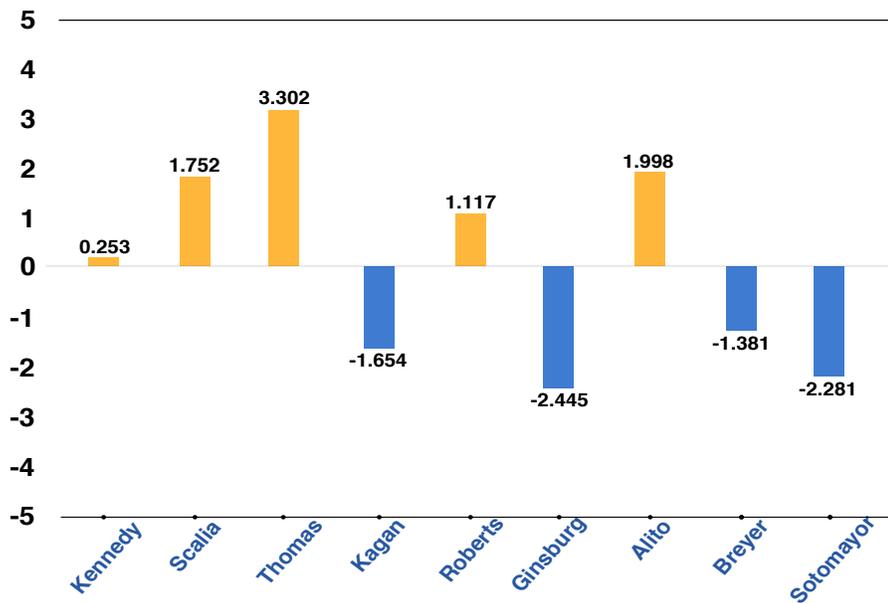
Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2012

Chief Justice	Median	Court Score
Roberts	0.253	0.07

United States v. Alvarez 567 U.S. 709 (2012)

2013



Justices serving on the Court and Martin Quinn Ideology scores, 2013

Justices serving on the Court, 2013

Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2013

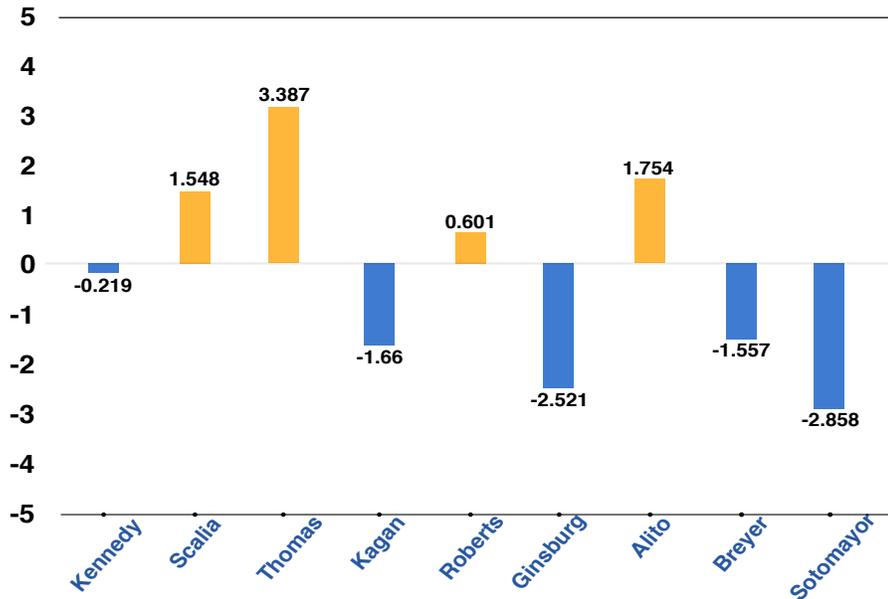
Chief Justice	Median	Court Score
Roberts	0.074	0.07

[*Burwell v. Hobby Lobby*](#) 573 U.S. 682 (2013)

[*Shelby County v. Holder*](#) 570 U.S. 529 (2013)

[*U.S. v. Windsor*](#) 570 U.S. 744 (2013)

2014



Justices serving on the Court and Martin Quinn Ideology scores, 2014

Justices serving on the Court, 2014

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.219	Reagan	Republican	1987-2018
Scalia	1.548	Reagan	Republican	1986-2016
Thomas	3.387	Bush, G.H.W	Republican	1991-
Kagan	-1.66	Bush, G.W	Republican	2005-
Roberts	0.601	Bush, G.W	Republican	2005-
Ginsburg	-2.521	Clinton	Democrat	1993-2020
Alito	1.754	Bush, G.W	Republican	2005-
Breyer	-1.557	Clinton	Democrat	1994-2022
Sotomayor	-2.858	Obama	Democrat	2008-

Chief Justice, 2014

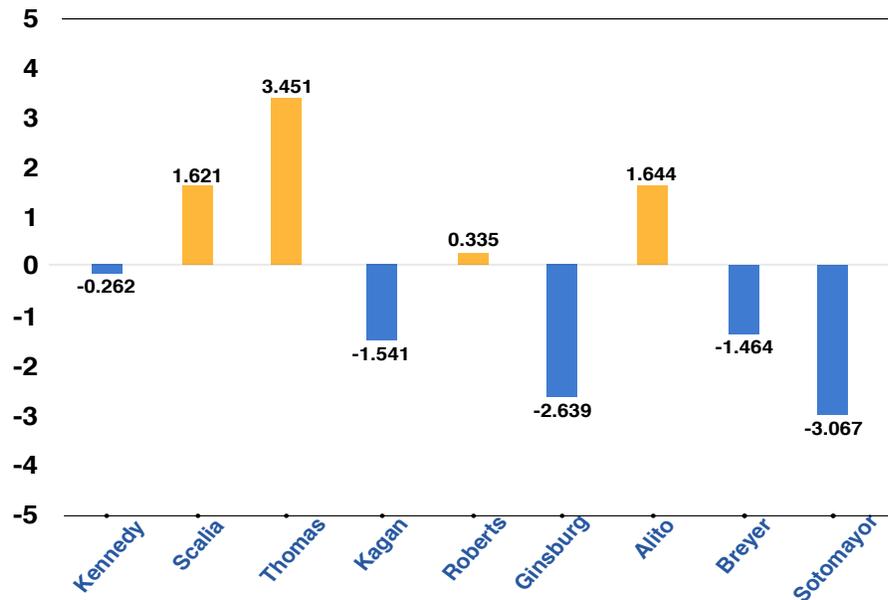
Chief Justice	Median	Court Score
Roberts	-0.219	-0.17

[Schuette v. BAMN](#) 572 U.S. ____ (2014)

[*McCullen v. Coakley*](#) 573 U.S. 464 (2014)

[*Town of Greece v. Galloway*](#) 572 U.S. 565 (2014)

2015



Justices serving on the Court and Martin Quinn Ideology scores, 2015

Justices serving on the Court, 2015

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.262	Reagan	Republican	1987-2018
Scalia	1.621	Reagan	Republican	1986-2016
Thomas	3.451	Bush, G.H.W	Republican	1991-
Kagan	-1.541	Bush, G.W	Republican	2005-
Roberts	0.335	Bush, G.W	Republican	2005-
Ginsburg	-2.639	Clinton	Democrat	1993-2020
Alito	1.644	Bush, G.W	Republican	2005-
Breyer	-1.464	Clinton	Democrat	1994-2022
Sotomayor	-3.067	Obama	Democrat	2008-

Chief Justice, 2015

Chief Justice	Median	Court Score
Roberts	-0.264	-0.21

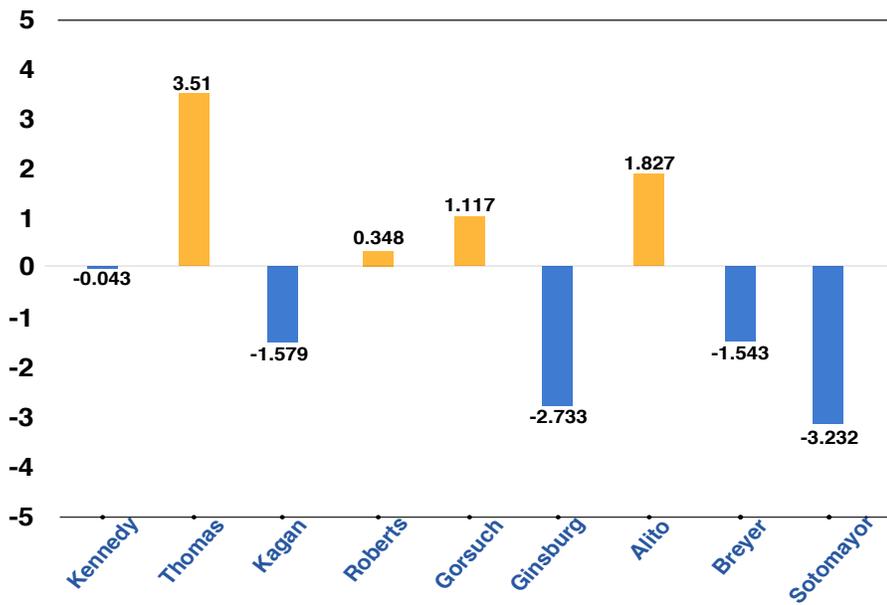
[*Elonis v. United States*](#) 575 U.S. 723 (2015)

[*Obergefell v. Hodges*](#) 576 U.S. 644 (2015)

[*Reed v. Town of Gilbert*](#) 576 U.S. 155 (2015)

[*Walker v. Texas Division, Sons of Confederate Veterans*](#) 576 U. S. ____ (2015)

2016



Justices serving on the Court and Martin Quinn Ideology scores, 2016

Justices serving on the Court, 2016

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.043	Reagan	Republican	1987-2018
Thomas	3.51	Bush, G.H.W	Republican	1991-
Kagan	-1.579	Bush, G.W	Republican	2005-
Roberts	0.348	Bush, G.W	Republican	2005-
Gorsuch	1.117	Trump	Republican	2016-
Ginsburg	-2.733	Clinton	Democrat	1993-2020
Alito	1.827	Bush, G.W	Republican	2005-
Breyer	-1.543	Clinton	Democrat	1994-2022
Sotomayor	-3.232	Obama	Democrat	2008-

Chief Justice, 2016

Chief Justice	Median	Court Score
Roberts	-0.055	-0.26

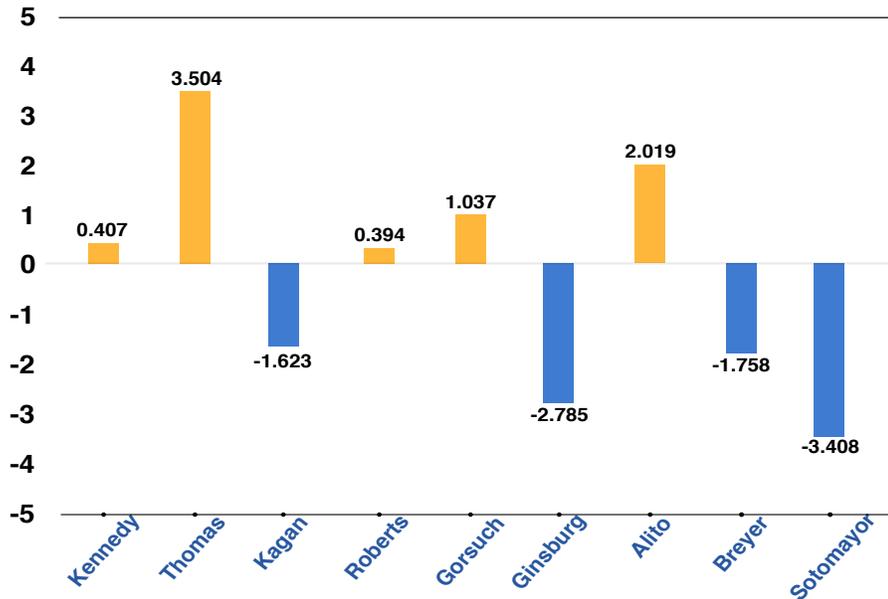
[*Caetano v. Massachusetts*](#) 577 U. S. ____ (2016)

[*Cooper v. Harris*](#) 532 U. S. 234 (2016)

[*Fisher v. Texas \(II\)*](#) 579 U.S. ____ (2016)

[*Whole Women's Health v. Hellerstedt*](#) 579 U.S. 742 (2016)

2017



Justices serving on the Court and Martin Quinn Ideology scores, 2017

Justices serving on the Court, 2017

Justice	Mean	President	Party of President	Years Served
Kennedy	0.407	Reagan	Republican	1987-2018
Thomas	3.504	Bush, G.H.W	Republican	1991-
Kagan	-1.623	Bush, G.W	Republican	2005-
Roberts	0.394	Bush, G.W	Republican	2005-
Gorsuch	1.037	Trump	Republican	2016-
Ginsburg	-2.785	Clinton	Democrat	1993-2020
Alito	2.019	Bush, G.W	Republican	2005-
Breyer	-1.758	Clinton	Democrat	1994-2022
Sotomayor	-3.408	Obama	Democrat	2008-

Chief Justice, 2017

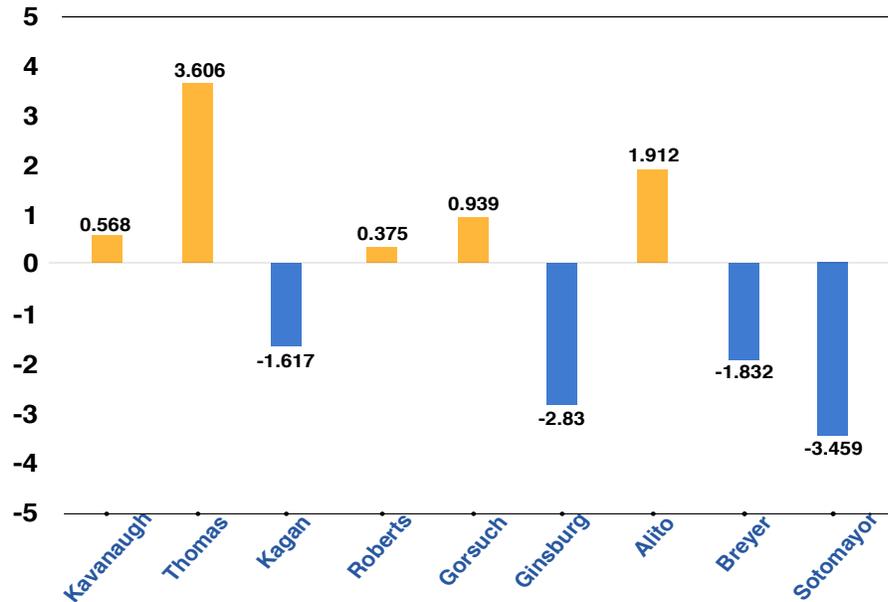
Chief Justice	Median	Court Score
Roberts	0.29	-0.25

[Matal v. Tam](#) 582 U.S. ____ (2017)

Pavan v. Smith 576 U.S. ____ (2017)

Sessions v. Morales-Santana 582 U.S. ____ (2017)

2018



Justices serving on the Court and Martin Quinn Ideology scores, 2018

Justices serving on the Court, 2018

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.568	Trump	Republican	2018-
Thomas	3.606	Bush, G.H.W	Republican	1991-
Kagan	-1.617	Bush, G.W	Republican	2005-
Roberts	0.375	Bush, G.W	Republican	2005-
Gorsuch	0.939	Trump	Republican	2016-
Ginsburg	-2.83	Clinton	Democrat	1993-2020
Alito	1.912	Bush, G.W	Republican	2005-
Breyer	-1.832	Clinton	Democrat	1994-2022
Sotomayor	-3.459	Obama	Democrat	2008-

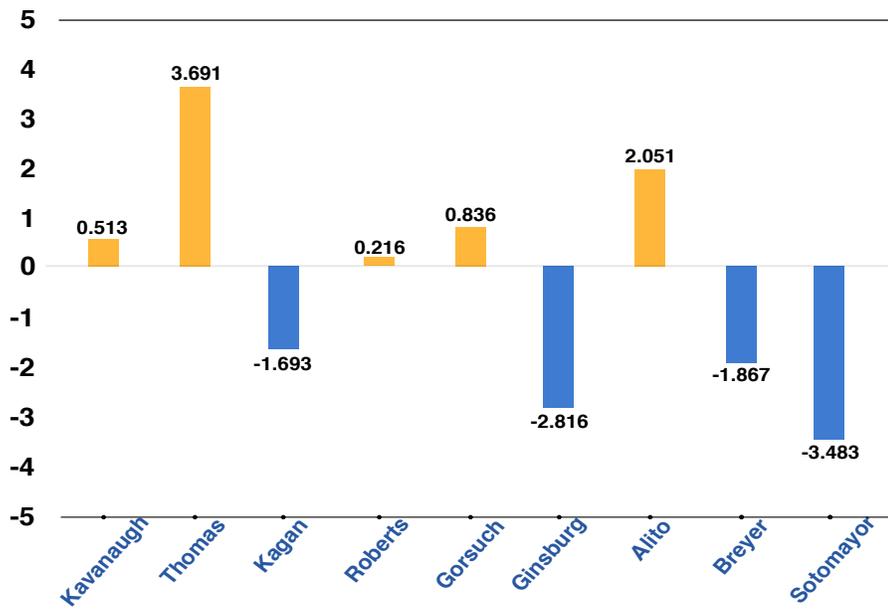
Chief Justice, 2018

Chief Justice	Median	Court Score
Roberts	0.326	-0.26

[*Masterpiece Cakeshop v. CO*](#) 584 U.S. ____ (2018)

[*Minnesota Voters Alliance v. Mansky*](#) 585 U.S. ____ (2018)

2019



Justices serving on the Court and Martin Quinn Ideology scores, 2019

Justices serving on the Court, 2019

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.513	Trump	Republican	2018-
Thomas	3.691	Bush, G.H.W	Republican	1991-
Kagan	-1.693	Bush, G.W	Republican	2005-
Roberts	0.216	Bush, G.W	Republican	2005-
Gorsuch	0.836	Trump	Republican	2016-
Ginsburg	-2.816	Clinton	Democrat	1993-2020
Alito	2.051	Bush, G.W	Republican	2005-
Breyer	-1.867	Clinton	Democrat	1994-2022
Sotomayor	-3.483	Obama	Democrat	2008-

Chief Justice, 2019

Chief Justice	Median	Court Score
Roberts	0.185	-0.28

[*American Legion v. American Humanist Assn.*](#) 588 U.S. ____ (2019)

[*Iancu v. Brunetti*](#) 588 U.S. ____ (2019)

[*Rucho v. Common Cause*](#) 588 U.S. ____ (2019)

[*Timbs v. IN*](#) 586 U.S. ____ (2019)

2020

No Martin Quinn Scores

Justices serving on the Court, 2020

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Ginsburg	Clinton	Democrat	1993-2020
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

[*Espinoza v. Montana Department of Revenue*](#) 91 U.S. ____ (2020)

[*June Medical Services v. Russo*](#) 591 U.S. ____ (2020)

[*Ramos v. Louisiana*](#) 590 U.S. ____ (2020)

2021

No Martin Quinn Scores

Justices serving on the Court, 2021

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Barrett	Trump	Republican	2021-
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

[*Brnovich v. Democratic National Committee*](#) 594 US ____ (2021)

[*Fulton v. City of Philadelphia*](#) 593 U.S. ____ (2021)

[*Mahanoy Area School District v. B.L.*](#) 594 U.S. ____ (2021)

[*Tandon v. Newsom*](#) 593 U.S. ____ (2021)

2022

No Martin Quinn Scores

[*Dobbs v. Jackson Women's Health Organization*](#) 597 U.S. ____ (2022)

[*Kennedy v. Bremerton School District*](#) 597 U.S. ____ (2022)

[*New York State Rifle & Pistol Association, Inc. et al. v. Bruen, Superintendent of New York State Police, et al.*](#)
597 U.S. ____ (2022)

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