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Freedom of Speech and Press: A Casebook for Undergraduates

Frank Harrison

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Freedom of Speech and Press

A Casebook for Undergraduates

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A Word About This Book

This book is the product of two semesters of academic leave, in the Fall of 1998 and 2005, for which I am grateful to Trinity University. Substantively, it is in (almost) final form. But even the most casual reader will notice that it needs extensive editing, mainly for formatting, consistency of style and, to some extent, spelling and grammar. A few cases also need a "headnote" and/or some "Comments and Queries." More importantly, the second half of the text might be reorganized to place greater emphasis on more current issues involving competition between constitutional rights. My syllabus for "Freedom II," offered at Trinity in the Spring of 2006, will test that hypothesis.

All of the cases and almost all of the materials have been edited, most of them very heavily. In doing so, I have not utilized ellipses or other indications of the omitted material because the frequency of the symbols would make reading tedious and substantially increase the size of the book.

The instructor would be grateful if students would call to his attention any errors of fact or citation they may find in the text.

January 12, 2006

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THE ORIGIN OF THE RIGHT

I. The Concept of a "Right"

Historians, playwrights and novelists have offered many and colorful reasons for the ignominy which attaches to the memory of King John. Put simply, he was a tyrant who brooked no opinion but his own and paid no respect to even the brief traditions of the land he ruled. The world was full of such in the beginning of the thirteenth century, and he was by no means the worst. But it was his fate to live in a country and a time which had decided, for whatever reasons, to place limits on absolute rule. Thirteen years after he came to the throne, his great nobles rose and defeated John's armies near a field called Runnymede. Even defeated, however, John was still king in a time when people believed that kings reigned by "divine right." The problem, therefore, was how to preserve the divine right while limiting its exercise. The solution was a document that, in any other circumstances, would have been called a treaty.

MAGNA CARTA

June 15, 1215

John, by grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, reeves, servants, and all bailiffs and his faithful people greeting. Know that by the inspiration of God and for the good of our soul and those of all our predecessors and of our heirs, to the honor of God and the exaltation of holy church, and the improvement of our kingdom, by the advice of our venerable fathers Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman church, Henry, archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, and Benedict of Rochester, bishops; of Master Pandulf, sub-deacon and member of the household of the lord Pope, of Brother Aymeric, master of the Knights of the Temple in England; and of the noblemen William Marshall, earl of Pembroke, William earl of Salisbury, William, earl of Warren, William, earl of Arundel, Alan of Galloway, constable of Scotland, Warren Fitz-Gerald, Peter Fitz-Herbert, Hubert de Burgh, steward of Poitou, Hugh de Nevil, Matthew Fitz-Herbert, Thomas Basset, Alan Basset, Philip d'Albini, Robert de Roppelay, John Marshall, John Fitz-Hugh, and others of our faithful.

We have granted moreover to all free men of our kingdom for us and our heirs forever all the liberties written below, to be had and holden by themselves and their heirs from us and our heirs.

No scutage of aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our body, for the making of our oldest son a knight, and for once marrying our oldest daughter, and for these purposes it shall be only a reasonable aid ...

And for the holding a common council of the kingdom concerning the assessment of an aid otherwise than in the three cases mentioned above, or concerning the assessment of a scutage, we shall cause to be summoned the archbishops, bishops, abbots, earls and greater barons by our letters under seal; and besides we shall cause to be summoned generally, by our sheriffs and bailiffs all those who hold from us in chief, for a certain day, that is at the end of forty days at least, and for a certain place; and in all the letters of that summons, we will express the cause of the summons, and when the summons has thus been given the business shall proceed on the appointed day, on the advice of those who shall be present, even if not all of those who were summoned have come.

The common pleas shall not follow our court, but shall be held in some certain place.

Earls and barons shall be fined only by their peers, and only in proportion to their offense.

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

To no one will we sell, to no one will we deny, or delay right or justice.

Since, moreover, for the sake of God, and for the improvement of our kingdom, and for the better quieting of the hostility sprung up lately between us and our barons, we have made all these concessions; wishing them to enjoy these in a complete and firm stability forever, we make

and concede to them the security described below; that is to say, that they shall elect twenty-five barons of the kingdom, whom they will, who ought with all their powers to observe, hold, and cause to be observed, the peace and liberties which we have conceded to them, and by this our present charter conformed to them; in this manner, that if we our or justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one, or shall have transgressed any of the articles of peace or security; and the wrong shall have been shown to four barons of the aforesaid twenty-five barons, let those four barons come to us or to our justiciar, if we are out of the kingdom, laying before us the transgression, and let them ask that we cause that transgression shall be corrected without delay. And if we shall not have corrected the transgression or, if we shall be out of the kingdom, if our justiciar shall not have corrected it within a period of forty days, counting from the time in which it has been shown to us or our justiciar, if we are out of the kingdom; the aforesaid four barons shall refer the matter to the remainder of the twenty-four barons, and let these twenty-five barons with the whole community of the country distress and injure us in every way they can; that is to say, by the seizure of our castles, lands, possessions, and in such other ways as they can until the it shall have been corrected according to their judgment, saving our person and that of our queen, and those of our children; and when the correction has been made, let them devote themselves to us as they did before. And let whoever in the country wishes to take an oath that in all the above-mentioned measures he will obey the orders of the aforesaid twenty-five barons, and that he will injure us as far as he is able with them, and we give permission to swear freely to each one who wishes to swear, and no one will we ever forbid to swear. ... In all those things, moreover, which are committed to those five and twenty barons to carry out, if ... some disagreement arises among them ... let that be considered valid and firm which the greater part of those who are present arrange or command, just as if the whole twenty-five had agreed in this And we will obtain nothing from any one, either by ourselves or by another by which any of these concessions and liberties shall be revoked or diminished; and if any such thing shall have been obtained, let it be invalid and void, and we will never use it by ourselves or another.

Wherefore we will and firmly command ... that the men in our kingdom shall have and hold all the aforesaid liberties, rights and concessions, well and peacefully, freely and quietly, fully and completely, for themselves and their heirs, from us and our heirs, in all things and

places, forever, as before said. It has been sworn, moreover, as well on our part as on the part of the barons, that all these things spoken of above shall be observed in good faith and without any evil intent. Witness the above named and many others. Given by our hand in the meadow which is called Runnymede, between Windsor and Staines, on the fifteen day of June, in the seventeenth year of our reign.

Comments and Queries

Many clauses have been omitted. Principal among them are guarantees of the rights of the Catholic Church, and provisions relating to the ownership and rent of land, the marriage of women and the relationship of guardians and wards.

The Magna Carta introduces the Problem of the Origin of Rights. A "right" can probably be defined as a human being's entitlement to hold a belief, to express a thought, to do or refrain from doing a certain thing. To many of the ancients, a "right" was inherent in the nature of personhood, and existed whether or not it was recognized by any human authority. Sophocles' Antigone gave voice to the agony of one whose belief in her "right" came into conflict with the power of the state which denied it. The more pragmatic Romans, and the Anglo-American legal tradition which followed them, have thought of a right as a concept which is defined by words and can be enforced by law.

But none of this answers the QUERY: how are rights derived? What authority can create or "define a "right"? Can the same authority modify or revoke that "right"?

More specifically, QUERY: what was to prevent John, if the fortunes of battle changed, from violating the provisions of the Charter? Or rescinding it entirely?

Four centuries later, the problem of "rights" arose in the context of religion. Those who refused to conform to the established faith were offered the choice of punishment by law or escape to the "new world."

MAYFLOWER COMPACT

November 11, 1620

IN THE NAME OF GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, etc. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience. IN WITNESS whereof we have hereunto subscribed our names at Cape-Cod the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland, the fifty-fourth, Anno Domini, 1620.

(names of 41 signers)

Comments and Queries

QUERY: are the premises of the Compact consistent? Can its signers be both "Loyal Subjects of our dread Sovereign Lord King James" and "covenant and combine ourselves together into a civil Body Politick"? And further QUERY: could this "Body Politick" in addition to "enact[ing] ... Laws," endow its citizens with "rights"? What if such "rights" were not recognized by their "dread Sovereign Lord," the king?

United States history relates that these "rights" were not recognized by the king or, more accurately, by his government.

DECLARATION OF INDEPENDENCE

July 4, 1776

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed equal; that they are endowed by their Creator ... with certain unalienable rights; that among these are life, liberty and pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established, should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present

King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let the facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature; a right inestimable to them, and formidable to tyrants only. He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions of the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people a large for their exercise; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigner; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out of their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas to be tried for pretended offences;

For abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments;

For suspending our own legislatures and declaring themselves invested with powers to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become executioners of their friends and brethren, or to fall themselves by their hands.

He has incited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, That these United Colonies are, and of a right ought to be, FREE and INDEPENDENT STATES; that they are absolved from all allegiance, to the British crown, and that all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as FREE and INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other our lives, our fortunes, and our sacred honour.

(fifty-six signatures)

Comments and Queries

QUERY: what is, and from whence comes, an "inalienable" right? Who is to define it? Who is to enforce it? How? Are the first two sentences of the second paragraph an effort to synthesize the latent conflict? If so, does it do so?

More specifically, QUERY: what is meant by the "pursuit of happiness"? Does it include some or all of those "rights" which were later to be defined in the "Bill of Rights," below, at pp. 33?

The Declaration of Independence was not, and has never been recognized to be, "law" in any formal sense. But after the war of Revolution was won, a new nation would require law. It would require first, a "basic law" that would organize the new nation's government. Eventually, it was achieved.

PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

September 17, 1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Comments and Queries

QUERY: from what source does the Constitution claim its authority? In addition to organizing a government, can it bestow "rights" on its citizens?

Further QUERY: can such rights be said to be "inalienable"? If they are created by "the people of the United States," cannot the "People," by the same process, change or repeal them? Thus, QUERY: is there a fundamental inconsistency between the underlying theory of the Declaration of Independence and the Constitution? How, if at all, can they be reconciled?

II. The Concept of a "Higher Law"

King John's grandson, Edward I, came to the throne in 1272. His father, Henry III, had reigned for fifty tumultuous years, during which he had "reissued" and "reconfirmed" the provisions of the Magna Carta under various titles. There is, however, no record of his serious effort to enforce any of them. Edward restored stability and began a series of conquests in Scotland and Wales. These, and other intended wars, required supportive subjects. To that end, perhaps, this is an effort to reiterate, and enforce, rights already granted.

CONFIRMATIO CARTARUM

November 5, 1297

EDWARD, by the grace of God, King of England, Lord of Ireland, and Duke of Guian, to all those that these present letters shall hear or see, greeting. Know ye that we, to the honour of God and of Holy Church, and to the profit of our realm, have granted for us and our heirs, that the Charter of liberties, and the Charter of the forest, which were made by common assent of all the realm, in the time of King HENRY, our father, shall be kept in every point without breach. And we will see that the same charters shall be sent under our seal, as well to our justices of the forest, as to others, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm, together with our writs, in which it shall be contained, that they cause the foresaid charters to be published, and to declare to the people that we have confirmed them in all points; and that our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the said charters pleaded before them in judgement in all their points, that is to wit, the Great Charter as the common law, and the Charter of the forest, for the wealth of our realm.

AND we will, That if any judgement be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for nought.

AND we will, That the same charters shall be sent, under our seal, to cathedral churches throughout our realm, there to remain, and shall be read before the people two times by the year.

AND that all archbishops and bishops shall pronounce the sentence of excomunicaion against all those that by word, deed or counsel do contrary to the foresaid charters, or that in any point break or undo them. And that the said curses be twice a year denounced and published by the prelates aforesaid. And if the said prelates, or any of them, be remiss in the denunciation of the said sentences, the archbishops of Canterbury and York for the time being shall compel and distrein them to the execution of their duties in form aforesaid.

In witness of which things we have caused these our letters to be made patents. Witness EDWARD our son at London the tenth day of October, the five and twentieth year of our reign.

Comments and Queries

Provisions relating to taxation have been omitted. The Charter of the Forest, referred to in the first paragraph, was coerced from Henry III in 1217. It was intended to supplement the provisions of the Magna Carta.

QUERY: what was the basic purpose of the Confirmatio? How, if at all, did it purport to "enforce" the provisions of the Magna Carta? How, and for how long, would such enforcement be effective? What other means of enforcement might have been available?

Despite the intimation in the Confirmatio, the concept of "judicial review" -- that the courts might invalidate a statute on the ground that it is in conflict with a "higher" law -- never took root in English law. The famous jurist Sir Edward Coke suggested the possibility in his dictum in Dr. Bonham's Case (1610): "And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be perform, the common law will control it and adjudge such act to be void." But neither Crown nor Parliament ever accepted the idea, and within the century (?), the courts had receded from it: "If Parliament were to do one thing and we the other, here, things would run round. ... " Thus, the commentator Blackstone could summarize that "True it is that what Parliament doth, no authority on earth can undo."

But England has what it has always characterized as an "unwritten constitution." The Magna Carta is part of it, as is the Confirmatio, and so is the totality of history and tradition. And, as noted above, Parliament itself has come to be recognized as the final arbiter of that constitution.

The United States has, of course, a different tradition. It created its government in a single written document, and by that document, and a few amendments to it, have imposed limits on that government.

In the election of 1800, Thomas Jefferson defeated John Adams. In the same election, Jefferson's "Democratic-Republican" party won control of both houses of Congress, ousting the Federalists who had supported Adams. Under the law as it was then, however, neither the new President nor the incoming Congress took office until the following March. (The present January dates for the expiration of congressional and presidential terms were established by the 20th Amendment to the Constitution, ratified in 1933.) Late in the interim, President Adams made, and the Federalist "lame duck" majority in the Senate, confirmed a number of nominations to the federal judiciary. Some were so late in the interim that the nominees were derisively referred to as the "midnight judges." Among these was an obscure federalist politician named William Marbury, who was nominated and confirmed as a Justice of the Peace for the District of Columbia.

What followed was bizarre. The Chief Justiceship of the United States was also vacant during this time. In February, Adams appointed his Secretary of State, John Marshall, to that office and his nomination was confirmed by the Senate. Marshall took office immediately and it appears served both as Chief Justice and Secretary of State for the balance of President Adams' term. In the latter capacity, as the Court was to observe in the following case, his duty was "prescribed by law ... He is to affix the seal of the United States to the commission, and is to record it." At 5 U.S. 158.

The incoming President appointed James Madison, his friend and associate of many years, as Secretary of State and he was rapidly confirmed by the Senate. Madison, it will be remembered, had been among the most active members of the Convention which drafted the

Constitution; he has historically been referred to as its "Father." He was, and was known to be, one of the three authors of the Federalist Papers, which had been instrumental in securing the ratification of that document. He had also been the most active member of the committee of the House of Representatives which drafted the constitutional amendments that became the Bill of Rights.

Madison was not in the capital at the time of Jefferson's inauguration; he was in Virginia visiting his father, who was ill. As a result, the new Attorney General, Levi Lincoln, acted for a short while as Secretary of State as well.

After making futile requests for the document or a copy of it, Marbury filed suit against Madison in December of 1801. The relief he sought was the issuance of a writ of mandamus, an order directing Madison to perform a "ministerial" duty, that is, one which he has no discretion but, rather, a legal duty to perform.

In the course of organizing the new government, the first Congress had passed, and President Washington signed, the Judiciary Act of 1789. One of the provisions of this Act authorized the Supreme Court to "issue writs of mandamus." Based upon this statutory authority, Marbury filed his suit, not in the lower federal court (the Circuit Court, as it was then called), but in the Supreme Court of the United States.

What happened to the actual commission has never been determined. Asked in the early stages of the proceeding what had become of it, Lincoln replied that he could not answer because it might "criminate" him. The matter was not pressed further.

MARBURY v. MADISON, 5 U.S. 137 (1803)

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

At the last term, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

It is the opinion of the court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the

verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on, [t]he nature of the writ applied for [a]nd, [t]he power of this court.

The nature of the writ. It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. It has already been stated that the applicant has a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person. This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court. The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

It cannot be presumed that any clause in the constitution is intended to be without effect.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the

peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him. If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Comments and Queries

It was widely believed at the time that, had the Court issued the writ, Madison, either on his own initiative or on instructions from President Jefferson, would have refused to comply. (Years later, Jefferson was to write to the prosecutor in the trial of Aaron Burr: "I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, & denounced as not law" See Murphy, et al., American Constitutional Interpretation, 2nd ed., 308. QUERY: Would the Court have been able to compel Madison to obey its command? QUERY further: What would have been the effect on the Court of its inability to enforce its order?

It has been said that this case presented the Court with an almost fatal dilemma. To have denied *Marbury's* right to the commission would have been to hand down a manifestly unjust, and politically motivated, decision. To have granted him the commission, would have been to hand down an unenforceable one. Interestingly, *Marbury* never pursued his case in the appropriate lower court. QUERY: could this have been because he had no desire to reimpose on the Court, through the inevitable appeal, the dilemma from which Justice Marshall had so artfully escaped?

QUERY: is the real "Marbury advantage" that it created a precedent for the power of "judicial review" in a such way that its decision could not be defied and, indeed, that the winning party would have no opportunity, and the losing party no motive, to challenge it.

Only one judicial opinion has ever challenged Justice Marshall's reasoning in Marbury. That was a dissenting opinion by Justice Gibson of the Supreme Court of Pennsylvania in Eakin v. Raub, 12 Sergeant & Rawles 330 (1825), which was based, essentially, on the English concept of legislative supremacy. He recanted his position when a subsequent state constitutional convention tacitly acquiesced in the power of judicial review by failing to include a provision against it.

QUERY: Under the factual situation as outlined in the head note, should Marshall have "recused himself," that is, withdrawn from participation in the decision of the case?

III. The Concept of "Free Speech"

MASSACHUSETTS BODY OF LIBERTIES

December 10. 1641

A COPPIE OF THE LIBERTIES OF THE MASSACHUSETTS COLONIE IN NEW ENGLAND

We doe therefore this day religiously and unanimously decree and confirme these following Rites, liberties and priveledges concerneing our Churches, and Civill State to be respectively impartiallie and invioably enjoyed and observed throughout our Jurisdiction for ever.

No mans life shall be taken away, no mans honor or good name shall be stayned, no mans person shall be arrested, restrayned, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authorities, unless it be by virtue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any particuler case by the word of god.

Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

Every man whether Inhabitant or forreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

Comments and Queries

Note that the liberty of expression “by speech or writeing” is limited to “convenient time, due order, and respective manner.” QUERY: What is the practical effect of this limitation?

Recall this concept when considering “Time, Place and Manner” regulations, below at pp. .

CONSTITUTION OF PENNSYLVANIA

August 16, 1776

Whereas, all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other rights which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness. ... We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government ... do, by virtue of the authority vested in us by our constituents, ordain, declare, and establish, the following Declaration of Rights and Frame of Government, to be the CONSTITUTION of this commonwealth, and to remain in force therein for ever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all governments, herein before mentioned.

I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying an defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

V. ... And that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government in such manner as shall be by that community judged most conducive to the public weal.

XII. That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore, the freedom of the press ought not to be restrained.

XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

Comments and Queries

QUERY: does the “Whereas” clause raise again the **Problem of the Origin of Rights**, discussed above at p. .

Compare the language in sections XIII and XVI of this document with that of the First Amendment to the Constitution. QUERY: what is meant by the unqualified statement that “freedom of the press ought not to be restrained?” QUERY further: why is there no similar statement with respect to “speech?”

THE LANGUAGE OF THE RIGHT

I. The "Bill of Rights" as submitted for ratification

A major criticism of the Constitution was that it contained no provisions to insure that the new government it created would not commit the same abuses condemned in the Declaration of Independence. Jefferson complained of this in a letter from France, and soon many prominent citizens echoed his concern. Further, many who were opposed to any "strong government" constitution took up the argument as a convenient weapon against ratification.

Still, by January of 1788, five states (Delaware, Pennsylvania, New Jersey, Georgia and Connecticut) had ratified. But then came serious trouble in Massachusetts. The "antifederalists," led by John Hancock and Samuel Adams, retreated to the "no provision of rights" stand. The federalists proposed a compromise: the Constitution would be ratified but the document would be accompanied by a formal recommendation of the legislature that a Bill of Rights be adopted. This won over Hancock and Adams, but not many of their followers, and ratification passed by 187-168.

By June, Maryland, South Carolina and New Hampshire ratified and, according to its terms, the Constitution went into effect as to those states that had accepted it. But achieving a "united" states without New York or Virginia was impractical at best. While both ratified after strenuous debate, the depth of feeling, in Virginia particularly, was enormous. The legislature denied Madison election to the United States Senate, largely on the belief that he was overly concerned with ratification and not enough with the issue of amendments. He was able to secure popular election to a seat in the House of Representatives only after an exhausting campaign centered mainly on the promise to secure adoption of a Bill of Rights as soon as possible.

When Congress first met, in March, 1789, it was largely taken up with the details of organizing a new government, and it was not until June that Madison was able to fulfill his promise. The federalist majority was not enthusiastic, but appointed a committee of three, which Madison soon came to dominate. The House finally approved seventeen amendments, and conference with the Senate reduced the number to twelve. Ten, those numbered three to twelve in the final Senate draft, were ratified by December, 1791.

In 1789 and 1790 respectively, North Carolina and Rhode Island reversed their positions and ratified the Constitution, thus completing the union of the original thirteen states.

JOINT RESOLUTION OF THE CONGRESS

September 25, 1789

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both houses concurring -- That the following articles be proposed to the legislatures of the several States as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of the said legislatures, to be valid, to all intents and purposes as part of the Constitution, viz:

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original Constitution:

Article I. After the first enumeration, required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.

Art. II No law, varying the compensation for the services of the senators and representatives, shall take effect until an election of representatives shall have intervened.

Art. III Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Art. IV A well regulated militia being necessary to the security of a free state, the right of people to bear arms shall not be infringed.

Art. V No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Art. VI The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Art. VII No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Art. VIII In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

Art. IX In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Art. X Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Art. XI The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Art. XI The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Comments and Queries

QUERY: does this document disprove the concept, frequently articulated in twentieth century arguments, that the First Amendment was placed first among the Bill of Rights because it guarantees those rights which are the most important?

The second of the original ten amendments was ratified by only six states as of 1792, and by only seven as of 1873. It then lay dormant for a hundred years until congressional “perks,” especially the ability of members of Congress to enact their own “pay raises,” became a major political issue. Public attention was drawn to the languishing amendment, and by 1992 an additional thirty-two states had ratified. The total was thus thirty-nine, one more than the required three-quarters of the fifty states. In May of that year, the Archivist of the United States certified to Congress that it had been ratified as the XXVII Amendment to the Constitution, 203 years after it had been submitted to the states.

Beginning with the XVIII (“prohibition”) Amendment, several have provided that they shall be effective only if ratified “within seven years from the date” of the submission to the states. QUERY: what is the purpose of the contemporary ratification requirement? Is it a good idea?

II. What the words mean

A. The "absolutist" position

Hugo Black, "The Bill of Rights"

1960

What is a bill of rights? In the popular sense it is any document setting forth the liberties of the people. I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures. I have in mind such clauses in the body of the Constitution itself as those which safeguard the right of habeas corpus, forbid bills of attainder and ex post facto laws, guarantee trial by jury, and strictly define treason and limit the way it can be tried and punished. I would certainly add to this list the last constitutional prohibition in Article Six that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

I shall speak to you about the Bill of Rights only as it bears on powers of the Federal Government. Originally, the first ten amendments were not intended to apply to the states but, as the Supreme Court held in 1833 in *Barron v. Baltimore*, were adopted to quiet fears extensively entertained that the powers of the big new national government "might be exercised in a manner dangerous to liberty." I believe that by virtue of the Fourteenth Amendment, the first ten amendments are now applicable to the states, a view I stated in *Adamson v. California*. I adhere to that view. In this talk, however, I want to discuss only the extent to which the Bill of Rights limits the Federal Government.

In applying the Bill of Rights to the Federal Government there is today a sharp difference of views as to how far its provisions should be held to limit the lawmaking power of Congress. How this difference is finally resolved will, in my judgment, have far-reaching consequences upon our liberties. I shall first summarize what those different views are.

Some people regard the prohibitions of the Constitution, even its most unequivocal commands, as mere admonitions which Congress need not always observe. This viewpoint finds many different verbal expressions. For example, it is sometimes said that Congress may abridge a constitutional right if there is a clear and present danger that the free exercise of the right will bring about a substantive evil that Congress has authority to prevent. Or it is said that a right may be abridged where its exercise would cause so much injury to the public that this injury would outweigh the injury to the individual who is deprived of the right. Again, it is sometimes said that the Bill of Rights' guarantees must "compete" for survival against general powers expressly granted to Congress and that the individual's right must, if outweighed by the public interest, be subordinated to the Government's competing interest in denying the right. All of these formulations, and more with which you are doubtless familiar, rest, at least in part, on the premise that there are no "absolute" prohibitions in the Constitution, and that all constitutional problems are questions of reasonableness, proximity, and degree. This view comes close to the English doctrine of legislative omnipotence, qualified only by the possibility of a judicial veto if the Supreme Court finds that a congressional choice between "competing" policies has no reasonable basis.

I cannot accept this approach to the Bill of Rights. It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be "absolutes." The whole history and background of the Constitution and Bill of Rights, as I understand, belies the assumption or conclusion that our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms. The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed. In this talk I will state some of the reasons why I hold this view. In doing so, however, I shall not attempt to discuss the wholly different and complex problem of the marginal scope of each individual amendment as applied to the particular facts of particular cases. For example, there is a question as to whether the First Amendment was intended to protect speech that courts find

“obscene.” I shall not stress this or similar differences of construction, nor shall I add anything to the views I expressed in the recent case of *Smith v. California*. I am primarily discussing here whether liberties *admittedly* covered by the Bill of Rights can nevertheless be abridged on the ground that a superior public interest justifies the abridgement. I think the Bill of Rights made its safeguards superior.

Today most Americans seem to have forgotten the ancient evils which forced their ancestors to flee to this new country and to form a government stripped of old powers used to oppress them. But the Americans who supported the Revolution and the adoption of our Constitution knew firsthand the dangers of tyrannical governments. They were familiar with the long existing practice of English persecutions of people wholly because of their religious or political beliefs. They knew that many accused of such offenses had stood, helpless to defend themselves, before biased legislators and judges.

John Lilburne, a Puritan dissenter, is a conspicuous example. He found out the hard way that a citizen of England could not get a court and jury trial under English law if Parliament wanted to try and punish him in some kind of summary and unfair method of its own. Time and time again, when his religious or political activities resulted in criminal charges against him, he had demanded jury trials under the “law of the land” but had been refused. Due to “trials” either by Parliament, its legislative committees, or courts subservient to the King or to Parliament, against all of which he vigorously protested as contrary to “due process” or “the law of the land.” Lilburne had been whipped, put in the pillory, sent to prison, heavily fined and banished from England, all of its islands and dominions, under penalty of death should he return. This last sentence was imposed by a simple Act of Parliament without any semblance of a trial. Upon his defiant return he was arrested and subjected to an unfair trial for his life. His chief defense was that the Parliamentary conviction was a nullity, as a denial of “due process of law,” which he claimed was guaranteed under Magna Charta, the 1628 Petition of Right, and statutes passed to carry them out. He also challenged the power of Parliament to enact bills of attainder on the same grounds – due process of law. Lilburne repeatedly and vehemently contended that he was entitled to notice, an indictment, and court trial by jury under the known laws of England; that he had a right to be represented by counsel; that he had a right to have witnesses summoned in his behalf and be confronted by the witnesses against him; that he could not be compelled to

testify against himself. When Lilburne finally secured a jury, it courageously acquitted him, after which the jury was severely punished by the court.

Prompted largely by the desire to save Englishmen from such legislative mockeries of fair trials, Lilburne and others strongly advocated adoption of an “Agreement of the People” which contained most of the provisions of our present Bill of Rights. That Agreement would have done away with Parliamentary omnipotence. Lilburne pointed out that the basic defect of the Magna Charta and statutes complementing it was that they were not binding on Parliament since “that which is done by one Parliament, as a Parliament, may be undone by the next Parliament: but an Agreement of the People, begun and ended amongst the People can never come justly within the Parliament’s cognizance to destroy.” The proposed “Agreement of the People,” Lilburne argued, could be changed only by the people and would bind Parliament as the supreme “law of the land.” This same idea was picked up before the adoption of our Federal Constitution by Massachusetts and New Hampshire, which adopted their constitution only after popular referendums. Our Federal Constitution is largely attributable to the same current of thinking.

Unfortunately, our own colonial history also provided ample reasons for people to be afraid to vest too much power in the national government. There had been bills of attainder here; women had been convicted and sentenced to death as “witches”; Quakers, Baptists and various Protestant sects had been persecuted from time to time. Roger Williams left Massachusetts to breathe the free air of new Rhode Island. Catholics were barred from holding office in many places. Test oaths were required in some of the colonies to bar any but Christians from holding office. In new England Quakers suffered death for their faith. Baptists were sent to jail in Virginia for preaching, which caused Madison, while a very young man, to deplore what he called that “diabolical hell-conceived principle of persecution.”

In the light of history, therefore, it is not surprising that when our Constitution was adopted without specific provisions to safeguard cherished individual rights from invasion by the legislative, as well as the executive and judicial departments of the National Government, a loud and irresistible clamor went up throughout the country. These protests were so strong that the Constitution was ratified by the very narrowest of votes in some states. It has been said, and I

think correctly, that had there been no general agreement that a supplementary Bill of Rights would be adopted as soon as possible after Congress met, the Constitution would not have been ratified. It seems clear that this widespread demand for a Bill of Rights was due to a common fear of political and religious persecution should the national legislative power be left unrestrained as it was in England.

The form of government which was ordained and established in 1789 contains certain unique features which reflected the Farmers' fear of arbitrary government and which clearly indicate an intention absolutely to limit what Congress could do. The first of these features is that our Constitution is written in a single document. Such constitutions are familiar today and it is not always remembered that our country was the first to have one. Certainly one purpose of a written constitution is to define and therefore more specifically limit government powers. An all-powerful government that can act as it pleases wants no such constitution – unless to fool the people. England had no written constitution and this once proved a source of tyranny, as our ancestors well knew. Jefferson said about this departure from the English type of government: “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”

A second unique feature of our Government is a Constitution supreme over the legislature. In England, statutes, Magna Charta, and later declarations of rights had for centuries limited the power of the King, but they did not limit the power of Parliament. Although commonly referred to as a constitution, they were never the “supreme law of the land” in the way in which our Constitution is, much to the regret of statesmen like Pitt the elder. Parliament could change this English “Constitution”; Congress cannot change ours. Ours can only be changed by amendments ratified by three-fourths of the states. It was one of the great achievements of our Constitution that it ended legislative omnipotence here and placed all departments and agencies of government under one supreme law.

A third feature of our Government expressly designed to limit its powers was the division of authority into three coordinate branches, none of which was to have supremacy over the others. This separation of powers with the checks and balances which each branch was given

over the others was designed to prevent any branch, including the legislative, from infringing individual liberties safeguarded by the Constitution.

Finally, our Constitution was the first to provide a really independent judiciary. Moreover, as the Supreme Court held in *Marbury v. Madison*, correctly I believe, this judiciary has the power to hold legislative enactments void that are repugnant to the Constitution and the Bill of Rights. In this country the judiciary was made independent because it has, I believe, the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches. Judges in England were not always independent and they could not hold Parliamentary acts void. Consequently, English courts could not be counted on to protect the liberties of the people against invasion by the Parliament, as many unfortunate Englishmen found out, such as Sir Walter Raleigh, who was executed as the result of an unfair trial, and a lawyer named William Prynne, whose ears were first cut off by court order and who subsequently, by another court order, had his remaining ear stumps gouged out while he was on a pillory. Prynne's offenses were writing books and pamphlets.

All of the unique features of our Constitution show an underlying purpose to create a new kind of limited government. Central to all of the Framers of the Bill of Rights was the idea that since government, particularly the national government newly created, is a powerful institution, its officials – all of them – must be compelled to exercise their powers within strictly defined boundaries. As Madison told Congress, the Bill of Rights' limitations point "sometimes against the abuse of the Executive power, sometimes against the Legislative, and in some cases against the community itself; or, in other words, against the majority in favor of the minority."¹ Madison also explained that his proposed amendments were intended "to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." In the light of this purpose let us now turn to the language of the first ten amendments to consider whether their provisions were written as mere admonitions to Congress or as mere admonitions to Congress or as absolute commands, proceeding for convenience from the last to the first.

¹ 1 Annals of Cong. 437 (1789).

The last two Amendments, the Ninth and Tenth, are general in character, but both emphasize the limited nature of the Federal Government. Number Ten restricts federal power to what the Constitution delegates to the central government, reserving all other powers to the states or to the people. Number Nine attempts to make certain that enumeration of some rights must “not be construed to deny or disparage others retained by the people.” The use of the words, “the people,” in both of these Amendments strongly emphasizes the desire of the Framers to protect individual liberty.

The Seventh Amendment states that “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...” This language clearly requires that jury trials must be afforded in the type of cases the Amendment describes. The Amendment goes on in equally unequivocal words to command that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Amendments Five, Six, and Eight relate chiefly to the procedures that government must follow when bringing its powers to bear against any person with a view to depriving him of his life, liberty, or property.

The Eighth Amendment forbids “excessive bail,” “excessive fines,” or the infliction of “cruel or unusual punishment.” This is one of the less precise provisions. The courts are required to determine the meaning of such general terms as “excessive” and “unusual.” But surely that does not mean that admittedly “excessive bail,” “excessive fines,” or “cruel punishments,” could be justified on the ground of a “competing” public interest in carrying out some generally granted power like that given Congress to regulate commerce.

Amendment Six provides that in a criminal prosecution an accused shall have a “speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel for his defence.” All of these requirements are cast in terms both definite and absolute. Trial by

jury was also guaranteed in the original Constitution. The additions here, doubtless prompted by English trials of Americans away from their homes, are that a trial must be “speedy and public,” “by an impartial jury,” and in a district which ‘shall have been previously ascertained by law.’ If there is any one thing that is certain it is that the Framers intended both in the original Constitution and in the Sixth Amendment that persons charged with a crime by the Federal Government have a right to be tried by jury. Suppose juries began acquitting people Congress thought should be convicted. Could Congress then provide some other form of trial, say by an administrative agency, or the military, where convictions could be more readily and certain obtained, if it thought the safety of the nation so required? How about secret trials? By *partial* juries? Can it be that these are not absolute prohibitions?

The Sixth Amendment requires notice of the cause of an accusation, confrontation by witnesses, compulsory process and assistance of counsel. The experience of centuries has demonstrated the value of these procedures to one on trial for crime. And this Amendment purports to guarantee them by clear language. But if there are no absolutes in the Bill of Rights, these guarantees can be taken away by Congress on findings that a competing public interest requires that defendants be tried without notice, without witnesses, without confrontation, and without counsel.

The Fifth Amendment provides:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Most of these Fifth Amendment prohibitions are both definite and unequivocal. There has been much controversy about the meaning of “due process of law.” Whatever its meaning, however, there can be no doubt that it must be granted. Moreover, few doubt that it has an historical meaning which denies Government the right to take away life, liberty, or property without trials properly conducted according to the Constitution and laws validly made in

accordance with it. This, at least, was the meaning of “due process of law” when used in Magna Charta and other old English Statutes where it was referred to as “the law of the land.”

The Fourth Amendment provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The use of the word “unreasonable” in this Amendment means, of course, that not *all* searches and seizures are prohibited. Only those which are *unreasonable* are unlawful. There may be much difference of opinion about whether a particular search or seizure is unreasonable and therefore forbidden by this Amendment. But if it *is* unreasonable, it is absolutely prohibited.

Likewise, the provision which forbids warrants for arrest, search or seizure without “probable cause” is itself an absolute prohibition.

The Third Amendment provides that:

“No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”

Americans had recently suffered from the quartering of British troops in their homes, and so this Amendment is written in language that apparently no one has ever thought could be violated on the basis of an overwhelming public interest.

Amendment Two provides that:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, so as construed, its prohibition is absolute.

This brings us to the First Amendment. It reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right

of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The phrase “Congress shall make no law” is composed of plain words, easily understood. The Framers knew this. The language used by Madison in his proposal was different, but no less emphatic and unequivocal. That proposal is worth reading:

“The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

“The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

“The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.”

Neither as offered nor as adopted is the language of this Amendment anything less than absolute. Madison was emphatic about this. He told the Congress that under it. “the right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government....*” (Emphasis added in all quotations.) Some years later Madison wrote that “it would seem scarcely possible to doubt that *no power whatever* over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a *positive and absolute reservation of it.*” With reference to the positive nature of the First Amendment’s command against infringement of religious liberty, Madison later said that “there is not a shadow of right in the general government to intermeddle with religion,” and that “this subject is, for the honor of America, perfectly free and unshackled. The *government has not jurisdiction over it.*”

To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights, which I have discussed with you, make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas – whatever the scope of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for “balancing” a particular right against some expressly granted power of Congress. If the Constitution withdraws from Government all power

over subject matter in an area, such as religion, speech, press, assembly, and petition, there is nothing over which authority may be exerted.

The Framers were well aware that the individual rights they sought to protect might be easily nullified if subordinated to the general powers granted to Congress. One of the reasons for the adoption of the Bill of Rights was to prevent just that. Specifically the people feared that the “necessary and proper” clause could be used to project the generally granted Congressional powers into the protected areas of individual rights. One need only read the debates in the various states to find out that this is true. But if these debates leave any doubt, Mr. Madison’s words to Congress should remove it. In speaking of the “necessary and proper” clause and its possible effect on freedom of religion he said, as reported in the *Annals of Congress*:

“Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws *necessary and proper* to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.”

It seems obvious to me that Congress, in exercising its general powers, is expressly forbidden to use means prohibited by the Bill of Rights. Whatever else the phrase “necessary and proper” may mean, it must be that Congress may only adopt such means to carry out its powers as are “proper,” that is, not specifically prohibited.

It has also been argued that since freedom of speech, press, and religion in England were narrow freedoms at best, and since there were many English laws infringing those freedoms, our First Amendment should not be thought to bar similar infringements by Congress. Again one needs only to look to the debates in Congress over the First Amendment cannot be treated as a mere codification of English law. Mr. Madison made a clear explanation to Congress that it was the purpose of the First Amendment to grant greater protection than England afforded its citizens. He said:

“In the declaration of rights which that country has established, the truth is, they have gone no further than to raise a barrier against the power of the Crown; the power of the

Legislature is left altogether indefinite. Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body, the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.

“But although the case may be widely different, and it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States.

“It was the desire to give the people of America greater protection against the powerful Federal Government than the English had had against their government that caused the Framers to put these freedoms of expression, again in the words of Madison, “beyond the reach of this Government.”

When closely analyzed the idea that there can be no “absolute” constitutional guarantees in the Bill of Rights is frightening to contemplate even as to individual safeguards in the original Constitution. Take, for instance, the last clause in Article Six that “no religious Test shall ever be required” for a person to hold office in the United States. Suppose Congress should find that some religious sect was dangerous because of its foreign affiliations. Such was the belief on which English test oaths rested for a long time and some of the states had test oaths on that assumption at the time, and after, our Constitution was adopted in 1789. Could Congress, or the Supreme Court, or both, put this precious privilege to be free from test oaths on scales, find it outweighed by some other public interest, and therefore make United States officials and employees swear they did not and never had belonged to or associated with a particular religious group suspected with disloyalty? Can Congress, in the name of overbalancing necessity, suspend habeas corpus in peacetime? Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man’s life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women, and children to exile or death without anything that even resembled a trial.

Perhaps I can show the consequences of the balancing approach to the Bill of Rights liberties by a practical demonstration of how it might work. The last clause of the Fifth Amendment is: “nor shall private property be taken for public use, without just compensation.” On its face this command looks absolute, but if one believes that it should be weighed against the powers granted to Congress, there might be some circumstances in which this right would have to give way, just as there are some circumstances in which it is said the right of freedom of religion, speech, press, assembly and petition can be balanced away. Let us see how the balancing concept would apply to the just compensation provision of the Bill of Rights in the following wholly imaginary judicial opinion of Judge X:

“This case presents an important question of constitutional law. The United States is engaged in a stupendous national defense undertaking which requires the acquisition of much valuable land throughout the country. The plaintiff here owns 500 acres of land. The location of the land gives it a peculiarly strategic value for carrying out the defense program. Due to the great national emergency that exists, Congress concluded that the United States could not afford at this time to pay compensation for the land which it needed to acquire. For this reason an act was passed authorizing seizure without compensation of all the lands required for the defense establishment.

“In reaching a judgment on this case, I cannot shut my eyes to the fact that the United States is in a desperate condition at this time. Nor can I, under established canons of constitutional construction, invalidate a Congressional enactment if there are any rational grounds upon which Congress could have passed it. I think there are such grounds here. Highly important among the powers granted Congress by the Constitution are the powers to declare war, maintain a navy, and raise and support armies. This, of course, means the power to conduct war successfully. To make sure that Congress is not unduly restricted in the exercise of these constitutional powers, the Constitution also gives Congress power to make all laws “necessary and proper to carry into execution the foregoing powers...” This ‘necessary and proper’ clause applies to the powers to make war and support armies as it does to all other granted powers.

“Plaintiff contends, however, that the Fifth Amendment’s provision about compensation is so absolute a command that Congress is wholly without authority to violate it, however great this nation’s emergency and peril may be. I must reject that contention. We must never forget that it is a constitution we are expounding. And a constitution, unlike ordinary statutes, must endure for ages; it must be adapted to changing conditions and the needs of changing communities. Without such capacity for change, our Constitution would soon be outmoded and become a dead letter. Therefore its words must never be read as rigid absolutes. The Bill of Rights’ commands, no more than any others, can stay the hands of Congress from doing that which the general welfare imperatively demands. When two great constitutional provisions like these conflict – as here the power to make war conflicts with the requirements for just compensation – it becomes the duty of courts

to weigh the constitutional right of an individual's right to compensation against the power of Congress to wage a successful war.

"While the question is not without doubt, I have no hesitation in finding the challenged Congressional act valid. Driven by the absolute necessity to protect the nation from foreign aggression, the national debt has risen to billions of dollars. The Government's credit is such that interest rates have soared. Under these circumstances, Congress was rationally entitled to find that if it paid for all the lands it needs it might bankrupt the nation and render it helpless in its hour of greatest need. Weighing as I must the loss the individual will suffer because he has to surrender his land to the nation without compensation against the great public interest in conducting war, I hold the act valid. A decree will be entered accordingly."

Of course, I would not decide this case this way nor do I think any other judge would so decide it today. My reason for refusing this approach would be that I think the Fifth Amendment's command is absolute and not be overcome without constitutional amendment even in times of grave emergency. But I think this wholly fictitious opinion fairly illustrates the possibilities of the balancing approach, not only as to the just compensation clause, but as to other provisions of the Bill of Rights as well. The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of the individuals. If the need is great, the right of Government can always be said to outweigh the rights of the individual. If "balancing" is accepted as the test, it would be hard for any conscientious judge to hold otherwise in times of dire need. And laws adopted in times of dire need are often very hasty and oppressive laws, especially when, as often happens, they are carried over and accepted as normal. Furthermore, the balancing approach to basic individual liberties assumes to legislators and judges more power than either the Framers or I myself believe should be entrusted, without limitation, to any many or any group of men.

It seems to me that the "balancing" approach also disregards all of the unique features of our Constitution which I described earlier. In reality this approach returns us to the state of legislative supremacy which existed in England and which the Framers were so determined to change once and for all. On the one hand, it denies the judiciary its constitutional power to measure acts of Congress by the standards set down in the Bill of Rights. On the other hand, though apparently reducing judicial power by saying that acts of Congress may be held unconstitutional only when they are found to have no rational legislative basis, this approach

really gives the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest. In effect, it changes the direction of our form of government from a government of limited powers to a government in which Congress may do anything that Courts believe to be “reasonable.”

Of course the decision to provide a constitutional safeguard for a particular right, such as the fair trial requirements of the Fifth and Sixth Amendments and the right of free speech protection of the First, involves a balancing of conflicting interests. Strict procedures may release guilty men; protecting speech and press may involve dangers to a particular government. I believe, however, that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights. They appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks. Courts have neither the right nor the power to review this original decision of the Framers and to attempt to make a different evaluation of the importance of the rights granted in the Constitution. Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict, and its policy should not be changed without constitutional amendments by the people in the manner provided by the people.

Misuse of government power, particularly in times of stress, has brought suffering to humanity in all ages about which we have authentic history. Some of the world’s noblest and finest men have suffered ignominy and death for no crime – unless unorthodoxy is a crime. Even enlightened Athens had its victims such as Socrates. Because of the same kind of bigotry, Jesus, the Great Dissenter, was put to death on a wooden cross. The flames of inquisitions all over the world have warned that men endowed with unlimited government power, even earnest men, consecrated to a cause, are dangerous.

For my own part, I believe that our Constitution, with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere. I cannot agree with those who think of the Bill of Rights as an 18th century straightjacket, unsuited for this age. It is old but not all old things are bad. The evils it guards against are not only old, they are with us now, they exist today. Almost any morning you open your daily paper you can see where some person somewhere in the world is on trial or has just been convicted of supposed

disloyalty to a new group controlling the government which has set out to purge its suspected enemies and all those who had dared to be against its successful march to power. Nearly always you see that these political heretics are being tried by military tribunals or some other summary and sure method for disposition of the accused. Now and then we even see the convicted victims as they march to their execution.

Experience all over the world has demonstrated, I fear, that the distance between stable, orderly government and one that has been taken over by force is not so great as we have assumed. Our own free system to live and progress has to have intelligent citizens, citizens who cannot only think and speak and write to influence people, but citizens who are free to do that without fear of governmental censorship or reprisal.

The provisions of the Bill of Rights that safeguard fair legal procedures came about largely to protect the weak and the oppressed from punishment by the strong and the powerful who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs. Nothing that I have read in the Congressional debates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications. The only arguments that tended to look in this direction at all were those that said “that all paper barriers against the power of the community are too weak to be worthy of attention.”² Suggestions were also made in and out of Congress that a Bill of Rights would be a futile gesture since there would be no way to enforce the safeguards for freedom it provided. Mr. Madison answered this argument in these words:

“If they [the Bill of Rights amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against any assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”

I fail to see how courts can escape this sacred trust.

Since the earliest days philosophers have dreamed of a country where the mind and spirit of a man would be free; where there would be no limits to inquiry; where men would be free to

² 1 Annals of Cong. 437 (1789).

explore the unknown and to challenge the most deeply rooted beliefs and principles. Our First Amendment was a bold effort to adopt this principle – to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny. The Framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man. Loyalty comes from love of good government, not fear of a bad one.

The First Amendment is truly the heart of the Bill of Rights. The Framers balanced its freedoms of religion, speech, press, assembly and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security. They were not afraid for men to be free. We should not be. We should be as confident as Jefferson was when he said in his First Inaugural Address:

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

John Hart Ely, Democracy and Distrust

1980

The First Amendment simply cannot stand on the shifting foundation of ad hoc evaluations of specific threat. The trick, of course, is to find something better. Justices Black and Douglas used to claim, though Black more insistently than Douglas, that they were “absolutists,” by which they said they meant that speech could never be officially punished or otherwise deterred. That does indeed sound better than what the Court has given us over the

years: there are precious few, if indeed there are any, First Amendment claims that have reached the Court whose vindication would have seriously imperiled the republic or anything else. That's not the right comparison, though: if all the claims raised had been successful, others more problematic would have been made, and I at least begin to get nervous about, say, false advertising for quack cancer cures or the printing of a (previously undisclosed) formula for the hydrogen bomb. A case can be made – in fact one has, eloquently, by Charles Black – that even though a justice must know deep down that no one can really mean that there can be no restriction on free speech, there is value in putting it that way nonetheless. Most of us aren't justices, however, so we should face the validity of such an “absolutist” approach head-on and recognize that one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch a prisoner within. To judge from performances elsewhere, Justice Douglas would say that that was “speech brigaded with action” and therefore not protected, while Justice Black would call it “speech plus” or perhaps simply “not speech” and similarly deny it protection. The justices do themselves no credit here for “answers” like this are simply not responsible. They refuse to display whatever reasoning in fact underlies the denial of protection, and by their transparent lack of principle substantially attenuate whatever hortatory value there was in the pronouncement that speech is always protected. We can all argue that it would be better to put extra guards on the jail and let the hothead have his say. But that's not always possible, and when it is not he simply cannot be granted a constitutional right to make his speech. For that assuredly is what it is: its likely effectiveness, and that is what we fear, does not make it any less a speech.

Comments and Queries

Compare the “wholly imaginary” opinion of Judge X with that of Justice Black, writing for the majority in Korematsu v. United States, 323 U.S. 214 (1944). At the outset of World War II, a military order excluded United States citizens of Japanese extraction from residing in certain portions of the West Coast, and directed them to report to specific locations for transportation to “relocation centers.” A federal statute made it a crime for any person subject to the order not to report as ordered. Korematsu, about whom “no question was raised...[concerning his]...loyalty to the United States” was convicted for failure to comply. The Court held that the statute did not violate the Fifth Amendment's provision that “[n]o person shall ... be deprived of life, liberty or property without due process of law.” In doing so, it observed that “we are not unmindful of the

hardships imposed by it upon a large group of American citizens...But hardships are a part of war, and war is an aggregation of hardships.” QUERY: how, if it all, do the cases differ?

Consider Professor Ely’s claim that justices of both philosophies pronounce more dogmatically than they judge. The “absolutists” will find a means to curtail really dangerous speech. The “traditionalists” will limit more speech than necessary so as to prevent more extravagant claims from being made. QUERY: assuming he is right, is there merit in either position? In both?

B. The traditional test

Laws against "sedition" have a long and inglorious history. So great was the fear of printed criticism of the government in England that, until 1649, both the Star Chamber, under the monarchy, and the Long Parliament, under the Cromwell's protectorship, required that all presses be licensed and all printed matter be authorized in advance of publication. Those requirements were ultimately replaced by the common law of "seditious libel," prohibiting any criticism which tended to diminish public respect for the government, whether or not what was said or written was, in fact, true. It also provided that the judge, not the jury, should determine whether the criticism was libelous*. (The susceptibility of English judges to political influence – epitomized by Lord Coke's removal from the Bench in 1616 – led to the constitutional provision that United States federal judges would serve during "good behavior," i.e., unless impeached, for life.) Thus, Blackstone would summarize the law that: "the liberty of the press is indeed essential to the nature of a free state; but it 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 consequences of his own temerity." 4 Commentaries 151-52. See Near v. Minnesota, below, at p.

The law of sedition was transported to the colonies, where it was the subject of a great many criminal prosecutions, the most famous being that of the printer John Peter Zenger in 1735. He had accused the British Governor of New York, William Cosby, of incompetence and corruption. In the now-famous trial, the "Philadelphia lawyer," Alexander Hamilton (no relation to the later Hamilton), was able to persuade the jury --contrary to the judge's instructions -- that truth should be an allowable defense, and Zenger was acquitted.

The law in England was changed in 1792, when Parliament approved a "Libel Act" proposed by Charles James Fox, which provided that truth should be allowable as a defense and that the jury, rather than the judge, should determine whether the material was libelous.

Meanwhile the First Amendment to the United States Constitution had been ratified in 1791, but with no clear understanding as to exactly what was intended by the guarantee of "freedom of speech." To some, it was intended to incorporate the "freedom" as it was known in the English law of that time; to others, see Justice Black, above at pp. 36-43, it was intended to go much further.

The developing partisan bitterness between the "Federalist" and "Democratic-Republican" factions had produced the first contested presidential election, that of 1796, in

* The susceptibility of English judges to political influence -- epitomized by Lord Coke's removal from the Bench in 1616 led to the constitutional provision that United States federal judges should serve during "good behavior," i.e., unless impeached, for life.

which John Adams had defeated Thomas Jefferson. It continued over a number of issues, many of them involving the Democratic-Republicans' sympathy toward the revolutionary and, later, the Napoleonic government in France. Napoleon's sea blockades had impacted American shipping and threatened

hostilities between the two countries. At the height of anti-French sentiment, the Adams administration proposed and the Federalist Congress passed the so-called "Alien and Sedition" Acts of 1798.

The Sedition Act made it a crime, among other things, to publish "any false, scandalous and malicious writing ... against the government of the United States, or either house of the Congress ... or the President ... with the intend to defame ... or to bring them into contempt or disrepute; or to excite against the ... the hatred of the good people of the United States." A number of newspaper editors, private citizens and one Congressman, Matthew Lyon of Vermont, were tried, convicted, and imprisoned, under it -- at least three of them in contentious trials before Federalist judges who were unsympathetic to the defendants. Nonetheless, it appears that even the most unsympathetic judges applied the "Fox principles" as they then existed in English law, allowing the defense of truth and permitting the jury to determine the libelous nature of the statements.

Jefferson always believed the Sedition Act to be unconstitutional, but was unwilling to have the matter tested in court since he was an opponent of the "judicial review" of legislation. He and Madison attempted to have the Act "nullified" by action of the states. The "Kentucky and Virginia Resolutions" purported to do so, but the concept was never accepted by any other state. The statute expired, according to its terms, in 1801. In the meantime, anti-French sentiment had abated and Jefferson had won the presidential election of 1800. Expressing his view as to the unconstitutionality of the Act, he pardoned all those convicted and remitted any fines imposed under it.

Despite the tumultuous history of the nineteenth century, including the Civil War, no equivalent act was passed until "sedition" language was included in the Espionage Act of 1917, which was passed shortly after the United States entered World War I. Initially, as would be expected, the Act prohibited sabotage and the unauthorized disclosure of military secrets. It also made it unlawful to advocate resistance to the draft or insubordination by members of the armed forces. But the following year, the Act was amended to prohibit advocacy of any "curtailment" in the production of armaments or, among other things, the utterance or publication of "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States."

SCHENCK v. UNITED STATES, 249 U.S. 47 (1919)

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 of 1917, by causing and attempting to cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant willfully conspired to have printed and circulated to men who had been called and accepted for military service a document alleged to be calculated to cause such insubordination and obstruction. The second count alleges a conspiracy to use the mails for the transmission of the document. The third count charges an unlawful use of the mails for the transmission of the same matter. 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.

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 any one 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 denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that 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. 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. 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 punishes conspiracies to obstruct as well as actual obstruction. We perceive no ground for saying that success alone warrants making the act a crime.

Judgments affirmed.

Comments and Queries

Strangely, Schenck is almost universally remembered for its example about someone "falsely shouting fire in a theatre" rather than the general rule it purported to establish. Parsed out, the rule is that "the question in every case is whether the words used are (1) used in such circumstances and are of such a nature as (2) to create a clear and present danger that (3) they will bring about the substantive evils that Congress has a right to prevent." (numeration and emphasis supplied) QUERY: what is the difference between a danger that is "clear" as opposed to "present"? Does this opinion demonstrate that the danger here was both?

QUERY: should the Court's distinction of utterances that "will not be endured so long as men fight" be limited to formally declared wars? See Justice Douglas' dissent in United States v. O'Brien below at p. , questioning whether the "power of Congress to raise and support armies" by means of the draft, while "undoubtedly true" in time of a declared war, is also "permissible in the absence of" a declared war, such as the conflict in Vietnam. And further QUERY: does it matter? Should First Amendment rights be subject to limitation on account of any war? Or is criticism of the nation's participation in war the very type of speech the First Amendment was designed to protect? For a negative response to that question, see Debs v. United States, below.

One week after Schenck was decided, the Court, again speaking through Justice Holmes, unanimously upheld two other convictions under the Espionage Act, both carrying sentences to ten years imprisonment. In Frohwerk v. United States, 249 U.S. 204, the defendant was an employee of a small newspaper, the "Missouri Staats Zeitung," who had apparently written articles, as to which "there is not much to choose between expressions to be found in them and those before us in Schenck." For reasons not fully explained, the record of trial was inadequately preserved and procedural errors apparently precluded an effort to reconstruct it. The Court concluded:

"It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. Small compensation would not exonerate the defendant if it were found that he expected the result, even if pay were his chief desire."

The other case, by contrast, involved a well known public figure. Eugene Debs had been the Socialist Party candidate for President of the United States in 1900, 1904, 1908 and 1912. He was an avowed opponent of United States participation in the First World War and his conviction, affirmed in Debs v. United States, 249 U.S. 211, was based upon a speech he had made to a public rally in Canton, Ohio, the previous year. The speech was concerned largely with his belief in Socialism, "with which we have nothing to do," added the Court, and praise of several "loyal comrades" who had been convicted and imprisoned for their anti-war activities.

"There followed personal experiences and illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that 'you need to know that you are fit for something better than slavery and cannon fodder.' The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said, 'I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

"There was introduced also an 'Anti-War Proclamation and Program' adopted in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit in substance. ... It said: 'We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.' Its first recommendation was, 'continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.' Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books."

When the Court reconvened in September for the 1919-1920 Term, it had one Espionage Act case remaining before it. Like Schenck, it was a "leaflet" case, but there was one significant difference.

Jacob Abrams and his co-defendants were Russian immigrants with strongly socialist views. Many, at least, were Jews; some of them, and their families, had suffered under the Czar's anti-Semitic pogroms. Thus they opposed the United States' "capitalistic" intervention in World War I. But they were equally opposed to President Wilson's decision to send a contingent of Marines into Siberia, where, they feared, the troops would side with the "White Russian" Army against the Bolshevik revolution. They expressed these views in two pamphlets, one in English and the other in Yiddish. Both condemned the Siberian expedition. The Yiddish pamphlet also called for a general strike to prevent the shipment of armaments to the troops in Siberia. But such a strike might also "curtail" the production of armaments for the troops in Europe, and they were indicted under the 1918 amendment to the Act.

ABRAMS v. UNITED STATES, 250 U.S. 616 (1919)

Mr. Justice CLARKE delivered the opinion of the Court.

The five defendants were convicted of conspiring to violate provisions of the Espionage Act of 1917. [The third count] charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to utter, print, write and publish language "intended to incite, provoke and encourage resistance to the United States in said war." The fourth count was that the defendants conspired "by utterance, writing, printing and publication to urge, incite and advocate curtailment of ordnance and ammunition, necessary and essential to the prosecution of the war."

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

It is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment. This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* and in *Frohwerk v. United States*.

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the verdict of guilty.

The first of the two articles attached to the indictment is conspicuously headed, "The Hypocrisy of the United States and her Allies." After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying: -- "His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity." It goes on:

"With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."

Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective would be to persuade persons not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians.

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 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 the judgment of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

No argument seems to be necessary to show that these pronunciamientos in no way attack the form of government of the United States. What little I have to say about the third count may be postponed until I have considered the fourth. 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 within the meaning of the Act. 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.

Let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that were before this Court in *Schenck*, *Frohwerk* and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But 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.

[And] I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government -- not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come

to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. 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."

Mr. Justice BRANDEIS concurs with the foregoing opinion.

Comments and Queries

Justice Holmes dissent has become famous for its last paragraph as a statement of the value of "free speech." But QUERY: does it raise the **Problem of the Unknown Man**? Does he mean that the First Amendment protects "unknown," obscure men and women in saying things that more prominent people may say only at the risk of criminal conviction? Should it be a constitutional rule -- or a societal value -- that people who have achieved prominence in public affairs, the arts, or any field, may give less expression to their opinions than those who have not done so?

Holmes seems to believe that Frohwerk may be such an "unknown man," but is unwilling to pursue the matter because the record before the Supreme Court is incomplete and "we must take the record as it is." For an even more striking example of this "record bound" approach, see Justice Brandeis' concurring opinion in Whitney v. California, below at pp. . Today such a

conviction might be open to challenge because the defendant had received the "ineffective assistance of counsel."

Eugene Debs was assuredly not an "unknown man." (He again ran for President in the election of 1920 and, while in prison, received nearly one million votes. President Harding granted him a Christmas Day pardon in 1921.) QUERY: was public recognition a factor in the Court's evaluation of his Canton speech? If so, why does Holmes not say so? If not, would Holmes have sustained the conviction of Abrams for making exactly the same speech? Or QUERY: If Debs had written, and signed, the Abrams pamphlet -- all other facts in that case being the same -- would Holmes have dissented?

And QUERY: if the standard is the prominence of the speaker and/or the size and receptivity of the audience, does it follow that the more generally accepted a "dangerous" idea is -- or is likely to become -- the less constitutional protection it will be afforded?

Lastly, QUERY: is Holmes' position consistent in all four cases? One of the bases of his Abrams dissent is that "the only object of the paper is to help Russia and stop American intervention there against the popular government." Yet in Schenck, he found intent to exist because "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." What "effect" could the Abrams defendants have "expected [the call for a general strike] to have" other than, if successful to curtail all arms production? There was no evidence that the call had been at all successful, but Holmes had concluded in Schenck that "[w]e perceive no ground for saying that success alone warrants making the act a crime."

The 1918 amendment was repealed in 1921, but the underlying Act remains largely in effect, but applies only "when the United States is at war." QUERY again: must it be a "declared" war?

Alexander Meikeljohn, the problem of "clear and present danger"

Free Speech and Its Relation to Self-Government (1949)

[T]he Court, following the lead of Justice Holmes, has persistently ruled that the freedom of speech of the American community may constitutionally be abridged by legislative action. That ruling annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our form of self-government. ... If the legislature has both the right and the duty to prevent certain evils, then apparently it follows that the legislature must be authorized to

take whatever action is needed for the preventing of those evils. But our plan of limited powers forbids that the interference be drawn. ... In the judgment of the Constitution, some preventions are more evil than the evil from which they would save us. And the First Amendment is a case in point.

Zachariah Chaffee, a reply to Meikeljohn

Book Review, 62 Harvard Law Review 891 (1949)

The truth is, I think, that the framers had no very clear idea as to what they meant by “the freedom of speech and the press,” but we can say three things with reasonable assurance. First, these politicians, lawyers, scholars, churchgoers and philosophers, scientists, agriculturalists, and wide readers used the phrase to embrace the whole realm of thought. Second, they intended the First Amendment to give all the protection they desired... . Finally, the freedom which Congress was forbidden to abridge was not, for them, some absolute concept which had never existed on earth. It was the freedom which they believed they already had – what they had wanted before the Revolution and had acquired through independence. In thinking about it, they took for granted the limitations which had been customarily applied in the day-to-day work of colonial courts. Now, they were setting up a new federal government of great potential strength, and (as in the rest of the Bill of Rights) they were determined to make sure it would not take away the freedoms which they enjoyed in their thirteen sovereign states.

The author condemns the clear and present danger test as “a peculiarly inept and unsuccessful attempt to formulate an exception” to the constitutional protection of public discussion, but he does not realize how unworkable his own views would prove when applied in litigation.

Take a few examples. A newspaper charges the mayor with taking bribes. Ezra Pound broadcasts from an Italian radio station that our participation in the war is an abominable mistake. A speaker during a very bad food shortage tells a hungry mass of voters that the

rationing board is so incompetent and corrupt that the best way to avoid starvation is to demand the immediate death of its members, unless they are ready to resign.

Even the author begins to hedge. Although his main insistence is on immunity for all speeches connected with self-government, as my examples surely are, occasionally he concedes that “repressive action by the government is imperative for the sake of the general welfare,” e.g. against libelous assertions, slander, words inciting men to crime, sedition, and treason by words. Here he is diving into very deep water. Once you push punishment beyond action into the realm of language, then you have to say pretty plainly how far back the law should go. You must enable future judges and jurymen to know where to stop. That is just what Holmes did when he drew his line at clear and present danger and the author gives us no substitute test for distinguishing between good public speech and bad public speech. He never faces the problem of Mark Anthony’s Oration – discussion which is calculated to produce unlawful acts without ever mentioning them.

At times he hints that the line depends on the falsity of the assertions or the bad motives of the speakers. In the mayor’s case, it is no answer to say that false charges are outside the Constitution; the issue is whether a jury shall be permitted to find them false even if they are in fact true. Moreover, in such charges a good deal of truth which might be useful to the voters is frequently mixed with some falsehood, so that the possibility of a damage action often keeps genuine information away from the voters. And the low character of speakers and writers does not necessarily prevent them from uttering wholesome truths about politics. ... In short, the trouble with the bad-motive test is that courts and judges would apply it only to the exponents of unpopular views.

Comments and Queries

Laurence Tribe, American Constitutional Law 786, summarizes Meikeljohn’s position as “limit[ing] the special guarantees of the first amendment to public discussion of issues of civic importance; in exchange for offering supposedly ‘absolute’ protection to a political category of discourse, the theory would relegate to only minimal due-process protection everything outside

that category.” Assuming that is an accurate summary, QUERY: is the “trade-off” worth it? If so, QUERY: how could “issues of civic importance” be defined?

For a case directly giving rise of the “**Problem of Mark Anthony’s Funeral Oration,**” see Terminello v. Chicago 337 U.S. 1 (1949), below at pp.

THE ENFORCEMENT OF THE RIGHT

I. To whom the words apply

A. The original intent of the Bill of Rights

Between 1815 and 1821, the City of Baltimore enacted a series of ordinances providing for the paving and changing the contour and gradient of the public streets. In the course of the work, "large masses of sand and earth" were dislodged and, eventually, deposited on the ocean bed surrounding "an extensive and highly productive wharf" owned by John Barron and his partner, John Craig. The result was that the water was rendered so shallow that it became unsuitable for the docking of any large boats and the wharf, consequently, lost much or all of its value. Barron, as the surviving partner, brought suit against the City for compensation, and the trial jury returned a verdict for the plaintiffs in the amount of \$4500. The Maryland court of appeals reversed, and Barron ("the plaintiff in error," the party complaining that error had been committed) appealed to the Supreme Court of the United States.

BARRON v. CITY OF BALTIMORE, 32 U.S. 243 (1833)

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

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

The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state

established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves.

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. In support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think, that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court.

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

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A

state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the states are interested. In these alone, were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason.

Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

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

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

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

Comments and Queries

Announced on February 16, 1833, this was Marshall's last major decision. He died on July 5, 1835, the last active surviving member of the "founders generation." (James Madison died in retirement on June 28, 1836.) QUERY: Did that fact, coupled with his statement concerning "the history of the day," make it impossible -- even if some basis could be found to do so -- for a future Court to over-rule or modify Barron's holding that the Bill of Rights was not intended to apply to the states?

QUERY: Was it really necessary to reach the constitutional issue on which the case was decided? Barron's claim was that his property had been "taken" without "just compensation" in violation of the 5th Amendment. Could the Court not have reached the same result by holding that the wharf had been damaged, but not "taken" under "the traditional rule that a permanent physical occupation of property is a taking," Loretto v. Teleprompter Manhattan CATV Corp., 438 U.S. 438 (1978)? If so, why did the Court unnecessarily reach the constitutional issue?

The Supreme Court was later to hold that the "due process" clause of the 14th Amendment required the states to provide just compensation for property "taken" under the power of Eminent Domain, Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897).

B. The intervention of the 14th Amendment

1. The threefold provisions

The 14th Amendment to the Constitution

(ratified 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Comments and Queries

Sections 2, 3 and 4 of the Amendment are omitted. Section 2 provided for the proportional reduction in the representation in Congress of any State in which the right to vote of otherwise eligible "male inhabitants" was abridged. No serious effort was ever made to enforce it. Section 3 provided for the debarment of a certain class of former Confederate officials from public office. Section 4 declared debts incurred by the former Confederate States to be "illegal and void."

The "dual citizenship" created by the first sentence of Section 1 was the subject of In re Slaughter-House Cases, 83 U.S. 36 (1873); a five-to-four decision defined the "privileges and immunities" of national citizenship as having to do, largely, with travel to the nation's capital, seaports, and similar activities. The result of this was to render the clause largely meaningless, "a vain and idle enactment, which accomplished nothing," as Justice Field claimed in dissent. For over a century, it applied by the Supreme Court only once, in Colgate v. Harvey, 296 U.S. 404 (1935), invalidating a Vermont statute which taxed income from money loaned out-of-state, but not from money loaned within the state. That case was specifically over-ruled in Madden v. Kentucky, 309 U.S. 83 (1940), upholding a statute imposing an ad valorem (value) tax on bank

accounts held outside of the state at five times that imposed on accounts held within the state. Then came Saenz v. Roe, 526 U.S. 489 (1999), which in the words of Chief Justice Rehnquist, dissenting, "breathes new life into the previously dominant Privileges and Immunities Clause." In a seven to two decision, the Court struck down a California statute imposing a length of residence requirement for the receipt of full welfare benefits under the Aid to Families with Dependent Children (AFDC) program. In doing so, it held that two of the three "components" of the "right to travel" are protected by that clause: "... the right [of a citizen] 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 exact intent of the Amendment's drafters has never been precisely ascertained. The somewhat scanty Journal kept by the Conference Committee which finalized its language lent support to the argument that the principal, and perhaps sole, purpose was to protect the former slaves by constitutionalizing the provisions of the Civil Rights of 1866, which had been passed over President Andrew Johnson's veto. (The Act's most generalized provision was that citizens "of every race and color" were to enjoy the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens") To the contrary, the Amendment's principal sponsors, Senator Jacob Howard of Michigan and Representative John A. Bingham of Ohio, made speeches in their respective chambers to the effect that the purpose of the Amendment, and in particular the "privileges and immunities clause," was to incorporate the entire Bill of Rights as a restriction on the states. See Kelly & Harbison, The American Constitution, 4th ed., 1970, 458-65.

Perhaps the best discussion of the meaning of Section 1, as a whole, and the "due process" clause particularly is contained in the respective concurring and dissenting opinions of Justices Frankfurter and Black in Adamson v. California, 332 U.S. 46 (1947). See pages , below

The Amendment was further clouded by the method of its ratification. The problem was twofold. First, the Reconstructionist Congress required the thirteen Confederate states to ratify as a condition of their "readmission" to the Union. But President Lincoln had proclaimed that the southern states had no "right" to "secede" and the Civil War had been fought, by the North, as a resistance to illegitimate "rebellion." If that were true, it follows that the Confederate states were never "out" of the Union; how, then, could they be required to ratify as a condition of coming back "in"? Since there were then thirty-seven states, including those who had joined the Confederacy, and the approval of three-quarters, or twenty-eight, was needed to ratify, without the thirteen confederate states, that number could obviously not be achieved. Thus, it was argued, ratification was obtained by coercion and unlawful coercion, at that. See Murphy, et al., American Constitutional Interpretation, 2nd ed., 1995, 191.

Additionally, at least two non-confederate states which had ratified the amendment, New Jersey and Ohio, had passed resolutions rescinding the ratifications. Only on July 20, 1868, in response to a congressional directive, Secretary of State William Seward "issued a proclamation reciting the ratification by twenty-eight states, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed

resolutions withdrawing their consent and that 'it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual.' The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the Amendment had become a part of the Constitution. On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the states (the list including North Carolina, South Carolina, Ohio and New Jersey) declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution, adding Georgia." Coleman v. Miller, 307 U.S. 433, 448-9 (1939).

Thus, it could be argued, some of the necessary ratifications had been obtained by illegal coercion and others had been counted after they no longer existed.

Lastly, there was the so-called "conspiracy theory." One of the members of the Conference Committee was Senator Roscoe Conkling of New York. After leaving the Senate, he appeared before the Supreme Court as counsel for the railroad in Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394 (1886). In oral argument, he contended that, while the term "citizen" was used in the "privileges and immunities clause," the word "person" was deliberately substituted in the "due process" and "equal protection" clauses as a covert means of bringing corporations (known at common law as "artificial persons") within the protection of the Amendment. He produced handwritten notes, supposedly taken during the meetings of the Conference Committee, in support of this theory. Spectrographic analysis later proved these to be forgeries. (In an extraordinary departure from tradition, Chief Justice Morrison Waite simply announced, before oral argument began, the Court's decision on the question "whether the provision in the Fourteenth Amendment to the Constitution which forbade a state to deny to any person within its jurisdiction the equal protection of the Constitution, applied to these corporations. We are all of the opinion that it does." At 396.) The famed historian Charles A. Beard concluded that Conkling's conduct was, in fact, part of a "conspiracy" to protect corporate interests. Later scholars have claimed that '[m]ore recent research has demolished the 'conspiracy theory'." Kelly & Harbison, above, 464. Whether that is so or not, the "conspiracy theory" was in the public domain for years and surely further colored the public perception of the Amendment's legitimacy.

QUERY: To what extent did these problems attending the passage and ratification of the Amendment account for the infrequency of its use until well into the 20th Century? Or the sometimes unexplained and somewhat confusing interpretations that followed?

2. The "due process of law" and the concept of "selective incorporation"

Between 1917 and 1920, some twenty states enacted "Criminal Syndicalism" or "Criminal Anarchy" laws, which made it a crime to advocate the use of violence or other unlawful means to bring about the overthrow of organized government. Their immediate target was the radical labor organization known as the Industrial Workers of the World, whose activities were considered especially unacceptable while the country was at war. Prosecutions continued after the war, however, as part of the first "Red Scare" of the nineteen twenties. Many defendants were the authors or circulators of leftist tracts, frequently awkward paraphrases of "The Communist Manifesto." Constitutional challenges to these prosecutions faced the seemingly insurmountable barrier of Barron v. Baltimore: the First Amendment's protection of speech and press do not apply to the states. In Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897), however, the Court held the "due process" clause of the 14th Amendment required the states to provide just compensation for property "taken" under the power of Eminent Domain. And in 1907, while affirming a contempt of court conviction based upon a publication, the Court, speaking through Justice Holmes, observed: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the first." Patterson v. Colorado, 205 U.S. 454. Such was the state of the law when "The Left Wing Manifesto" was published; the following extracts summarize its contents:

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. ... Humanity can be saved from its last excesses only by the Communist Revolution. ... Strikes are developing which verge on revolutionary action ... the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. ... These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant ... Revolutionary Socialism adheres to the class struggle because through the class struggle alone -- the mass struggle -- can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. ... The power of the proletariat lie fundamentally in its control of the industrial process. ... The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. ... The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. ... The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. ... The proletarian 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!"

GITLOW v. PEOPLE OF THE STATE OF NEW YORK, 268 U.S. 652 (1925)

Mr. Justice SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted for the statutory crime of criminal anarchy, tried, convicted, and sentenced to imprisonment. 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:

"Sec. 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.

"Sec. 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 entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

The defendant's counsel submitted two requests to charge [the jury] which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" or force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied.

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 consequences; 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. 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 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.

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Insurance Co. v. Cheek*, 259 U.S. 530 [1922], that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives

immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 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.

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering 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 incipency.

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.

The general statement in the Schenck Case that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils," -- upon which great reliance is placed in the defendant's argument -- has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated.

Affirmed.

Mr. Justice HOLMES, dissenting.

Mr. Justice BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies:

"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 [the State] has a right to prevent."

If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

Comments and Queries

QUERY: Does the holding in this case effectively amend the "clear and present danger" test in such a way as to eliminate consideration both of the "circumstances" in which the words were uttered and the "present" nature of the danger created? See note to Schenck v. United States, above, at pp.

QUERY: on what basis does the Court "assume that freedom of speech and of the press ... are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment..."? No historical or legal precedent was offered in support of this "assumption"; the only authority mentioned was an "incidental statement" to the contrary. Is it possible that this was simply an easy way to achieve a practical necessity: some way had to be found to apply at least some of the Bill of Rights to the states and doing it this way avoided the necessity of over-ruling the Slaughterhouse cases? Why did neither opinion make any reference to Justice Holmes' somewhat enigmatic comment in Patterson?

This "assumption" heralded a profound change in constitutional law, yet it had no effect on the outcome of this case. QUERY: does this achieve the "Marbury advantage" by establishing a precedent to be utilized later but avoiding the wave criticism that might otherwise be generated by a result which was perceived to be without any basis in law?

Does the dissent create a variant of **The Problem of the "Unknown Man"**? Here it is not Gitlow's lack of notoriety but his "redundant discourse" that "had no chance of creating a present conflagration." QUERY: would Holmes have joined the majority had he considered the "Manifesto" more persuasive?

Two years later, the Court was confronted with a criminal syndicalism conviction in the State of Kansas. The record revealed that the defendant had circulated "books and pamphlets" of the Industrial Workers of the World Organization, knowing that the Preamble of the organization's charter proclaimed: "That the employing class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life. ... Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth and the machinery of production and abolish the wage system." The Court held that "there was no evidence that the organization taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. ... The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant without any evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts as a means of effecting industrial or political changes or revolution. Thus applied, the Act in an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." Fiske v. Kansas, 274 U.S. 380, 381-387 (1927). QUERY: can these decisions be reconciled?

Compare the rejected request for a charge to the jury -- and the Court's statement: "It was not necessary within the meaning of the statute, that the defendant should have 'advocated' 'some definite or immediate acts' of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated." -- with the holding in Brandenburg v. Ohio, 395 U.S. 444 (1969) below, pp. .

Once the Court concluded that the First Amendment protections of speech and press were included in the "liberties" protected by the 14th Amendment, the obvious question became: what other provisions of the Bill of Rights might be included as well?

Seven years later, Powell v. Alabama, 287 U.S. 45 (1932), added the right "to counsel" in the particular circumstances of the famous "Scottsboro Boys" case: nine young black men were tried on capital charges for the alleged rape of two white girls in a community obviously hostile to the defendants. Two years after that, the "free exercise" of religion was included in Hamilton v. Board of Regents, 293 U.S. 245 (1934), which also held that this "freedom" did not extend to the right to be released from compulsory ROTC training by a young man voluntarily attending the University of California. In 1937, DeJonge v. Oregon invalidated a "syndicalism" conviction, holding that "[P]eaceable assembly for lawful discussion cannot be made a crime." It was inevitable that there would be efforts to extend the list of "included" rights.

In Kepner v. United States, 195 U.S. 100 (1988), the Court had held that, in the federal courts, any new trial in a criminal case obtained as a result of an appeal by the prosecution would constitute the "double jeopardy" forbidden by the 5th Amendment.

PALCO v. CONNECTICUT, 302 U.S. 319 (1937)

Mr. Justice CARDOZO delivered the opinion of the Court.

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

Appellant was indicted 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, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors pursuant to an act adopted in 1886. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility; and (3) in the instructions to the jury as to the difference between first and second degree murder.

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

violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction. The case is here upon appeal.

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

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the States, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the people of a state. All this may be assumed for the purpose of the case at hand.

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 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U.S. 516 [1884]. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey*, 211 U.S. 78 [1908]. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil

cases at common law where the value in controversy shall exceed \$20. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Maxwell v. Dow*, 176 U.S. 581 [1900]. As to the Fourth Amendment, one should refer to *Weeks v. United States*, 223 U.S. 383 [1914] and as to other provisions of the Sixth, to *West v. Louisiana*, 194 U.S. 258 [1904].

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon*, 299 U.S. 353 [1937]; *Herndon v. Lowry*, 301 U.S. 242 [1937] or the like freedom of the press, *Grosjean v. American Press Co.*, 297 U.S. 233 [1936]; *Near v. Minnesota*, 283 U.S. 697 [1931] or the free exercise of religion, *Hamilton v. Regents of University*, 293 U.S. 245 [1934]; or the right of peaceable assembly, without which speech would be unduly trammelled, *DeJonge v. Oregon*; *Herndon v. Lowry*, or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*, 287 U.S. 45 [1932]. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering 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*, 291 U.S. 97 []. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt

there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*, 297 U.S. 278 . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, 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, 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. *Maxwell v. Dow* gives all the answer that is necessary.

The judgment is affirmed.

Mr. Justice BUTLER dissents.

Comments and Queries

Palko represents the beginning of the concept of "selective incorporation": that some, but not all, of the provisions of the Bill of Rights are carried over against the states by virtue of the 14th Amendment's "due process" clause. The Court uses four phrases to distinguish between "included" and "nonincluded" rights: whether the right represents "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"; "the belief that neither liberty nor justice would exist if they were sacrificed," and whether their violation creates "a hardship so acute and shocking that our polity will not endure it." Is it one of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? QUERY: is there any objective standard by which these criteria can be applied or must they, inevitably, depend upon the values of the individual judges called upon to decide each case? If the latter is true, does that undermine the much-quoted concept of a "government of laws and not of men"? (The much-quoted phrase appears to have originated in James Harrington, Commonwealth of Oceana, 1656.)

Since Palko, and particularly during the 1960s era of the "Warren Court," all of the Bill of Rights, except the 5th Amendment guarantee of indictment by a grand jury and the 7th Amendment provision for a jury trial in all civil cases involving \$20, have been deemed "fundamental" and, thus, made applicable to the states through the "due process" clause. See, in particular, Benton v. Maryland, 395 U.S. 784 (1969), with respect to the protection against double jeopardy. But, sometimes, the nature of the right may be different depending on whether it applies against the federal government or a state. The most striking example is in the right to a trial by jury in a criminal cases. A federal jury must consist of twelve persons, whose verdict must be unanimous "if it is to go against the accused," Rochin v. California, 342 U.S. 165 (1952). Yet state criminal juries may be as few as six, Williams v. Florida, 399 U.S. 78 (1970), and their verdicts need not be unanimous, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). As to whether this dichotomy exists with respect to the freedom of speech and press, see Justice Harlan's concurring and dissenting opinions in Roth v. United States and Alberts v. California, below at pp.

There are several problems with the concept that the "due process" clause of the 14th Amendment "incorporates" some or all of the provisions of the Bill of Rights. Not the least is that the language of the clause is identical in the 5th Amendment and the 14th. It is difficult to believe that the authors of the Bill of Rights included "due process" as one phrase among many in the 5th Amendment if they believed it included the other rights they listed in the document. Another difficulty is that the concept of "due process of law" has deep historical roots, traceable back to the Magna Carta, where it appeared as "the law of the land" (per legem terrae). What, then, does the phrase, as used in both the 5th and 14th Amendments, mean?

A series of murders allegedly committed by a "silk stocking killer," because of the means of death, provided the Court with an opportunity to reaffirm Palko as well as conduct a profound debate on that question.

ADAMSON v. PEOPLE OF THE STATE OF CALIFORNIA, 332 U.S. 46 (1947)

Mr. Justice REED delivered the opinion of the Court.

The appellant, Adamson, was convicted, without recommendation for mercy, of murder in the first degree [and] the sentence of death was affirmed by the Supreme Court of the state. Review of that judgment by this Court was sought and allowed. Provisions of California law permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury. The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of the Fourteenth Amendment.

The appellant was charged in the information with former convictions for burglary, larceny and robbery and answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial. Under California's interpretation of the Penal Code and the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced "the commission of these crimes could have been revealed to

the jury on cross-examination to impeach his testimony." This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

Appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

We shall assume, but without any intention thereby of ruling upon the issue, that state permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House Cases* decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. The power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and

immunities clause of the Fourteenth Amendment in *Twining v. New Jersey*. "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment. Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*. *Palko* held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty" became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. California is one of a few states that permit limited comment upon a defendant's failure to testify. That permission is narrow. The California law authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. We see no

reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

Less than 10 years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, "which is not directed to the States, but solely to the federal government," provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-crimination: "in prosecutions by a state, the exemption will fail if the state elects to end it." *Palko v. Connecticut*, 302 U.S. 319, 322. The matter no longer called for discussion; a reference to *Twining v. New Jersey*, decided 30 years before the *Palko* case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best -- comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for 40 years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

This does not create an issue different from that settled in the *Twining* case. Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process."

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. This opinion is concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment. I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but one of the decisions beginning with the *Slaughter-House* Cases see the deviation in *Colgate v. Harvey*, overruled by *Madden v. Kentucky*.

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but -- it is especially relevant to note -- they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But

they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are "narrow or provincial" would deem essential to "a fair and enlightened system of justice." *Palko v. Connecticut*. To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of 12 in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds \$20, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these

States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above \$20. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of 12 for every claim above \$20 might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," *Palko v. Connecticut*, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a constitution we are expounding," so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law

meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of "life, liberty, or property, without due process of law." Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are

applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

Mr. Justice BLACK, dissenting.

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

I would not reaffirm the *Twining* decision. I think that decision and the "natural law" theory of the Constitution upon which it relies, degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise. My reasons for believing that the *Twining* decision should not be revitalized can best be understood by reference to the constitutional, judicial, and general history that preceded and followed the case.

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

In *Maxwell v. Dow*, the issue turned on whether the Bill of Rights guarantee of a jury trial was, by the Fourteenth Amendment, extended to trials in state courts. In that case counsel for

appellant did cite from the speech of Senator Howard, which so emphatically stated the understanding of the framers of the Amendment -- the Committee on Reconstruction for which he spoke -- that the Bill of Rights was to be made applicable to the states by the Amendment's first section. The Court's opinion in Maxwell acknowledged that counsel had "cited from the speech of one of the Senators," but indicated that it was not advised what other speeches were made in the Senate or in the House. The Court considered, moreover, that "What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it."

In the Twining case itself, the Court was cited to a then recent book, Guthrie, Fourteenth Amendment to the Constitution (1898). A few pages of that work recited some of the legislative background of the Amendment, emphasizing the speech of Senator Howard. But Guthrie did not emphasize the speeches of Congressman Bingham, nor the part he played in the framing and adoption of the first section of the Fourteenth Amendment. Yet Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment. In the Twining opinion the Court explicitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the states the several protections of the Bill of Rights. It held that question was "no longer open" because of previous decisions of this Court which, however, had not appraised the historical evidence on that subject. The Court admitted that its action had resulted in giving "much less effect to the 14th Amendment than some of the public men active in framing it" had intended it to have. Thus the Court declined and again today declines, to appraise the relevant historical evidence of the intended scope of the first section of the Amendment. Instead it relied upon previous cases, none of which had analyzed the evidence showing that one purpose of those who framed, advocated, and adopted the Amendment had been to make the Bill of Rights applicable to the States. None of the cases relied upon by the Court today made such an analysis.

For this reason, I am attaching to this dissent, an appendix which contains a resume, by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was

thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights. And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

At the same time that the *Twining* decision held that the states need not conform to the specific provisions of the Bill of Rights, it consolidated the power that the Court had assumed under the due process clause by laying even broader foundations for the Court to invalidate state and even federal regulatory legislation. For under the *Twining* formula, which includes no regard for the first eight amendments, what are "fundamental rights" and in accord with "canons of decency," as the Court said in *Twining*, and today reaffirms, is to be independently "ascertained from time to time by judicial action ... what is due process of law depends on circumstances." *Moyer v. Peabody*, 212 U.S. 78. Thus the power of legislatures became what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights such as the right to freedom of speech, religion and assembly, the right to just compensation for property taken for a public purpose, the right to jury trial or the right to be secure against unreasonable searches and seizures.

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice

must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices. I would follow what I believe was the original purpose of the Fourteenth Amendment -- to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty conform literally to the Bill of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

Since *Marbury v. Madison* was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575.

Mr. Justice DOUGLAS joins in this opinion.

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

I agree that the specific guarantees of the Bill of Rights should be carried over intact to the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceedings falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

Comments and Queries

QUERY: are Frankfurter and Black more effective in refuting each other's arguments than in establishing their own position? The "Murphy-Rutledge" opinion, without commenting on any of the rebuttal arguments, accepts both positions. Why?

The "Murphy-Rutledge" position seems to have prevailed. It has since been held that a criminal conviction obtained as a result of a "fundamentally unfair" trial -- even when there has been no violation of any specific provision of the Bill of Rights -- cannot stand, see Sheppard v. Maxwell, below, pp . And almost all of the specific provisions of the Bill of Rights have since been applied against the states through the process of "selective incorporation," see Comments on Palko v. Connecticut, above, pp .

II. What is prohibited.

A. The distinction between "prior restraint" and "subsequent consequences."

The "Saturday Press" was a weekly newspaper published in Minneapolis-St. Paul, Minnesota in the Fall of 1927. From the outset, its co-publishers, Guilford and Near, made clear that their primary purpose was to campaign against what they believed was widespread public corruption. They were particularly virulent in accusations against a number of individuals and public officials (calling one a "human louse" and another "a skulking, cowardly cur, too foul to fight fair"). More troubling to many, however, was the anti-Semitic rhetoric in which they were couched. The last edition contained, among other charges, the following:

"There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

"It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett's place of 'business' that the '13 dollar Jew' found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand -- had bought and paid for him.

"Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW.

"If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully calls 'Jews' they can easily do so BY THEMSELVES CLEANING HOUSE.

"I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

"I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead and won a bed for myself in St. Barnabas Hospital for six weeks. ...

"Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis' law enforcement league or the K. K. K. hammers the eagle's beak out straight."

NEAR v. MINNESOTA ex rel. OLSON, 283 U.S. 697 (1931)

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

Chapter 285 of the Session Laws of Minnesota for 1925 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Section 1 of the act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

"(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (sic) to issues or editions or periodicals taking place more than three months before the commencement of the action."

Section 2 provides that, whenever any such nuisance is committed or exists, the county attorney of any county where any such periodical is published or circulated may maintain an action in the district court of the county in the name of the state to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. The action is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the act from continuing the violation, and, "in and by such judgment, such nuisance

may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, the county attorney of Hennepin county brought this action to enjoin the publication of The Saturday Press, published by the defendants in the city of Minneapolis, on September 24, 1927, and on eight subsequent dates in October and November, 1927.

We deem it sufficient to say that the[se] 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. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. 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.

The judgment [rendered by the Trial Court] 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.' From the judgment as affirmed [by the State Supreme Court], the defendant Near appeals to this Court.

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. *Gitlow v. New York*, 268 U.S. 652,666 [1925].

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The Statute, said the state court, 'is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel.' In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. The statute requires the allegation that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the state of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends. The [State Supreme Court] court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodical of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be

"malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of the class.

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 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." This Court said, in *Patterson v. Colorado*: "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. In the present case, we have no occasion to inquire as to the permissible scope of subsequent

punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws.

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*. 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 fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.

Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.

Judgment reversed.

Mr. Justice BUTLER, dissenting.

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.

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.

Comments and Queries

QUERY: was the First Amendment intended to prohibit only the "prior restraint" of publication? See Justice Holmes' comment in Schenck: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado, 205 U.S. 454, 462, [1907]."

Notice the majority's "first" observation that private remedies for libel "remain available and unaffected." The basic argument of the dissent was that such remedies, i.e. civil suits for libel, depend -- both as deterrence and for restitution to the injured party -- on the ability of the perpetrator to pay an award of damages. A person or corporation without funds to pay damages will have little to fear from civil suits; and they, it might be argued, are the ones most likely to be reckless in their accusations. QUERY: do the tabloids now available at nearly every supermarket counter bear out Justice Butler's concern? If so, is that a sufficient basis on which to reject the majority position?

Notice, in particular, the majority's statement that "[p]ublic officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws" Beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), a series of cases severely limited the availability of these remedies not only to "public officials" but to "public figures" as well. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For a fuller discussion of the issue, see pp. , below.

Also, while "criminal libel" statutes were available at the time Near was decided, see Beauharnais v. Illinois, below, at pp. ,there is considerable doubt that they remain so. See Colin v. Smith, below, at pp. .

The three possible "exceptions" given at the end of the majority opinion are also the most likely situations in which "subsequent punishment" may be imposed. The Chapter on "Exceptions to the Right," below, is organized on this basis.

Prior restraint, of course, is not limited to printed material. It can also be applied to the spoken word, as Shakespeare well knew when he was required to submit his scripts for the Lord Chamberlain's approval prior to their performance. Another performance, centuries later, afforded the Supreme Court its most recent opportunity to summarize the requirements of the First Amendment.

SOUTHEASTERN PROMOTIONS, LTD. v. CONRAD, 420 U.S. 546 (1975)

Mr. Justice BLACKMUN delivered the opinion of the Court.

The issue in this case is whether First Amendment rights were abridged when respondents denied petitioner the use of a municipal facility in Chattanooga, Tenn., for the showing of the controversial rock musical "Hair." It is established, of course, that the Fourteenth Amendment has made applicable to the States the First Amendment's guarantee of free speech.

Petitioner, Southeastern Promotions, Ltd., is a New York corporation engaged in the business of promoting and presenting theatrical productions for profit. On October 29, 1971, it applied for the use of the Tivoli, a privately owned Chattanooga theater under long-term lease to the city, to

present "Hair" there for six days beginning November 23. This was to be a road company showing of the musical that had played for three years on Broadway, and had appeared in over 140 cities in the United States.

Respondents are the directors of the Chattanooga Memorial Auditorium, a municipal theater. Shortly after receiving Southeastern's application, the directors met, and, after a brief discussion, voted to reject it. None of them had seen the play or read the script, but they understood from outside reports that the musical, as produced elsewhere, involved nudity and obscenity on stage. Although no conflicting engagement was scheduled for the Tivoli, respondents determined that the production would not be "in the best interest of the community." Southeastern was so notified but no written statement of reasons was provided.

On November 1 petitioner, alleging that respondents' action abridged its First Amendment rights, sought a preliminary injunction from the United States District Court for the Eastern District of Tennessee. The District Court concluded that conduct in the production - group nudity and simulated sex - would violate city ordinances and state statutes making public nudity and obscene acts criminal offenses. This criminal conduct, the court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection. Accordingly, the court denied the injunction. On appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote, affirmed.

Petitioner urges reversal on the grounds that (1) respondents' action constituted an unlawful prior restraint, (2) the courts below applied an incorrect standard for the determination of the issue of obscenity vel non, and (3) the record does not support a finding that "Hair" is obscene. We do not reach the latter two contentions, for we agree with the first. We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards. Accordingly, on this narrow ground, we reverse.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a unanimous Court held invalid an act which proscribed the solicitation of money or any valuable thing for "any alleged religious, charitable

or philanthropic cause" unless that cause was approved by the secretary of the public welfare council. The elements of the prior restraint were clearly set forth:

"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."

The elements of prior restraint identified in *Cantwell* and other cases were clearly present in the system by which the Chattanooga board regulated the use of its theaters. One seeking to use a theater was required to apply to the board. The board was empowered to determine whether the applicant should be granted permission - in effect, a license or permit - on the basis of its review of the content of the proposed production. Approval of the application depended upon the board's affirmative action. Approval was not a matter of routine; instead, it involved the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the board.

The board's judgment effectively kept the musical off stage. Respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied the application in anticipation that the production would violate the law. The Memorial Auditorium and the Tivoli were public forums designed for and dedicated to expressive activities. There was no question as to the usefulness of either facility for petitioner's production. There was no contention by the board that these facilities could not accommodate a production of this size. None of the circumstances qualifying as an established exception to the doctrine of prior restraint was present. Petitioner was not seeking to use a facility primarily serving a competing use. Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users. No rights of individuals in surrounding areas were violated by noise or any other aspect of the production. There was no captive audience.

Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S., at 163 .

Labeling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se. We have rejected the contention that the First Amendment's protection "includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture . . . even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government" [*Times Film Corp. v. Chicago*, 365 U.S. 43], at 46-47. Any system of prior restraint, however, "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S., at 70 ; *New York Times Co. v. United States*, 403 U.S., at 714 ; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S., at 716 . The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. We do not decide whether the performance of "Hair" fits within such an exception or whether, as a substantive matter, the board's standard for resolving that question was correct, for we conclude that the standard, whatever it may have been, was not implemented by the board under a system with appropriate and necessary procedural safeguards.

The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In *Freedman* the Court struck down a state scheme for the licensing of motion pictures, holding "that, because only a judicial determination

in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Procedural safeguards were lacking here in several respects. The board's system did not provide a procedure for prompt judicial review. Throughout, it was petitioner, not the board, that bore the burden of obtaining judicial review. It was petitioner that had the burden of persuasion at the preliminary hearing if not at the later stages of the litigation. During the time prior to judicial determination, the restraint altered the status quo. Petitioner was forced to forgo the initial dates planned for the engagement and to seek to schedule the performance at a later date. The delay and uncertainty inevitably discouraged use of the forum.

The procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied. Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards. We need not decide whether the standard of obscenity applied by respondents or the courts below was sufficiently precise or substantively correct, or whether the production is in fact obscene. The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances.

Mr. Justice DOUGLAS, dissented in part and concurred in the result in part.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE joined, dissented.

Mr. Justice REHNQUIST dissenting:

The Court treats this case as if it were on all fours with *Freedman v. Maryland*, 380 U.S. 51 (1965), which it is not. *Freedman* dealt with the efforts of the State of Maryland to prohibit the petitioner in that case from showing a film "at his Baltimore theater." Petitioner here did not seek to show the musical production "Hair" at its Chattanooga theater, but rather at a Chattanooga theater owned by the city of Chattanooga. The Court glosses over this distinction by treating a community-owned theater as if it were the same as a city park or city street, which it is not. The Court's decisions have recognized that city streets and parks are traditionally open to the public, and that permits or licenses to use them are not ordinarily required. But until this case the Court has not equated a public auditorium, which must of necessity schedule performances by a process of inclusion and exclusion, with public streets and parks.

If every municipal theater or auditorium which is "designed for and dedicated to expressive activities" becomes subject to the rule enunciated by the Court in this case, consequences unforeseen and perhaps undesired by the Court may well ensue. May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis? These questions are real ones in light of the Court's opinion, which by its terms seems to give no constitutionally permissible role in the way of selection to the municipal authorities.

A municipal theater may not be run by municipal authorities as if it were a private theater, free to judge on a content basis alone which plays it wishes to have performed and which it does not. But, just as surely, that element of it which is "theater" ought to be accorded some constitutional recognition along with that element of it which is "municipal." I do not believe fidelity to the First Amendment requires the exaggerated and rigid procedural safeguards which the Court insists upon in this case.

Comments and Queries

For a fuller discussion of the “procedural safeguards” required to avoid constitutional infirmity compare Kingsley Books v. Brown, 354 U.S. 346 (1957), printed material, with Freedman v. Maryland, 381 U.S. 55 (1965), motion pictures. Below, at pp. .

One prominent scholar has suggested that “forum analysis,” see below at pp. , “makes one of its first appearances in the dissenting opinion of Chief Justice Rhenquist.” VanAlstyne, The American First Amendment in the Twenty-First Century, 2002, at 427. See also Gunther, Individual Rights in Constitutional Law, 5th ed., 1992, at 974-5, for a discussion of the “forum” analysis in the Blackmun, Douglas and Rhenquist opinions.

QUERY: could more recent analysis, see ISCON v. Lee and Lee v. ISCON, below at pp. , resolve Justice Rhenquist’s specific concerns by declaring the theater to be a “limited” or “quasi” public forum, i.e. open to any opera but only opera or any classical theater but only classical theater? Even if such a resolution were theoretically possible, would it be practicable?

B. What cannot be compelled.

In 1940, the Supreme Court, in Minersville School District v. Gobitis 310 U.S. 586, sustained a regulation which required that each school day be opened with a general recitation of the Pledge of Allegiance to the flag of the United States. The objectors had been members of the Jehovah Witness faith, who believed that such an affirmation violated their literal interpretation of a biblical commandment. The decision was eight to one, with Justice (later Chief Justice) Stone in dissent. In the intervening years, three justices in the majority declared the case wrongly decided (Black, Douglas and Murphy in Jones v. Opelika, 316 U.S. 584 (1932)), two other majority justices retired, and World War II began.

WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE, 319 U.S. 624 (1943)

Mr. 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 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 was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools.

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." The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification appears to have been made in deference to these

objections, but no concession was made to Jehovah's Witnesses. What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

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. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." 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.

As the present Chief Justice said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." Here, however, we are dealing with a compulsion of students to declare a belief.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg v. California*. 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.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

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. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision. It was said [in *Gobitis*] that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?'" and that the answer must be in favor of strength.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

It was also considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country."

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth

Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. 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.

Lastly, and this is the very heart of the Gobitis opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp

out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. 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. 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. Gobitis* [is] overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Mr. Justice ROBERTS and Mr. Justice REED adhered to the views expressed by the Court in *Minersville School District v. Gobitis*, and were of the opinion that the judgment below should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurred with a separate opinion.

Mr. Justice MURPHY, concurred with a separate opinion.

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime.

But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." *United States v. Butler* (dissent). Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the

legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts", he went to the very essence of our constitutional system and the democratic conception of our society. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment, these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Comments and Queries

Notice Justice Frankfurter's articulation of the "rational basis" test: "It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law."

For an insight into the thinking which had led to the Court's decision in Gobitis, including the famous "Frankfurter to Stone memo," see Murphy, et al., American Constitutional Interpretation, 3rd ed., 2003, at 1266-1296.

The Pledge of Allegiance to the Flag is now as it was in 1943 except for the phrase "under God," which was added by statute in 1954. In Newdow v. United States Congress, ___ F.2d. ___ (2002), a divided panel of the 9th U.S. Circuit of Appeals held that the inclusion of the phrase violated the 1st Amendment's prohibition against an "establishment of religion," and enjoined the recitation of the Pledge in the public schools. With Justice Scalia not participating, the Supreme Court unanimously reversed in Elk Grove Unified School District v. Newdow, ___ U.S. ___ (2004). Five justices held the plaintiff lacked "prudential standing" to sue as he was not the custodial parent of the minor child involved. Three (Rhenquist, O'Connor and Thomas) would have reached the merits and upheld the statutory language.

There are schools districts which currently require the teacher, but not the students, to recite the Pledge of Allegiance at the beginning of each day. QUERY: is this constitutional? Before answering, consider the "prenatal counseling" case, Rust v. Sullivan, below, at pp. Is it,

in any event, a good idea? QUERY further: can students be required to stand during the recitation? Can they ask to be excused from the room? These were the alternatives available to nonconsenting students during the mandatory reading of verses from the Bible before that practice was held to violate the "establishment" clause in Abington School District v. Schempp, 374 U.S. 203 (1963). Compare Abington with the arguments in the five-to-four "graduation prayer" case, Lee v. Weisman, below, at pp.

For an interesting application of Barnette, see Wooley v. Maynard, 430 U.S. 705 (1977), in which the Court sustained the right of a New Hampshire motorist to cover up that portion of his state-required license plate that proclaimed the state motto: "Live Free or Die." "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."

The Court has long held that "regulation of the use of the streets for parades and processions is a traditional exercise of control by local government" and that licenses might be granted and limited in such a way as to "prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." Cox v. New Hampshire, 312 U.S. 569, 574, 576 (1941). It is clear that licenses may not be granted or denied on the basis of the message which the parade seeks to convey, see "Time, Place and Manner restrictions," below, at pp. . Nor can unlimited discretion be vested in a municipal official; thus an ordinance authorizing denial of a license if the "public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused" was struck down in Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

If the United States had a political calendar, St. Patrick's Day would surely be one of its holidays, and St. Patrick's Day parades a ritual of the occasion. They are major events in cities and towns large and small, as different as New York, New York and Savannah, Georgia. Access to the parades is avidly sought by officeholders, candidates and, frequently, by anyone with something to say.

HURLEY v. IRISH-AMERICAN GAY GROUP OF BOSTON, 514 U.S. 1061 (1995)

JUSTICE SOUTER delivered the opinion of the 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.

I

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display.

The tradition of formal sponsorship by the city came to an end in 1947, however, when 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.

1992 was the year that 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 as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day 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." After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be. . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment."

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation." This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only "incidental" and "no greater than necessary to accomplish the statute's legitimate purpose" of eradicating discrimination. Accordingly, it ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants."

III

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, *Parades and Power: Street Theatre in Nineteenth-Century Philadelphia* 6 (1986). Hence, we 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." *Id.*, at 171. 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. In *Gregory v. Chicago*, 394 U.S. 111, 112 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), where petitioners had joined in a march of protest and pride, carrying placards and singing *The Star Spangled Banner*, we held that the activities "reflect an exercise of these basic constitutional rights in their most pristine and classic form."

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 Board of Education v. Barnette*, 319 U.S. 624, 632 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an arm band to protest a war, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369 (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, 432 U.S. 43 (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. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. 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.

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement. As with many public accommodations statutes across the Nation, the legislature continued to broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. The petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the 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.

"Since all speech inherently involves choices of what to say and what to leave unsaid," *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 11 (1986), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say." Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), outside that context it may not compel affirmation of a belief with which the speaker disagrees, see *Barnette*, 319 U.S., at 642.

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. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the

organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

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. 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. *Tornillo*, 418 U.S., at 258. Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." 475 U.S., at 15. The plurality made the further point that if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."

It might, of course, have been argued that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access

to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. 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.

Comments and Queries

QUERY: Had this case been decided the other way, could the American Nazi party have been required to include Holocaust survivors in its proposed parade down the streets of Skokie, see *Colin v. Smith*, 578 F.2d 1197 (7th Cir., 1978), below at pp. , or civil rights groups required to include Klu Klux Klan members in a Martin Luther King Day parade? QUERY further: Would not such inclusions create the "imminence of grave disorder," *Fiener v. New York*, 340 U.S. 315 (1951) or a situation functionally equivalent to "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)? See below, at pp. .

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court upheld an interpretation of the Minnesota Human Rights Commission requiring the Jaycees to admit women. It held that "[t]he right to associate for expressive purposes is not, however, absolute. ... By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms. ... [E]ven if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." QUERY: could a similar analysis have led to the conclusion that the State's interest in preventing discrimination on the basis of sexual orientation outweighed "whatever burden" or "incidental abridgment" was placed upon the parade organizers' freedom of speech.

Relying heavily on Hurley, the Court held in Boy Scouts of America v. Dale, 530 U.S. 640 (2000), that the Boy Scouts might bar an openly gay man from serving as an Assistant Scoutmaster, notwithstanding New Jersey's "public accommodation law" which prohibited discrimination based on sexual orientation. The rationale of the five to four decision was that the BSA's right of "expressive association" protected it from being forced to accept a member who, in its opinion, violated its credo statement that a scout must be "morally strait" and "clean." QUERY: is the parallel with Hurley valid? QUERY further: assuming, as the Court did in both cases, that the Jaycees and the Boy Scouts are activities of "public accommodation," can Roberts be squared with Dale?

In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court upheld an Internal Revenue Service determination denying "charitable exemption" status to an otherwise qualified institution of higher learning on the ground that its policies of student governance required racial discrimination, notwithstanding the University's claim that its policies were religiously based. "The governmental interest here is compelling. ... [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education. ... That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." QUERY: is the "overriding" governmental interest in "eradicating racial discrimination in education" greater than its interest in preventing discrimination based on "sexual orientation"?

Justice Roberts' opinion in Hague v. Committee for industrial Organization, 307 U.S. 496, 515 (1939) stated that "[s]uch use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights and liberties of citizens." But only Justice Black concurred in that opinion, and it did not, therefore, speak for the Court. In fact, the Court has never had the opportunity to consider a situation in which a municipality foreclosed all use of the streets for, example, parades. QUERY: would such an ordinance be invalid as banning "too much speech" as was a ban on all live entertainment in Shad v. Borough of Mt. Ephriam, 452 U.S. 61 (1981)? Could any available "alternate channels of communication" be sufficient to justify such a ban? Before deciding, consider the statement in Schneider v. State, 308 U.S. 147 (1939) that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

III. Standards for Review: Rational Basis, Strict and Intermediate Scrutiny

By 1938, the potentially catastrophic confrontation between the Supreme Court and the New Deal had been resolved. Whether President Franklin D. Roosevelt could have succeeded in his "court packing" plan, will never be known because a change in judicial philosophy made it unnecessary. In West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937), the Court upheld a Washington state minimum wage law virtually indistinguishable from the New York law it had struck down the previous year in Morehead v. New York ex. rel Tirpaldo, 298 U.S. 587. With that and a series of cases that followed, the Court gradually abandoned the concept of "substantive due process" by which it had, for almost a half century, invalidated economic legislation. (For the clearest statement of this form of judicial activism, see Lochner v. New York, 198 U.S. 45 ((1905)). Invalidating a state statute setting maximum hours for the employment of bakery workers, the Court observed that "[w]e do not believe in the soundness of the views which uphold this law.") It adopted, instead, a doctrine of legislative deference, which would invalidate economic regulations only if they had no "rational basis." In matters of civil liberties, a similar deference had been accorded under the still prevailing Gitlow doctrine. But a profound change in constitutional interpretation was about to occur, heralded, as Justice Frankfurter would later complain, with "all the casualness of a footnote." See Dennis v. United States, below, at p.

CAROLINE PRODUCTS CO. v. UNITED STATES, 304 U.S. 144 (1938)

Mr. Justice STONE delivered the Opinion of the Court:

The question for decision is whether the "Filled Milk Act" of 1923, which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Third. Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.*

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. But such inquiries must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face, the judgment will be reversed.

Mr. Justice BLACK concurs in the result and in all of the opinion except that part marked "Third."

Mr. Justice McREYNOLDS thinks that the judgment should be affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice BUTLER concurred in the result in a separate opinion.

*Footnote 4. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369, 370 [1931]; *Lovell v. Griffin*, 303 U.S. 444, decided March 28, 1938.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536 [1927]; *Nixon v. Condon*, 286 U.S. 73 [1932]; on restraints upon the dissemination of information, see *Near v. Minnesota*, 283 U.S. 697, 713-714, 718-720 [1931]; *Grosjean v. American Press Co.*, 297 U.S. 233 [1936]; *Lovell v. Griffin*, *supra*; on

interferences with political organizations, see *Stromberg v. California*, *supra*, 283 U.S. 359, 369; *Fiske v. Kansas*, 274 U.S. 380 [1927]; *Whitney v. California*, 274 U.S. 357, 373-378 [1927]; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365 [1937].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510 [1925], or national, *Meyer v. Nebraska*, 262 U.S. 390 [1923]; *Bartels v. Iowa*, 262 U.S. 404 [1923]; *Farrington v. Tokushige*, 273 U.S. 284 [], or racial minorities. *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428 [1819]; *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, decided February 14, 1938, note 2, and cases cited.

Comments and Queries

A classic example of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" would seem to be one permitting a "gerrymander" of legislative bodies in such a way that a majority of the legislature would, in perpetuity, represent a minority of the population. But Stone voted with the majority in *Colegrove v. Green*, 328 U.S. 548 (1946), holding challenges to legislative reapportionment statutes to be "nonjusticiable," i.e., beyond the power of the Court to review on constitutional grounds. Justice Murphy's handwritten notes taken at the Conference which considered the case reflected Justice Stone's position to be that: "It isn't court business." Murphy, et al., *American Constitutional Interpretation*, 2nd ed., 1995, 618. For the tortuous history that led to a reversal of *Colegrove* in *Baker v. Carr*, 369 U.S. 186 (1962), see Cortner, *The Apportionment Cases*, 1970.

The case citations in the second paragraph suggest that Justice Stone would include statutes infringing the freedoms of speech, press and assembly among those which "restricts those political processes." Yet "freedom of speech" had already achieved a different standard of review in the *Schenck* "clear and present danger" test. QUERY: why does this "famous footnote" make no reference to the *Schenck* test?

Also QUERY: should all statutes infringing "free speech" be lumped together into this category? How, for example, would a statute prohibiting the flying of a red flag -- held to violate the right of "free speech" in *Stromberg* -- "restrict political processes" or "interfere with political organizations"?

Should legislation apparently interfering with equal access to educational opportunities be included on the theory that it will ultimately result in "restricted" participation in the "political process"? See San Antonio School District v. Rodriguez, below, pp.

The concept put forward in the Carolene footnote did not receive immediate attention. In Jones v. City of Opelika, 319 U.S. 105, 115 (1943), however, a majority struck down a Pennsylvania municipal ordinance imposing a license fee on the door-to-door distribution or sale of religious tracts. To the argument that the fee applied to all solicitations, the majority responded: "The fact the fee is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

But Jones went no further. How would that "preferred" status influence future cases? The answer came immediately, as we have already seen, in one of the most famous of all "free speech cases."

WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE, 319 U.S. 624 (1943)

See above, pp.

Comments and Queries

The immediate effect of the decision -- striking down the "flag salute" requirement as World II was still being fought -- masked the larger constitutional doctrine which had been enunciated in reaching it.

QUERY: Is there here the **Problem of the Origin of Rights**? The majority holds that the "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." And yet the "Bill of Rights" was passed as amendments to the Constitution by a vote of the Congress and ratified by the votes of state legislatures. Any of its provisions could be repealed by a similar electoral process. Is the Court, then, saying that these rights are "inalienable" and would exist whether or not they were recognized in the constitution?

The Court holds that these rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." What does this mean? What, if any, is the parallel to the "clear and present" Schenck doctrine, which is referred to as "now a commonplace"?

How does this language compare with Palko's dictum that "of freedom of thought and speech ... one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom"? On this basis, could it be said that "free speech" should be incorporated not because it is "inalienable," but because it is necessary to the functioning of the constitutional system? Would that be a sufficient reason for incorporation?

Note the significant difference in Frankfurter's dissent: "Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom." QUERY: If Frankfurter is wrong, what is the textual or historical basis for distinguishing between these rights which were, after all, enunciated in the same document? Is the "inalienable" nature of some rights the distinguishing factor? If so, why does the Court not say so?

The concept that "some rights are more important than others" and that the standards for evaluation of constitutional questions should vary accordingly was not confined to the First Amendment. The Supreme Court's cases, over the years, developed a dual standard for judgment in cases involving the "equal protection of the laws." Going back to the Carolene footnote, the Court held that situations involving a "fundamental right" or operating to the disadvantage of a "suspect class" should be judged with "strict scrutiny" instead of the traditional "rational basis" test. So "strict" was the "scrutiny" that some commentators believed that to ask the question was to answer it: that is, any statute judged under "strict scrutiny" would almost certainly not survive; judged under "rational basis," it almost certainly would. That dilemma, in turn, caused some observers to believe that there was need for a more flexible, or "intermediate," standard.

The complicated system by which the State of Texas funds its public school system provided the vehicle both for a thorough explanation of the "strict scrutiny" test and a judicial endorsement of a third alternative.

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. Named as defendants were the State Board of Education and [other relevant public officials]. A three-judge 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. For the reasons stated in this opinion, we reverse.

I

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. 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. 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 state 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. Apart from its concession that educational financing in Texas has "defects" and "imperfections," the State defends the system's 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 judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote. Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

We are unable to agree that this case may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

For these 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. It is this question -- whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution -- which has so consumed the attention of courts and commentators in recent years.

B

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 "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S., at 655, 661. In his view, 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."

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection

under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be pursued by a implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where - as is true in the present case - no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal

skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. 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. 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.

Texas has acknowledged its shortcomings and has persistently endeavored -- not without some success -- to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.

Reversed.

MR. JUSTICE STEWART, concurring.

I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory - only by classifications that are wholly arbitrary or capricious.

This doctrine is no more than a specific application of one of the first principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law.

Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. But there are other classifications that, at least in some settings, are also "suspect" -- for example, those based upon national origin, alienage, indigency, or illegitimacy.

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an

identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press.

MR. JUSTICE BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed "fundamental" for the purposes of equal protection analysis only if it is "explicitly or implicitly guaranteed by the Constitution."

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. This being so, any classification affecting education must be subjected to strict judicial scrutiny.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved.

If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to

show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause. I need go no farther than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly under represented counties in the reapportionment cases. See, e. g., *Baker v. Carr*, 369 U.S. 186, 204-208 (1962); *Reynolds v. Sims*, 377 U.S. 533, 554-556 (1964).

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

II

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued - that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated

against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge v. Williams*, [397 U.S. 471,] at 520-521 [1970] (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 758 (1966). Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S., at 634. But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution."

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e. g., *Reynolds v. Sims*, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e. g., *Griffin v. Illinois*, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an

unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws." Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "superlegislature." I cannot agree. Such an approach seems to me a part of the

guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document.

If the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

B

It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding" Thus, we have not casually described the classroom as the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."

As this Court held in *Brown v. Board of Education*, 347 U.S., at 493, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize

the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts.

D

The nature of our inquiry into the justification for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interest. See *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling," or a "substantial" or "important," state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose, but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported

interest in assuring its school districts local fiscal control. At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well as, if not better than, the present scheme without the current impairment of the educational opportunity of vast numbers of Texas schoolchildren.

Comments and Queries

Prior to San Antonio, "strict scrutiny" and "rational basis" had been the only two alternatives available for analysis under the "equal protection" clause. Justice Marshall's concurring opinion, for the first time, suggested a third, "intermediate," (or "heightened") standard. This theory was first applied by the Court in Craig v. Boren, 429 U.S. 190, 197 (1976). A gender classification (represented by an Oklahoma statute allowing women to purchase "3.2 beer" at age 18, while requiring men to wait until 21) did not require strict scrutiny but still "must serve important governmental objectives and must be substantially related to those objectives." QUERY: is there any way to develop "objective" criteria by which to apply this "intermediate" standard? If not, is that a sufficient reason to reject it? Are the "objective" standards of strict scrutiny, ultimately, equally "subjective" in their application?

Perhaps more importantly, QUERY: can any of these standards be justified by the original rationale for judicial review as expressed in Marbury v. Madison, above at pp. ?

Over time, the "strict scrutiny" concept was carried over into "due process" and, hence, First Amendment cases. Not everyone agrees that this has been a wise development.

SIMON & SCHUSTER, INC. v. NEW YORK STATE CRIME VICTIMS BOARD, 502 U.S. 105 (1991)

JUSTICE O'CONNOR delivered the opinion of the Court.

New York's "Son of Sam" law requires that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account. These funds are then made

available to the victims of the crime and the criminal's other creditors. We consider whether this statute is consistent with the First Amendment.

The law requires any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to respondent Crime Victims Board, and to turn over any income under that contract to the Board. This requirement applies to all such contracts in any medium of communication.

A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. As we emphasized in invalidating a content-based magazine tax, “official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

The State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.

As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive. As counsel for the Board conceded at oral argument, the statute applies to works on any subject, provided that they express the author’s thoughts or recollections about his crime, however tangentially or incidentally. In addition, the statute’s broad definition of “person convicted of a crime” enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted.

These two provisions combine to encompass a potentially very large number of works. Had the Son of Same law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments “my past foulness and the carnal

corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard. [The] Association of American Publishers, Inc., has submitted a sobering biography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of the crime for which the authors were incarcerated, including works by such authors as Emma Goldstein and Martin Luther King, Jr. A list of prominent figures whose autobiographies would be subject to the statute if written is not difficult to construct: the list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons. The argument that a statute like the Son of Sam law would prevent publication of all of these works is hyperbole – some would have been written without compensation – but the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated.

Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthless prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author’s creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the state’s objective of compensating crime victims from the profits of crime.

As a result, the statute is inconsistent with the First Amendment.

JUSTICE KENNEDY, concurring in the judgment.

The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment, and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view, it is both unnecessary and incorrect to ask whether the State can show that the statute “is necessary to serve a compelling state interest, and

is narrowly drawn to achieve that end." That test or formulation derives from our equal protection jurisprudence, and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums.

Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.

Borrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.

This said, it must be acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late, even where the sole question is, or ought to be, whether the restriction is in fact content-based. Although the notion that protected speech may be restricted on the basis of content if the restriction survives what has sometimes been termed "the most exacting scrutiny," *Texas v. Johnson*, 491 U.S. 397, 412 (1989), may seem familiar, the Court appears to have adopted this formulation in First Amendment cases by accident, rather than as the result of a considered judgment. In *Johnson*, for example, we cited *Boos v. Barry*, 485 U.S. 312, 320 (1988), as support for the approach. *Boos v. Barry*, in turn, cited *Perry Education Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), for the proposition that, to justify a content-based restriction on political speech in a public forum, the State must show that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Turning to the appropriate page in *Perry*, we discover that the statement was supported with a citation of *Carey v. Brown*, 447 U.S. 455, 461 (1980). Looking at last to *Carey*, it turns out the Court was making a statement about equal protection: "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection

Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. Thus was a principle of equal protection transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech.

The inapplicability of the compelling interest test to content-based restrictions on speech is demonstrated by our repeated statement that, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). These general statements about the government's lack of power to engage in content-discrimination reflect a surer basis for protecting speech than does the test used by the Court today.

There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, see, e.g., *Miller v. California*, 413 U.S. 15 (1973), defamation, see, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), incitement, see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or situations presenting some grave and imminent danger the government has the power to prevent, see, e.g., *Near v. Minnesota*, 283 U.S. 697, 716 (1931). These are, however, historic and traditional categories long familiar to the bar, although, with respect to the last category, it is most difficult for the government to prevail. See *New York Times Co. v. United States*, 403 U.S. 713 (1971). While it cannot be said with certainty that the foregoing types of expression are or will remain the only ones that are without First Amendment protection, as evidenced by the proscription of some visual depictions of sexual conduct by children, see *New York v. Ferber*, 458 U.S. 747 (1982), the use of these traditional legal categories is preferable to the sort of ad hoc balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.

As a practical matter, perhaps we will interpret the compelling interest test in cases involving content regulation so that the results become parallel to the historic categories I have discussed,

although an enterprise such as today's tends not to remain pro forma, but to take on a life of its own. When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that, in fact, present clear violations of the First Amendment, as is true in the case before us.

To forgo the compelling interest test in cases involving direct content-based burdens on speech would not, of course, eliminate the need for difficult judgments respecting First Amendment issues. Among the questions we cannot avoid the necessity of deciding are: whether the restricted expression falls within one of the unprotected categories discussed above, whether some other constitutional right is impaired, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the activity or the expression, compare *United States v. O'Brien*, 391 U.S. 367 (1968), with *Texas v. Johnson*, 491 U.S., at 406-410; whether the regulation restricts speech itself or only the time, place, or manner of speech, see *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); and whether the regulation is, in fact, content-based or content-neutral. See *Boos v. Barry*, 485 U.S., at 319-321. However difficult the lines may be to draw in some cases, here the answer to each of these questions is clear.

The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment. I would recognize this opportunity to confirm our past holdings and to rule that the New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to end the matter.

Comments and Queries

Justice Kennedy's concern is that "resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so." QUERY: how does this differ from the "clear and present danger" test?

QUERY further: is there any real possibility that "experiments" under the test might dilute First Amendment guarantees? Wouldn't the "flag desecration" case, *Texas v. Johnson*, see below, pp. , have provided the most attractive opportunity? Was *Johnson* decided under the "strict scrutiny" test?

THE EXCEPTIONS TO THE RIGHT

I. National Security

A. Prior Restraint

With the exception of the Civil War, there has been no more divisive event in the history of the United States than its participation in the conflict in Vietnam. An observer might point to a few identifiable events, such as the Gulf of Tonkin Resolution, which marked significant increases in that involvement. But, by and large, it occurred in small and, at times, imperceptible steps, beginning with a handful of military advisers in the Eisenhower administration, increased gradually during John Kennedy's, and became a full scale commitment under Lyndon Johnson. In an effort to understand how and why this involvement began and increased, the Department of Defense commissioned a classified study by the Rand Corporation, a California based "think tank," on the "History of U.S. Decision-Making Process on Viet Nam Policy." Sometime during 1970 or 1971, Daniel Ellsberg, an "anti-war" Rand employee, began to make copies of the classified documents involved in the study, smuggled them out of the corporation's offices and, at some point, gave approximately 47 volumes of documents to the New York Times and the Washington Post. On June 13th, the Times published the first of what it announced would be a series of articles on "The Pentagon Papers," extracting and summarizing the "History" and its supporting documentation. The following day, claiming that public release of this information would cause grave danger to the national security, the Department of Justice obtained an order from the United States District Court for the Southern District of New York, enjoining further publication until a hearing on the merits of the national security claims. A few days later, after the hearing was held, the District Court reversed itself and dissolved the restraining order. The Court of Appeals for the Second Circuit promptly reinstated the injunction pending its consideration of the government's appeal.

On June 18th, the Washington Post began its serialization of the material, and the District Court for the District of Columbia refused the government's request for an injunction. The Court of Appeals for the District of Columbia promptly affirmed the refusal.

These proceedings consumed only nine days, between the 15th and 23rd. The Supreme Court immediately granted the government's petition for certiorari in the Washington Post case and, in an extraordinary action, certiorari before judgment in the New York Times case -- that is, it removed the case from the Second Circuit before that court could consider it. The Supreme Court also restrained further publication by both papers, pending oral argument on Saturday, June 26th. Demonstrating the speech with

which the Court can act when necessary, the decision came down the following Wednesday.

NEW YORK TIMES CO. v. UNITED STATES, 403 U.S. 713 (1971)

(Together with United States v. Washington Post Co., et al.)

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."

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697 (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*, 402 U.S. 415, 419 (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.

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.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

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

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, *The System of Freedom of Expression*, c. V (1970); Z. Chafee,

Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota*.

MR. JUSTICE BRENNAN, concurring.

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*, 249 U.S. 47, 52 (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*, 283 U.S. 697, 716 (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*, at 713. 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.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of

them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. 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.

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.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 7975 makes it a crime to publish certain photographs or drawings of military installations. Section 7986 also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or

communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The 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'." 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.

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." After substantial floor discussion on the proposal, it was rejected. If the proposal that Senator Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota*, 283 U.S. 697 (1931), until recently in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of

a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances -- a view I respect, but reject -- can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act? I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instantaneously.

To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought -- perhaps naively -- was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not familiar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the Post case. I would direct that the District Court on remand give priority to the Times case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases. Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Congress 613 (1800).

From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have

been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." 1 J. Richardson, Messages and Papers of the Presidents 194-195 (1896).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned -- here the Secretary of State or the Secretary of Defense -- after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state.

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit and remand the case for further proceedings in the District Court. And I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court.

Comments and Queries

In a footnote not reprinted above, Justice Douglas observed "[t]here are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress." As a result, while these cases were pending in the courts, additional articles appeared in newspapers in Los Angeles, Boston, St. Louis and, perhaps, elsewhere. There was concern that the material might fall into the hands of the Associated Press or the electronic media, which could transmit it across the country. Senator Mike Gravel of Alaska read portions into the record of a Senate Subcommittee hearing and, allegedly, was making arrangements to have the transcript published commercially, see Gravel v. United States, 408 U.S. 606 (1972). QUERY: Would it have been feasible to maintain effective "restraints on publication" during the fact-finding proceedings in the lower courts which the minority justices believed were required. If not, should the inability of the judiciary to prevent dissemination be a sufficient reason not to attempt it? Should the Court be influenced by the effect on its credibility of issuing orders it cannot effectively enforce?

As a result of the majority opinions, there was no "Opinion of the Court" in this case. The "holding" is the brief per curiam ("by the Court") statement that the government had not met its "heavy burden." The opinions have been classified into four groups: the Black/Douglas "absolutist" approach; Brennan's reiteration of the Near doctrine; the Stewart/White position that the release was improper and possibly criminal even though the government had not met the standard of proof necessary for "prior restraint," and the Marshall "statutory" approach. QUERY: With which, if any, do you most closely agree?

In the same footnote mentioned above, Justice Douglas said of the material he had reviewed: "It is all history, not future events. None of it is more recent than in 1968." QUERY: would he, or Justice Black, have maintained their "absolutist" view if they

believed the material contained information, such as "the sailing dates of transports or the number and location of troops," Near v. Minnesota, above, at p. , which would clearly damage the national security?

Daniel Ellsberg, and an associate Anthony Russo, were indicted and tried for the theft and unauthorized release of classified documents. The charges against them were dismissed, with prejudice (that is, it could not be brought again), on account of numerous prosecutorial abuses, including an alleged and unsuccessful attempt by President Nixon's aide, John Erlichman, to improperly influence the trial judge. No charges were ever brought against the newspapers or any of their employees. It has been said that the decision not to prosecute was made in part, at least, because conflicting passions about the conflict in Vietnam and the "Watergate" scandal which enveloped the country, made it highly unlikely that a jury would have convicted. QUERY: in light of the admonition in Justice Stewart's and, particularly, Justice White's opinions, should an effort have been made regardless of the likely outcome?

The only other modern instance of prior restraint came in United States v. Progressive, Inc., 467 F.Supp. 990 (W.D.Wis., 1979), mandamus denied sub nom (under the title of) Morland v. Sprecher, 443 U.S. 709 (1979). The magazine had announced that its April issue would contain an article by a free lance writer, named Howard Morland, on the construction of a hydrogen bomb. The District Court enjoined publication on the authority of the Atomic Energy Act, which prohibits communication of "restricted data." While an appeal was pending in the Court of Appeals for the Seventh Circuit, it became clear that the information in the article was already available in several popular publications, including two encyclopedia articles, and the case was dismissed on the government's motion. The injunction had been in effect for six and one-half months. QUERY: had the information not been available elsewhere, should the injunction have been made permanent?

B. Subsequent Consequences

The "Smith Act" (named for its sponsor, Representative Howard W. Smith of Virginia) was enacted in 1940, probably as a result of a mixture of motives. Some members of Congress undoubtedly saw it as a response to the "red scare" of the 1930s; others were concerned with the "German American Bund" and similar organizations that, it was feared, might be sympathetic to the enemy if the United States was drawn into the war in Europe. But the Soviet Union was an ally during World War II, and fears that "fifth columnists" might be sympathetic to the Axis Powers never materialized. As a result, the Act was rarely invoked and largely forgotten during the war. But the Soviet alliance grew chilly as the war wound down, and quickly deteriorated into animosity once it was over. The reason was the Soviet Union's military expansion into eastern Europe and the resulting "iron curtain" division of the continent. On March 12, 1947, President Truman, in what would be called a "get-tough-with-Russia" policy, asked Congress to appropriate \$400 million to bolster the threatened governments of Greece and Turkey and, generally, to support a policy of "containing" Soviet aggression. In a domestic parallel of that policy, the Department of Justice obtained indictments against Eugene Dennis, the general secretary of the Communist Party of the United States, and the other ten members of the Party's national board.

DENNIS v. UNITED STATES, 341 U.S. 494 (1951)

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

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. 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 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 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 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.

"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.

II.

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. 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.

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."

III.

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.

The rule we deduce from [a survey of First Amendment] cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, e. g., interference with enlistment. But 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. 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.

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. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or 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. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those

factors which we deem relevant, and relates their significance. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

V.

There remains to be discussed the question of vagueness -- whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit.

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbalization "clear and present danger" is the proper standard. We see no difference, from the standpoint of vagueness, whether the standard

of "clear and present danger" is contained within the statute, or whether it is the judicial measure of constitutional applicability. Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute.

We hold that the Smith Act do[es] not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are

Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring in affirmance of the judgment.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due

process, and whether it respects the safeguards against undue concentration of authority secured by separation of power. We must assure fairness of procedure, allowing full scope to governmental discretion but mindful of its impact on individuals in the context of the problem involved. And, of course, the proceedings in a particular case before us must have the warrant of substantial proof. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all we must remember that this Court's power of judicial review is not "an exercise of the powers of a super-legislature." Mr. Justice Brandeis and Mr. Justice Holmes, dissenting in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534.

But in recent decisions we have made explicit what has long been implicitly recognized. In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society. Some members of the Court -- and at times a majority -- have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. It has been said that such statutes "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U.S. 516, 530. It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid, see *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, and it has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards. *Kovacs v. Cooper*, 336 U.S. 77, 88.

The precise meaning intended to be conveyed by these phrases need not now be pursued. It is enough to note that they have recurred in the Court's opinions, and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of "imminent" peril against which legislation may

guard. It is on this body of the Court's pronouncements that the defendants' argument here is based.

Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: "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." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. We have frequently indicated that the interest in protecting speech depends on the circumstances of the occasion. It is pertinent to the decision before us to consider where on the scale of values we have in the past placed the type of speech now claiming constitutional immunity.

The defendants have been convicted of conspiring to organize a party of persons who advocate the overthrow of the Government by force and violence. The jury has found that the object of the conspiracy is advocacy as "a rule or principle of action," "by language reasonably and ordinarily calculated to incite persons to such action," and with the intent to cause the overthrow "as speedily as circumstances would permit." On any scale of values which we have hitherto recognized, speech of this sort ranks low.

III.

These general considerations underlie decision of the case before us.

On the one hand is the interest in security. The Communist Party was not designed by these defendants as an ordinary political party. The jury found that the Party rejects the basic premise of our political system - that change is to be brought about by nonviolent constitutional process. The jury found that the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. It found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherents and as a policy to be translated into action. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of

evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

On the other hand is the interest in free speech. The right to exert all governmental powers in aid of maintaining our institutions and resisting their physical overthrow does not include intolerance of opinions and speech that cannot do harm although opposed and perhaps alien to dominant, traditional opinion. The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights.

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends. Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?

Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous. But it is relevant to remind that in sustaining the power of Congress in a case like this nothing irrevocable is done. The democratic process at all events is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives. All the Court says is

that Congress was not forbidden by the Constitution to pass this enactment and that a prosecution under it may be brought against a conspiracy such as the one before us.

IV.

Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law.

MR. JUSTICE JACKSON, concurred in a separate opinion.

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 the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection.

MR. JUSTICE DOUGLAS, dissenting.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: Stalin, Foundations of Leninism (1924); Marx and Engels, Manifesto of the Communist Party (1848); Lenin, The State and Revolution (1917); History of the Communist Party of the Soviet Union (B.) (1939).

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent -- that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent

with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "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." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action.

Vishinsky wrote in 1938 in *The Law of the Soviet State*, "In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism." Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

Comments and Queries

QUERY: how, if at all, does Judge Hand's formula, endorsed in the majority opinion, that "in each case" the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" differ from the "clear and present danger" test enunciated in Schenck v. United States?

Critics have claimed that Dennis reinforces the "bad tendency" test of Gitlow v. New York because, despite its references to the Hand formulation and to the "clear and present danger" test, it really holds that it is enough if a danger exists and the defendants intend to accomplish it if they can. QUERY: is this what Dennis holds? Regardless of Dennis, is the so-called "bad tendency" test preferable to the others?

Note that, in concurring, Justice Frankfurter restates his objection to the different standards of evaluation for "fundamental" or "preferred" rights: "We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it." Justice Black "cannot agree The Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection." QUERY: who is right? Can both be?

Note especially this sentence in section IV of Frankfurter's opinion: "Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom." The danger, his argument runs, is that if legislators can rely on the Supreme Court to use "heightened scrutiny," they will feel free to enact questionably constitutional laws in order to placate the public opinion of the day, no matter how unwise or dangerous such laws may be. QUERY: has the experience of the last half century proven him correct? QUERY further: even if such a danger does exist, is it a reason to reject a higher standard for the evaluation of statutes infringing on "fundamental" rights?

If the National Board of the Communist Party could be convicted under the provisions of the Smith Act, why not state leadership groups as well? By the time Dennis was decided, there were more reasons to fear the "international communist conspiracy": in 1949, Mao's Red Army had seized control of mainland China; Julius and Ethel Rosenberg had been charged with espionage for passing the technology of the atomic bomb to the Soviets; in 1950 a high ranking state department official, Alger Hiss, had been convicted of perjury for denying, under oath that he was a communist agent and the voice of Senator Joseph McCarthy began to be heard in the land. The resulting atmosphere led to over one hundred and fifty "little Smith Act" indictments, including, in 1951, the leaders of the California party.

YATES v. UNITED STATES, 354 U.S. 298 (1957)

MR. JUSTICE HARLAN delivered the opinion of the Court.

We brought these cases here to consider certain questions arising under the Smith Act which have not heretofore been passed upon by this Court, and otherwise to review the convictions of these petitioners for conspiracy to violate that Act. Among other things, the convictions are claimed to rest upon an application of the Smith Act which is hostile to the principles upon which its constitutionality was upheld in *Dennis v. United States*.

These 14 petitioners stand convicted, after a jury trial, upon a single count indictment charging them with conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The conspiracy is alleged to have originated in 1940 and continued down to the date of the indictment in 1951. The indictment charged that in carrying out the conspiracy the defendants and their co-conspirators would (a) become members and officers of the Communist Party, with knowledge of its unlawful purposes, and assume leadership in carrying out its policies and activities; (b) cause to be organized units of the Party in California and elsewhere; (c) write and publish, in the "Daily Worker" and other Party organs, articles on the proscribed advocacy and teaching; (d) conduct schools for the indoctrination of Party members in such advocacy and teaching, and (e) recruit new Party members, particularly from among persons employed in the key industries of the nation.

In the view we take of this case, it is necessary for us to consider only the following of petitioners' contentions: ... (2) that the trial court's instructions to the jury erroneously excluded from the case the issue of "incitement to action"; (3) that the evidence was so insufficient as to require this Court to direct the acquittal of these petitioners For reasons given hereafter, we conclude that these convictions must be reversed and the case remanded to the District Court with instructions to enter judgments of acquittal as to certain of the petitioners, and to grant a new trial as to the rest.

Petitioners contend that the instructions to the jury were fatally defective in that the trial court refused to charge that, in order to convict, the jury must find that the advocacy

which the defendants conspired to promote was of a kind calculated to "incite" persons to action for the forcible overthrow of the Government. It is argued that advocacy of forcible overthrow as mere abstract doctrine is within the free speech protection of the First Amendment; that the Smith Act, consistently with that constitutional provision, must be taken as proscribing only the sort of advocacy which incites to illegal action; and that the trial court's charge, by permitting conviction for mere advocacy, unrelated to its tendency to produce forcible action, resulted in an unconstitutional application of the Smith Act. The Government, which at the trial also requested the court to charge in terms of "incitement," now takes the position, however, that the true constitutional dividing line is not between inciting and abstract advocacy of forcible overthrow, but rather between advocacy as such, irrespective of its inciting qualities, and the mere discussion or exposition of violent overthrow as an abstract theory.

After telling the jury that it could not convict the defendants for holding or expressing mere opinions, beliefs, or predictions relating to violent overthrow, the trial court defined the content of the proscribed advocacy or teaching in the following terms, which are crucial here:

"Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.

"The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence."

There can be no doubt from the record that in so instructing the jury the court regarded as immaterial, and intended to withdraw from the jury's consideration, any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action. The court made it clear in colloquy with counsel that in its view the illegal advocacy was made out simply by showing that what was said dealt with forcible overthrow and that it

was uttered with a specific intent to accomplish that purpose, insisting that all such advocacy was punishable "whether it is language of incitement or not."

We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.

We need not decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words "advocate" and "teach" in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. The Gitlow case and the New York Criminal Anarchy Act there involved, which furnished the prototype for the Smith Act, were both known and adverted to by Congress in the course of the legislative proceedings. The legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action, and that it did not intend to disregard it. The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action.

The Government's reliance on this Court's decision in Dennis is misplaced. It is true that at one point in the late Chief Justice's opinion it is stated that the Smith Act "is directed at advocacy, not discussion," but it is clear that the reference was to advocacy of action, not ideas, for in the very next sentence the opinion emphasizes that the jury was properly instructed that there could be no conviction for "advocacy in the realm of ideas."

In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since "inciting" speech is usually thought of as

something calculated to induce immediate action, and since Dennis held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.

This misconceives the situation confronting the Court in Dennis and what was held there. The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule-or principle of action," and employing "language of incitement," is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable per se under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis. As one of the concurring opinions in Dennis put it: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." There is nothing in Dennis which makes that historic distinction obsolete.

In light of the foregoing we are unable to regard the District Court's charge upon this aspect of the case as adequate. The jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government. The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.

The determinations already made require a reversal of these convictions. Nevertheless, in the exercise of our power under 28 U.S.C. 2106 to "direct the entry of such appropriate judgment . . . as may be just under the circumstances," we have conceived it to be our duty to scrutinize this lengthy record with care, in order to determine whether the way should be left open for a new trial of all or some of these petitioners. Such a judgment, we think, should, on the one hand, foreclose further proceedings against those of the petitioners as to whom the evidence in this record would be palpably insufficient upon a new trial, and should, on the other hand, leave the Government free to retry the other petitioners under proper legal standards, especially since it is by no means clear that certain aspects of the evidence against them could not have been clarified to the advantage of the Government had it not been under a misapprehension as to the burden cast upon it by the Smith Act.

On this basis we have concluded that the evidence against petitioners Connelly, Kusnitz, Richmond, Spector, and Steinberg is so clearly insufficient that their acquittal should be ordered, but that as to petitioners Carlson, Dobbs, Fox, Healey (Mrs. Connelly), Lambert, Lima, Schneiderman, Stack, and Yates, we would not be justified in closing the way to their retrial.

It is so ordered.

MR. JUSTICE BURTON concurred in the result.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in part and dissenting in part.

I would reverse every one of these convictions and direct that all the defendants be acquitted. In my judgment the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment to the United States Constitution.

MR. JUSTICE CLARK, dissenting.

The petitioners, principal organizers and leaders of the Communist Party in California, have been convicted for a conspiracy covering the period 1940 to 1951. The conspiracy includes the same group of defendants as in the Dennis case though petitioners here occupied a lower echelon in the party hierarchy. They, nevertheless, served in the same army and were engaged in the same mission.

I would affirm the convictions. I have studied the section of the opinion concerning the instructions and frankly its "artillery of words" leaves me confused as to why the majority concludes that the charge as given was insufficient. I thought that Dennis merely held that a charge was sufficient where it requires a finding that "the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. . . . not as a prophetic insight or as a bit of . . . speculation, but as a program for winning adherents and as a policy to be translated into action" as soon as the circumstances permit. I notice however that to the majority

"The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur."

I have read this statement over and over but do not seem to grasp its meaning for I see no resemblance between it and what the respected Chief Justice wrote in Dennis, nor do I find any such theory in the concurring opinions. As I see it, the trial judge charged in

essence all that was required under the Dennis opinions, whether one takes the view of the Chief Justice or of those concurring in the judgment.

Comments and Queries

None of the Yates defendants were ever retried. The government eventually requested dismissal of the charges on the ground that it could not satisfy the evidentiary requirements.

QUERY: is Yates consistent with Dennis? In disapproving the trial court's charge, the majority wrote: "The court made it clear ... that in its view the illegal advocacy was made out simply by showing that what was said dealt with forcible overthrow and that it was uttered with a specific intent to accomplish that purpose, insisting that all such advocacy was punishable 'whether it is language of incitement or not'." How does this differ from the holding in Dennis?

In his dissent, Clark claims: "I have read this sentence over and over but do not seem to grasp its meaning for I see no resemblance between it ... and Dennis": "The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." QUERY: do you see a resemblance?

Four new justices had joined the Court, two of whom took no part in the decision; the other two -- Chief Justice Warren along with Harlan -- were in the majority. QUERY: is it possible that the Court had simply changed its mind about Dennis? And had decided that it was more politic to "reinterpret" the statute than to over-rule Dennis and declare the Smith Act unconstitutional? If so, should the Court have simply said so -- regardless of the political situation?

QUERY further: is Yates internally consistent? The majority criticizes the trial court because it "intended to withdraw from the jury's consideration any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action." It then frames the question for decision as whether the Act "prohibits advocacy ... divorced from any effort to instigate action to that end." What, then, is the criteria: whether the defendants made "any effort" or whether that effort had the "capacity" to succeed?

Given this construction, there did not seem to be much point in seeking further indictments under the Smith Act. But some had already been obtained, and tried, prior to the Yates decision. A number of them seemed on even shakier ground since they had been obtained under the provision which made it a crime merely "to be or become a member of ... any such group ... knowing the purposes thereof." To the surprise of some, the Court did not invalidate the "membership" clause outright, but applied the Yates holding that "the mere abstract teaching of Communist theory, including the 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." Noto, below, at 367 U.S. at 297-298. It then "review[ed] the general sufficiency of the evidence ... not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future of the lower courts ... ," Scales, below, at 367 U.S. at 230.

Compare the facts which led to different results in these cases:

SCALES v. UNITED STATES, 367 U.S. 203 (1961)

[Some of] the witnesses testified primarily as to their dealings with petitioner Scales. We regard this testimony, which finds no counterpart in the Yates record with respect to any of the defendants whose acquittal was directed, as being of special importance in two ways: it supplies some of the strongest and most unequivocal evidence against the Party based on the statements and activities of a man whose words and deeds, by virtue of his high Party position, carry special weight in determining the character of the Party from the standpoint of the Smith Act; and it appears clearly dispositive as to the quality of petitioner's Party membership, and his knowledge and intent, when we come to consider him not as a Party official but as the defendant in this case.

Petitioner arranged for Clontz to be awarded a scholarship to study in New York at the Jefferson School of Social Science, an official Communist Party School, during the month of August 1950. Because Clontz arrived at a time when few scheduled courses were being offered, the bulk of his training at the school was received in private instruction from Doxey A. Wilkerson, the teacher with whom petitioner had communicated in arranging Clontz' scholarship. Wilkerson, like petitioner, told Clontz,

"that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means, that no longer was there any even pretense among intelligent Communists that any voting system or any people's election could bring this government." He also stated, as Scales had, that "the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class as the vanguard."

Affirmed.

But, decided the same day:

NOTO v. UNITED STATES, 367 U.S. 290 (1961)

[T]he showing of illegal Party advocacy lacked the compelling quality which in Scales was supplied by the petitioner's own utterances and systematic course of conduct as a high Party official.

Surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies, and might indicate what could be expected from the Party if it should ever succeed to power. The "industrial concentration" program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of

sabotage were presently advocated; and it is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause. To permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act. In view of our conclusion as to the insufficiency of the evidence as to illegal Party advocacy, the judgment of the Court of Appeals must be

Reversed.

Comments and Queries

Scales was decided on a five-to-four vote, Warren, Black Douglas and Brennan dissenting. The same four concurred in Noto for reasons that went beyond the insufficiency of the evidence. Black and Douglas would have declared the Smith Act unconstitutional; Warren and Brennan believed it was in fatal conflict with another statute. QUERY: given the Yates standard, the closely divided Court and the analysis of the evidence given above, was there any substantial chance of sustaining future convictions under any provision of the Act?

Although the Smith Act was never invalidated or repealed, these decisions marked the end of prosecutions under it. President Kennedy granted Scales a Christmas Day pardon in 1962. Two years later, in Dombrowski v. Pfister, 380 U.S. 479, the Court struck down the Louisiana Subversive Activities Criminal Control Act, which was virtually identical to the Smith Act in its language, under the "void for vagueness" doctrine.

One avenue for federal prosecution remained: another statute, known as the McCarran Act, had created the Subversive Activities Control Board. The Board issued an administrative order directing all party members to register with the Department of Justice as members of a "Communist action group." In Albertson v. Subversive Activities Control Board 382 U.S. 70 (1965), a unanimous Court invalidated the Board's order as a violation of the 5th Amendment's prohibition against compulsory self-incrimination. With that, the era was over.

One of the principal arguments against all of these prosecutions was that they would not destroy the Communist Party but would merely drive it underground where, arguably, it would be even more dangerous. QUERY: would that have been the result? Should the Court have taken that argument into account, either publicly or privately, in reaching its decisions?

II. Obscenity

A. The absence of constitutional protection, and the one exception

Until shortly after the Civil War, when a retired New York grocer named Anthony Comstock launched a national campaign against it, there had been few laws against obscenity in the United States, and those that existed were largely unenforced. But such was the impact of the “Comstock crusade” that by 1896, in Rosen v. United States, 161 U.S. 29, the Supreme Court, for the first time, upheld an obscenity conviction, and did so without any consideration of its First Amendment implications. By 1931, Near v. Minnesota, *supra*, opined that the “primary requirements of decency” made “obscene publications” an exception to the ban on prior restraints. Not for another quarter-century, however, did the Court fully address the tension between the First Amendment and statutes which criminalized the possession and/or distribution of “obscene” material.

ROTH v. UNITED STATES, 354 U.S. 476 (1957)

(Together with *Alberts v. California*)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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 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.

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 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 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 the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266 [1952]. 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*, 315 U.S. 568, 571-572 [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. . . ."

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. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois*, *supra*, at 266:

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

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

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, 1868. L. R. 3 Q. B. 360 [1868]. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken

as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

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

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

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

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

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." United States v.

Petrillo, 332 U.S. 1, 7-8 [1947]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Affirmed.

MR. CHIEF JUSTICE WARREN, concurred in the result.

MR. JUSTICE HARLAN, concurring in the result in [Albert], and dissenting in [Roth].

I regret not to be able to join the Court's opinion. I cannot do so because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

II.

I concur in the judgment of the Court in *Alberts v. California*.

The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a "tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the

fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power.

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader. And so, in the final analysis, I concur in the judgment because, upon an independent perusal of the material involved, and in light of the considerations discussed above, I cannot say that its suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause. I therefore agree with the Court that appellant's conviction must be affirmed.

III.

I dissent in *Roth v. United States*.

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same.

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel

techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation." Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States. Even the ill-starred Dennis case conceded that speech to be punishable must have some relation to action which could be penalized by government. *Dennis v. United States*, 341 U.S. 494, 502-511.

This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression protected by the First Amendment." I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless. I would give the broad sweep of the First Amendment full support. I have the same confidence in

the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

Comments and Queries

Note that the Court refuses to apply the "clear and present danger" test because "obscenity is not within the area of constitutionally protected speech or press." As authority, it relies on a quotation from the "group libel" case, Beauharnais v. Illinois: "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances." QUERY: why? Libel is, presumably, outside constitutional protection because of the harm it does to others. What harm does obscenity do? The Court acknowledges, and does not deny, the "strenuously urged" argument that no relationship has been established between the "incitation to impure sexual thoughts" and "any overt antisocial conduct."

In Stanley v. Georgia, below, at pp. the Court rejects the argument that "[i]f the State can protect the body of a citizen, may it not ... protect his mind?" QUERY: isn't that exactly what is being done here? The trial judge in Roth charged the jury that the "test in each case is the effect of the book ... upon all those it is likely to reach," The previous paragraph of the charge suggested that the question was "whether it would arouse sexual or impure thoughts." Justice Harlan described the purpose of the California statute as being to prohibit sale of "books whose dominant tendency might be to 'deprave or corrupt' a reader." Therefore, QUERY further: if these are not the purpose(s) of the statutes, what are? Why does the Court make no effort to describe them?

The Court's principal reason for excluding obscenity from the First Amendment appears to be historical: "there is sufficiently contemporaneous evidence to show that obscenity ... was outside the protection intended for speech and press." It also cites a Massachusetts statute which, "as early as 1712 ... made it criminal to publish any ... 'mock sermon,' in imitation or mocking of religious services." QUERY: would the Court, today, declare such a statute to be unconstitutional as a violation of the freedom of speech and the press? Or as an "establishment of religion"? See Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), invalidating a New York statute which prohibited the exhibition of "sacrilegious" films.

Justice Harlan's opinions in these cases are a classic example of the view that the provisions of the Bill of Rights may have different meanings when applied directly against the federal government and when they are applied indirectly -- through the "prism" or "filter" of the "due process clause" -- against the states. QUERY: what is your opinion of this concept? Would the "different meanings" theory be more appropriate when applied to other provisions than to those of the First Amendment? See Comments to Palko v. Connecticut, above, at pp. .

It was relatively easy to determine that "obscenity" is outside of the protection of the First Amendment. The problem, as it developed, was in attempting to define the term. The effort in Roth to describe it as "material which deals with sex in a manner that appeals to the purient interest," soon proved inadequate to the task. Three early cases demonstrated the problem. Kingsley International Pictures Corporations v. Regents, 360 U.S. 684 (1959) confronted a New York statute under which the Board of Regents had censored a film version of D.H. Lawrence's novel "Lady Chatterley's Lover." In several opinions badly splintered in their reasoning, a unanimous Court struck down the statute. Justice Stewart, in the opinion of the Court, wrote that the First Amendment "protects advocacy of the opinion that adultery may sometimes be proper, no less than the advocacy of socialism or the single tax." Three years later, the issue was a Post Office determination that three magazines containing, mainly, pictures of nude males were obscene and, therefore, unmailable. The Court overturned that determination in Manuel Enterprises v. Day, 370 U.S. 478 (1962), holding that "obscene material" must not only be "purient," but must be characterized by "patent offensiveness and indecency." The last was Jacobellis v. Ohio, 378 U.S. 184 (1964). At issue was a movie, Les Amants, in which, it was argued, a scene simulated sexual intercourse. Seven justices decided, again in multiple opinions, that it was not obscene. The case is famous, however, not for its result, but for Justice Stewart's comment that, although he could not define obscenity, "I know it when I see it, and the motion picture involved in this case is not it."

The Court's first effort to devise a comprehensive definition was in a very strangely titled case: A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General (often cited as Memoirs v. Massachusetts), 383 U.S. 413 (1966). In addition to finding that this 18th century novel of English life was not obscene, the majority opinion set out a three-part test for deciding what was. It must be found that (a) the dominant theme of the material, taken as a whole, appeals to purient 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." Shortly thereafter, a large number of otherwise arguably "obscene" paperbooks began to include a preface of one or two pages, written by someone with an advanced degree, explaining the social and psychological problems presented by the "following story."

A number of cases followed, but none of them offered any degree of certainty to the law of obscenity, which, even those opposed to it agreed, was badly needed if people were to know what they could or could not publish or sell.

MILLER v. CALIFORNIA, 413 U.S. 15 (1973)

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

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem."

Appellant was convicted of a misdemeanor, by knowingly distributing obscene matter. 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.

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.

The case we now review was tried on the theory that [the] California Penal Code approximately incorporates the three-stage Memoirs test. But now the Memoirs test has been abandoned as unworkable by its author [Justice Brennan], 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. "The First and Fourteenth Amendments have never been treated as absolutes." We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*; that concept has never commanded the adherence of more than three Justices at one time.

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, MR. JUSTICE DOUGLAS contends.

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. "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case'." *Jacobellis v. Ohio* [378 U.S. 184, 188 (1964)]

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. 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.

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. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

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."

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

Today we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law. Those are the standards we ourselves have written into the Constitution. Yet how under these vague tests can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and over again. But at least a criminal

prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.

No such protective procedure has been designed by California in this case. Obscenity -- which even we cannot define with precision -- is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL joined, also dissented.

Comments and Queries

Justice Douglas' dissent argues that the specificity problem would be satisfied if prosecutions were limited to situations in which "a specific book, play ... has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person shows or displays that particular book or film" QUERY: if the film, or book, "John and Jane" is declared obscene, does it automatically follow that "Jim and Jane" or "John and Joan," would be as well? Would a judicial proceeding be required to determine if differently titled books or films were, in fact, the same? Regardless of the answer to that question, QUERY further: would the Douglas suggestion render the obscenity statutes unenforceable, as a practical matter, given the almost infinite number of slightly different paperback books and slightly recut reels of film or videotape that might be produced?

PARIS ADULT THEATRE I v. SLAYTON, 413 U.S. 49 (1973)

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

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." *Breard v.*

Alexandria, 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society . . .," *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion).

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. "We do not demand of legislatures 'scientifically certain criteria of legislation.'" *Noble State Bank v. Haskell*, 219 U.S. 104, 110." Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." *Palko v. Connecticut*. Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Vacated and remanded.

Comments and Queries

The majority opinion is a classic statement of the "rational basis" test: "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist." The test is appropriate only because of the Court's prior determination that obscenity is outside of the protection of the First Amendment. Again, QUERY: why has obscenity been declared to be outside of the First Amendment?

Justice Douglas also dissented, based largely on the same basis as his dissent in Miller, above.

An axiom of English law holds that "a man's home is his castle." This is so even if it is only a hovel: "the wind may enter, the rain may enter, but the King of England may not enter." In the United States, respect "for the sanctity of the home ... has been embedded in our traditions since the origins of the Republic," United States v. Orito, 413 U.S. 139, 142 (1973). What have become the Third and Fourth Amendments to the Constitution were drafted to prevent a repetition of the abuses against the home in colonial times. This, as Justice Harlan observed in a much-quoted opinion, is "to protect the privacies of the life within," Poe v. Ullman, 367 U.S. 497, 551 (dissenting from the denial of certiorari, 1961).

STANLEY v. GEORGIA, 394 U.S. 557 (1969)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

An investigation of alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law, tried before a jury and convicted.

The State and appellant both agree that the question here before us is whether "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter" is constitutional. In this context, Georgia concedes that the present case appears to be one of "first impression . . . on this exact point," but contends that since "obscenity is not within

the area of constitutionally protected speech or press," *Roth v. United States*, the States are free, subject to the limits of other provisions of the Constitution, to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive" *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law" *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children or that it might intrude upon the sensibilities or privacy of the general public. No such dangers are present in this case.

Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even

if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

MR. JUSTICE BLACK concurred.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, concurred in the result.

Comments and Queries

The Court notes the "danger that obscene material might fall into the hands of children," and that "[n]o such dangers are present in this case." QUERY: would the result have been different if children lived in the home? Especially if the film was not concealed or locked away? Should it be?

With respect to the similar possession of pornographic film involving minors, see Osborne v. Ohio, below, at pp. . Note particularly Osborne's consideration of "the argument that prohibition of possession ... is a necessary incident to ... prohibiting distribution."

Shortly after joining the Court, Justice John Paul Stevens dissented from the remand of an obscenity conviction for retrial because, among other reasons: "the statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess." Marks v. United States, 430 U.S. 188, 198 (1977). QUERY: is the constitutional right to possess obscene material an argument for the constitutional protection of its sale? Or, QUERY further: can it be argued that there are two distinct constitutional provisions involved? That while neither the material or its purveyors have any protection under the

First Amendment, the possessor's protection arises from his constitutional right "of privacy"? In the latter case, QUERY: what is the source of this "privacy" right? Most modern theory would hold it to be part of the "liberty" protected by the "due process" clause of the 5th and 14th Amendments. As to the most well known applications of that right, compare Roe v. Wade, 410 U.S. 113 (1973), abortion, with Bowers v. Hardwick, 478 U.S. 186 (1986), sodomy, over-ruled on different grounds by Lawrence v. Texas, ___ U.S. ___ (2003). Note that the privacy protection in Stanley could not stem from the 4th Amendment since the officers were present in the home pursuant to a search warrant, and neither the validity nor the execution of the warrant were challenged.

B. Prior Restraint

1. By ban on distribution

"[T]he protection even as to previous restraint is not absolutely unlimited," runs the famous dictum in Near v. Minnesota, and "the primary requirements of decency may be enforced against obscene publications." The difficulty lies in devising, and applying, the definition of "obscenity." These difficulties are multiplied when they must be applied, often on short notice, by a single administrative or judicial official, and where the result of a mistake may be the "the curtailment of constitutionally protected expression, which is often separated from obscenity by only a dim and uncertain line," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

The extent to which censorship can be directed against significant works of literature can be seen in several post Near decisions. Customs officials attempted to ban James Joyce's Ulysses; their decision was overturned by the federal district and circuit courts, United States v. One Book called "Ulysses", 72 F.2d 705 (1934). The Post Office denied mailing privileges to the magazine Esquire; the decision was enjoined by the lower federal courts and the decision was affirmed in Hannegan v. Esquire, Inc., 327 U.S. 146 (1946). The Postmaster General later declared D.H. Lawrence's novel, Lady Chatterly's Lover, to be unmailable; his decision was struck down by the district and circuit courts, Grove Press v. Christenberry, 276 F.2d 433 (1960), and the government decided not to appeal to the Supreme Court. An attempt by the Attorney General of Massachusetts to ban as "obscene" Henry Miller's novel Tropic of Cancer was reversed by a four-to-three decision of that state's Supreme Judicial Court, Attorney General v. The Book named "Tropic of Cancer", 184 N.E.2d 328 (1962). Other examples are given in the headnote to Miller v. California, above, at p.

The complaint, by writers, publishers and others, was that the delays involved -- the Supreme Court's 1946 decision in Hannegan dealt with Esquire issues from January to November of 1943 -- were expensive, discouraged creative effort and substantially denied the public an opportunity to read the books in question.

KINGSLEY BOOKS, INC. v. BROWN, 354 U.S. 436 (1957)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding under 22-a of the New York Code of Criminal Procedure, authorizing the chief executive, or legal officer, of a municipality to invoke a "limited

injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications.

A complaint dated September 10, 1954, charged appellants with displaying for sale paper-covered obscene booklets under the general title of "Nights of Horror." The complaint prayed that appellants be enjoined from further distribution of the booklets, that they be required to surrender to the sheriff for destruction all copies in their possession, and, upon failure to do so, that the sheriff be commanded to seize and destroy those copies. The same day the appellants were ordered to show cause within four days why they should not be enjoined pendente lite from distributing the booklets. Appellants consented to the granting of an injunction pendente lite and did not bring the matter to issue promptly, as was their right under the challenged section, which provides that the persons sought to be enjoined "shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." After the case came to trial, the judge found that the booklets were clearly obscene -- were "dirt for dirt's sake"; he enjoined their further distribution and ordered their destruction. He refused to enjoin "the sale and distribution of later issues" on the ground that "to rule against a volume not offered in evidence would . . . impose an unreasonable prior restraint upon freedom of the press."

Neither in the New York Court of Appeals, nor here, did appellants assail the legislation insofar as it outlaws obscenity. The claim they make lies within a very narrow compass. Their attack is upon the power of New York to employ the remedial scheme of 22-a. Resort to this injunctive remedy, it is claimed, is beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that "freedom of thought, and speech" which has been "withdrawn by the Fourteenth Amendment from encroachment by the states." *Palko v. Connecticut*, 302 U.S. 319, 326-327. Reliance is particularly placed upon *Near v. Minnesota*, 283 U.S. 697.

In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced

against obscene publications." And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts v. California*, decided this day. The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of 22-a.

The judicial angle of vision in testing the validity of a statute like 22-a is "the operation and effect of the statute in substance." Criminal enforcement and the proceeding under 22-a interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. In each case the bookseller is put on notice by the complaint that sale of the publication charged with obscenity in the period before trial may subject him to penal consequences. In the one case he may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction. The bookseller may of course stand his ground and confidently believe that in any judicial proceeding the book could not be condemned as obscene, but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content -- the threat of subsequent penalization.

It only remains to say that the difference between *Near v. Minnesota* and this case is glaring in fact. Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, "This is of the essence of censorship." 283 U.S., at 713. As such, it was found unconstitutional. Unlike *Near*, 22-a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive.

Affirmed.

MR. CHIEF JUSTICE WARREN, dissenting.

This is not a criminal obscenity case. Nor is it a case ordering the destruction of materials disseminated by a person who has been convicted of an offense for doing so, as would be authorized under provisions in the laws of New York and other States. It is a case wherein the New York police, under a different state statute, located books which, in their opinion, were unfit for public use because of obscenity and then obtained a court order for their condemnation and destruction.

The majority opinion sanctions this proceeding. I would not. Unlike the criminal cases decided today, this New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution. Certainly in the absence of a prior judicial determination of illegal use, books, pictures and other objects of expression should not be destroyed. It savors too much of book burning.

Opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK, dissenting, announced by MR. JUSTICE BRENNAN.

There are two reasons why I think this restraining order should be dissolved.

First, the provision for an injunction pendente lite gives the State the paralyzing power of a censor. A decree can issue ex parte -- without a hearing and without any ruling or finding on the issue of obscenity. This provision is defended on the ground that it is only a little encroachment, that a hearing must be promptly given and a finding of obscenity promptly made. But every publisher knows what awful effect a decree issued in secret can have. We tread here on First Amendment grounds. And nothing is more devastating to the rights that it guarantees than the power to restrain publication before even a hearing is held. This is prior restraint and censorship at its worst.

Second, the procedure for restraining by equity decree the distribution of all the condemned literature does violence to the First Amendment. The judge or jury which

finds the publisher guilty in New York City acts on evidence that may be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester. In New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people. The nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Yet the present statute makes one criminal conviction conclusive and authorizes a state-wide decree that subjects the distributor to the contempt power. I think every publication is a separate offense which entitles the accused to a separate trial. Juries or judges may differ in their opinions, community by community, case by case. The audience, in this case the judge or the jury, that hissed yesterday may applaud today, even for the same performance.

MR. JUSTICE BRENNAN, dissenting.

I believe the absence in this New York obscenity statute of a right to jury trial is a fatal defect. The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its

definition, calls for an appraisal of material according to the average person's application of contemporary community standards. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i. e., that reasonable men may differ whether the material is obscene.

Comments and Queries

The essence of Kingsley is its approval of the New York statutory scheme providing for a trial within one day, and a decision within two days, after the trial of an effort to prevent distribution. It remained unclear, however, whether distribution would be prohibited during the time between service of notice on the distributor and the judicial decision after hearing. Justice Douglas' dissent assumes that it is: "This provision is defended on the ground that it is only a little encroachment." QUERY: should the "ban"

be in effect during this period? For the Court's eventual view, see Freedman v. Maryland, immediately below.

QUERY: could it be argued that obscene materials, being wholly outside of the protection of the First Amendment, are "contraband," subject to seizure in the same way as narcotics, gambling paraphernalia or untaxed liquor? See Marcus v. Search Warrant, 367 U.S. 717, 730-31 (1961).

As a practical matter, what happens to the challenged material during the period of litigation? In A Quantity of Books v. Kansas, 378 U.S. 205 (1964), the Court invalidated a procedure under which a judge could order the seizure of all copies of the book(s) upon the filing of an affidavit by the prosecuting attorney. Subsequently, it upheld seizure of a single copy of the material (here a film), as evidence for use in court, where there was "no showing ... that the seizure of the copy prevented continuing exhibition," Heller v. New York, 413 U.S. 483 (1973). QUERY: does allowing sale, or exhibition, during litigation encourage the distributor to stretch out the court proceedings, while engaging in massive advertising and "cashing in" on sales during that time, even if they are later prohibited? Further QUERY: is this risk "worth it" in order to protect First Amendment values?

Notice Chief Justice Warren's claim, in dissent, that the work must be judged "in context" to determine whether it is obscene. Compare this with his opinion for the Court in Ginzberg v. United States, below, at pp.

From its inception, "film" was treated differently from print. The theory was that the young and "most susceptible" would be more vulnerable to "movies," which, therefore, required greater scrutiny. Many states and some municipalities instituted "licensing" procedures, which required a copy of each film to be submitted to some censorship authority before it was shown to the public. This is exactly what the English government had required of printers prior to 1659, and, it is generally agreed, was, at least, what the First Amendment was intended to prohibit. Nonetheless, the Supreme Court upheld a Chicago ordinance requiring a copy to be "produced at the office of the commissioner of police for examination" prior to exhibition. Times Film Corp. v. Chicago, 365 U.S. 43 (1961). There were four dissenters, speaking through Chief Justice Warren: "I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune." (The ordinance also provided that a license should be denied if the film violated any of the "group libel" prohibitions discussed in Beauharnais, see below, at pp. , and the Court, specifically, declined to pass upon that provision.)

FREEDMAN v. MARYLAND, 380 U.S. 51 (1965)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, and exhibited the film "Revenge at Daybreak" at his Baltimore theatre without first submitting the picture to the State Board of Censors as required. The State concedes that the picture does not violate the statutory standards and would have received a license if properly submitted, but the appellant was convicted despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed. We reverse.

I.

Appellant argues that [the statute] constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed. No time limit is imposed for completion of Board action. Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United Artists Corp. v. Maryland State Board of Censors*, 210 Md. 586.

II.

The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court -- part of an independent branch of government -- to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient

to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed.

III.

How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected.

Reversed.

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

I do not believe any form of censorship - no matter how speedy or prolonged it may be - is permissible. As I see it, a pictorial presentation occupies as preferred a position as any other form of expression. If censors are banned from the publishing business, from the pulpit, from the public platform - as they are - they should be banned from the theatre. I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment.

Comments and Queries

Note that the Court resolves the ambiguity in Kingsley: "That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing." QUERY: after Freedman, what are the constitutional requirements for any valid system of "censorship"?

2. By restrictions on location

One of the striking developments of the late 1960s and early 1970s was the development of the "adult entertainment" industry. It had three principal retail components: storefronts selling "nonobscene" pornographic paperback books and magazines; motion picture theaters displaying the same fare, and so-called "topless" or "go-go" bars. Efforts to close such establishments as "immoral" were easily defeated on First Amendment grounds. Other objections, however, received more sympathetic attention. Schools and churches complained that the proximity of such businesses endangered children and deeply offended parishoners engaged in the "free exercise" of their religion. Neighbors claimed that they attracted undesirables and lowered property values. And they were, after all, commercial enterprises, operated for profit.

Municipalities have long been permitted to use "zoning" ordinances to regulate land use, and restrict the location of legitimate enterprises, on the theory that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard," Village of Euclid v. Amber Realty Co., 272 U.S. 365, 368 (1926).

Thus, two different "land use" theories motivated by the same complaints.

YOUNG v. AMERICAN MINI THEATRES, 427 U.S. 50 (1976)

MR. JUSTICE STEVENS delivered the opinion of the Court, Part III of which is joined by only THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST.

Effective November 2, 1972, Detroit adopted the ordinances challenged in this litigation. Instead of concentrating "adult" theaters in limited zones, these ordinances require that such theaters be dispersed. Specifically, an adult theater may not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The term "regulated uses" includes 10 different kinds of establishments in addition to adult theaters.

The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are

concentrated in limited areas. The decision to add adult motion picture theaters and adult book stores to the list was, in part, a response to the significant growth in the number of such establishments. In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

Respondents, operators of two adult motion picture theaters, brought actions against appropriate city officials, seeking a declaratory judgment that the ordinances were unconstitutional and an injunction against their enforcement.

The District Court granted defendants' motion for summary judgment. The Court of Appeals reversed. Because of the importance of the decision, we granted certiorari.

II

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare.

It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

III

Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment.

The judgment of the Court of Appeals is Reversed.

MR. JUSTICE POWELL concurred.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees filed an action seeking a declaratory judgment that the ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.* There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments.

This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community. In short, the Renton ordinance is as completely consistent with our definition of "content-neutral" speech regulations as those that "are justified without reference to the

content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U.S., at 71.

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is crisscrossed by freeways, highways, and roads."

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U.S., at 71, n. 35, we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Reversed.

JUSTICE BLACKMUN concurred in the result.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions.

Even assuming that the ordinance should be treated like a content-neutral time, place and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided ... that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five percent of the city. However, the Court of

Appeals found that because much of this land was already occupied, “[l]imiting adult theater uses to these area is a substantial restriction on speech.” Many “available” sites are also largely unsuitable for use by movie theaters.

Despite the evidence in the record, the Court reasons that the fact “[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.” However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel “the government to ensure that adult theaters, or any other kind of speech-related businesses for that matter, will be able to obtain sites at bargain prices.” However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders.

Comments and Queries

QUERY: is there any constitutional basis for a distinction between the "dispersal" and "cluster" concepts? For a recent and dramatic example of the "dispersal" approach, see New York Mayor Rudolf Guiliani's "clean up" of Times Square. As to the long-term success of that effort, see The New York Times, March 15, 105, which notes that :Sex-Related Shops are Making a Comeback in Times Square ... Exploiting loopholes and paying higher rents than other can afford.”

QUERY also: is there merit in the Young dissenters' argument that these decisions mark a departure from the traditional rule that regulations affecting "protected expression be content neutral except in the limited context of a captive or juvenile audience"? Do these cases create a new category of "lesser protected" speech? Can a distinction be made between the "bookstores" and the "movie theatres"? As to the "topless" bars, see Barnes v. Glen Theatre, Inc., and Erie, City of v. Pao's A.M., tdba Kandyland, below, at pp. . For the separate rationale allowing states and municipalities to ban nudity or sexually explicit performances in places where alcohol is served, see Newport v. Iacobucci, 479 U.S. 92 (1986) and insightful commentaries in Tribe, American Constitutional Law, 2nd ed., 1988, at 478, ftn. 15 and 917-18, ftn. 89.

3. By licensing procedure

There is a very old saying that "there is more than one way to skin a cat." Some cities and towns, finding their zoning powers insufficient to curb "adult" businesses, have sought to make use of other municipal powers. Conspicuous among these is the traditional power to "license" new building and renovations and to "inspect" commercial premises so as to guarantee sound construction, prevent fire hazards, and assure adequate water supply and sanitation.

FW/PBS, INC. v. DALLAS, 493 U.S. 215 (1990)

(Together with M.J.R., Inc. et al. v. City of Dallas and Berry et al. v. City of Dallas)

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Part II, in which JUSTICE STEVENS and JUSTICE KENNEDY join.

These cases call upon us to decide whether a licensing scheme in a comprehensive city ordinance regulating sexually oriented businesses is a prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland*. As this litigation comes to us, no issue is presented with respect to whether the books, videos, materials, or entertainment available through sexually oriented businesses are obscene pornographic materials.

On June 18, 1986, the city council of the city of Dallas unanimously adopted [an] Ordinance regulating sexually oriented businesses, which was aimed at eradicating the secondary effects of crime and urban blight. The ordinance, as amended, defines a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." The ordinance regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections.

II

Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses.

Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."

Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible because the "delay compel[led] the speaker's silence."

Although the ordinance states that the "chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances."

Moreover, the ordinance does not set a time limit within which the inspections must occur. The ordinance provides no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved. The city asserted at oral argument that when applicants apply for licenses, they are given the telephone numbers of the various inspection agencies so that they may contact them. That measure, obviously, does not place any limits on the time within which the city will inspect the business and thereby make the business eligible for the sexually oriented business license.

The Court also required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. Under the Dallas ordinance, the city does not exercise discretion by passing

judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

The cases are remanded for further proceedings consistent with this opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

I write separately because I believe that our decision two Terms ago in *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988), mandates application of all three of the procedural safeguards specified in *Freedman v. Maryland*, 380 U.S. 51 (1965), not just two of them.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I would affirm the Fifth Circuit's holding that *Freedman* is inapplicable to the Dallas scheme. The Dallas ordinance is in many respects analogous to regulations requiring parade or demonstration permits and imposing conditions on such permits. Such regulations have generally been treated as time, place, and manner restrictions and have been upheld if they are content neutral, serve a substantial governmental interest, and

leave open alternative avenues of communication. Furthermore, the Court should not assume that the licensing process will be unduly prolonged or that inspections will be arbitrarily delayed. There is no evidence that this has been the case, or that inspections in other contexts have been delayed or neglected.

Perhaps JUSTICE O'CONNOR is saying that those who deal in expressive materials are entitled to special procedures in the course of complying with otherwise valid, neutral regulations generally applicable to all businesses. I doubt, however, the bookstores or radio or television stations must be given special breaks in the enforcement of general health, building, and fire regulations. If they must, why would not a variety of other kinds of businesses, like supermarkets and convenience stores that sell books and magazines, also be so entitled?

JUSTICE STEVENS concurred in part and dissented in part.

JUSTICE SCALIA, concurring in part and dissenting in part.

I would affirm the Fifth Circuit's holding that the ordinance is constitutional in all respects before us.

The Dallas ordinance at issue in these cases is not an isolated phenomenon. It is one example of an increasing number of attempts throughout the country, by various means, not to withhold from the public any particular book or performance, but to prevent the erosion of public morality by the increasingly general appearance of what the Dallas ordinance delicately calls "sexually oriented businesses." Such businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast. Indeed, as a case we heard last Term demonstrates, they reach even the smallest of communities via telephonic "dial-a-porn." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

While many communities do not object to such businesses, others do, and have sought to eliminate them. Attempts to do so by focusing upon the individual books, motion pictures, or performances that these businesses market are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression. Communities cannot close down "porn-shops" by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected), just as Congress cannot eliminate specialized "dial-a-porn" telephone services by prohibiting individual messages that are "indecent" but not quite obscene.

Consequently, communities have resorted to a number of other means, including stringent zoning laws, see e.g., *Young v. American Mini Theatres, Inc.* (ordinance adopting unusual zoning technique of requiring sexually oriented businesses to be dispersed rather than concentrated); *Renton v. Playtime Theatres, Inc.* (ordinance restricting theaters that show "adult" films to locations comprising about 5% of the community's land area, where the Court of Appeals had found no "commercially viable" sites were available), Draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography, see *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (state Racketeer Influenced and Corrupt Organizations (RICO) statute), and the ordinance we have before us today, a licensing scheme purportedly designed to assure that porn-shops are run by a better class of person. Not only are these oblique methods less than entirely effective in eliminating the perceived evil at which they are directed (viz., the very existence of sexually oriented businesses anywhere in the community that does not want them), but they perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the "chilling" of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*.

It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents and should be applied in the present cases. That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be

considered merely pornographic and not obscene. It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate businesses that hold themselves forth as specializing in such material. Because I think that Dallas could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards.

The prohibition of concentrated pornography here is analogous to the prohibition we sustained in *American Mini Theatres*. There we upheld ordinances that prohibited the concentration of sexually oriented businesses, each of which (we assumed) purveyed material that was not constitutionally proscribable. Here I would uphold an ordinance that regulates the concentration of sexually oriented material in a single business.

Comments and Queries

Riley, cited in Justice Brennan's dissent, struck down a North Carolina regulation which required paid charitable solicitors, but not volunteers, to comply with licensing requirements. It held that "a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." And, "even assuming" the state's right to license solicitors, its procedure must comply with the Freedman requirement that the licensor "will, within a specified brief period, either issue a license or go to Court." QUERY: is there a viable distinction between that case and this?

Justice Scalia's dissent suggests that a purpose of the Dallas ordinance might have been "to assure that porn shops are run by a better class of person." QUERY: how could such a "class" be defined? Unless it were defined by financial means, how would requiring heightened regulatory compliance assure such a result? Is the ordinance "narrowly tailored" to that end? Or is the justice simply being sarcastic?

Compare Scalia's dissent with Chief Justice Burger's majority opinion in Paris Adult Theatre I v. Slayton, below, at pp. , that "the interest of the public in the quality of life and the total community environment" are among the legitimate justifications for the prohibition of obscenity. QUERY: why would not such considerations justify the prohibition of "pornography" as well?

C. Subsequent Consequences

1. The definition of obscenity

The decisions in Miller v. California and Paris Adult Theatre I v. Slayton, above, at pp. , both reaffirmed the Roth, that "obscenity" was without First Amendment protection and articulated the still-prevailing definition of that term. The principal dissent in Slayton, which follows, applies to both cases.

PARIS ADULT THEATRE I v. SLAYTON, 413 U.S. 49 (1973)

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in Roth v. United States, and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

After 16 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials.

Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio*, *supra*, at 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). As Mr. Chief Justice Warren pointed out, "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harris*, 347 U.S. 612, 617 (1954).

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959).

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems

concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague.

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

But the sheer number of the cases does not define the full extent of the institutional problem. For, quite apart from the number of cases involved and the need to make a fresh constitutional determination in each case, we are tied to the "absurd business of perusing and viewing the miserable stuff that pours into the Court" *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 707 (separate opinion of Harlan, J.). While the material may have varying degrees of social importance, it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity.

In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale -- or indeed, any rationale at all -- necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required.

Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth*:

that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be unprotected speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.

It may well be, as one commentator has argued, that "exposure to [erotic material] is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. . . . [And it] constitutes an invasion of his privacy" Similarly, if children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," *Ginsberg v. New York*, 390 U.S., at 649-650 (STEWART, J., concurring), then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles.

But, whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. That court assumed for the purposes of its decision that the films in issue were exhibited only to persons over the age of 21 who viewed them willingly and with prior knowledge of the nature of their contents. And on that assumption the state court held that the films could still be suppressed. The justification for the suppression must be found, therefore, in some independent interest in regulating the reading and viewing habits of consenting adults.

If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a

tendency to exert a corrupting and debasing impact leading to antisocial behavior," then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State, in an effort to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films.

In short, while I cannot say that the interests of the State -- apart from the question of juveniles and unconsenting adults -- are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents.

Comments and Queries

Among other reasons, Justice Brennan's dissent cites "the stress imposed on the state and federal judicial machinery" as a reason to invalidate "obscenity" statutes. QUERY: how far does that depart from Marbury's justification of judicial review? QUERY further: could the President argue that a statute, perhaps one passed over his veto, creates such "institutional stress" on the executive branch as to render it unconstitutional? Could the President refuse to enforce a statute on such a ground?

The decision in Miller v. California held that "[t]he 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." It thus created a national legal definition of obscenity while localizing the determination of its content. The latent contradiction appeared only later: what should be the result if a particular community's "standards" are more restrictive than the national definition allows?

JENKINS v. GEORGIA, 418 U.S. 153 (1974)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant was convicted in Georgia of the crime of distributing obscene material. His conviction, in March 1972, was for showing the film "Carnal Knowledge" in a movie theater in Albany, Georgia.

There is little to be found in the record about the film "Carnal Knowledge" other than the film itself. However, appellant has supplied a variety of information and critical commentary, the authenticity of which appellee does not dispute. The film appeared on many "Ten Best" lists for 1971, the year in which it was released. Many but not all of the reviews were favorable.

Appellee contends essentially that under Miller the obscenity of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of Miller to evaluate appellee's contention.

Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." "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 To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility. Even though questions of appeal to

the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "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," but we made it plain that under that holding "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"

We also took pains in Miller to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. It would be wholly at odds with this aspect of Miller to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

Our own viewing of the film satisfies us that "Carnal Knowledge" could not be found under the Miller standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in Miller of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards.

We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia.

Reversed.

MR. JUSTICE DOUGLAS, being of the view that any ban on obscenity is prohibited by the First Amendment, made applicable to the States through the Fourteenth, concurs in the reversal of this conviction.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in the result.

Today's decision confirms my observation in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), that the Court's new formulation does not extricate us from the mire of case-by-case determinations of obscenity. It is clear that as long as the Miller test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

Comments and Queries

In *Pope v. Illinois*, 481 U.S. 497, 501 (1987), the Court extended judicial supervision over the fact-finding function of local juries by holding that "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value," is to be determined, not by community standards, but "whether a reasonable person would find such value in the material, taken as a whole."

QUERY: do the decisions in *Jenkins* and *Pope* "confirm" the concerns expressed by Justice Brennan in his *Slayton* dissent?

The Court's has consistently held that "nudity alone is not enough to make material legally obscene." Yet, based upon "moral disapproval," the government may prohibit people from appearing nude in public. *Barnes v. Glen Theatre, Inc.*, below at p. .

Nude photographs may not, however, be banned from the mails, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). And, as we have seen above, nudity is not a sufficient basis to ban a theatrical or cinematic performance, at least one performed in an enclosed space. The remaining question, whether the public display of such performances can be prohibited, came before the Court in circumstances that can best be called unusual.

ERZNOZNIK v. CITY OF JACKSONVILLE, 422 U.S. 205 (1975)

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Fla., ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller v. California*, 413 U.S. 15 (1973), and thus applies to films that are protected by the First Amendment. Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a nuisance. Several theories are advanced to justify this contention.

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman v. City of Shaker Heights*, [418 U.S. 298 (1974)].

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. California*, [403 U.S. 15 (1977)], at 21.

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence.

[A]ssuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors.

At oral argument appellee, for the first time, sought to justify its ordinance as a traffic regulation. It claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents. Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose

of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95 .

In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity [of purpose] are essential. These prerequisites are absent here.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, see *Cohen v. California*, 403 U.S. 15 (1971), or a flag hung from a second-floor apartment window, see *Spence v. Washington*, 418 U.S. 405 (1974), it distorts reality to apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge; indeed, photographs included in the record of this case show that the screen of petitioner's theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color

and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. See Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 707-708 (1951).

[T]he screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

Comments and Queries

QUERY: do you think the Court regarded the City's interest in traffic safety as disingenuous because it was first raised at oral argument? If so, should that matter? QUERY further: would it have made a difference if the City Council had made specific findings that the display of such movies endangered the public safety? Before answering, consider the Court's observation in Erie v. Pap's A.M. below at p. , that: "The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, experts judgments about the resulting harmful secondary effects."

Further QUERY: would a ban on the showing of all movies on a screen visible from the public highway satisfy the "reasonable time, place and manner" requirement? Or would be it struck down as "overinclusive," i.e. banning "too much speech." See Schad v. Borough of Mt. Ephriam, 452 U.S. 61 (1981).

2. The necessity of "guilty knowledge"

The Latin terms "scienter" and "mens rea" come from the Common Law. They were different expressions of the same concept that, with rare exceptions, a person could not be convicted of a crime unless they knew the act to be criminal when they committed it. This does not contradict the axiom that "ignorance of the law is no excuse," for everyone is presumed to know what the law is. Scienter requires that they knew -- or reasonably should have known -- their conduct was in violation of the law. But what the law requires or forbids can, in some cases, be unclear, and what someone "reasonably should have known" can often be difficult to determine.

The law of obscenity poses particularly difficult problems in this regard. Compare the following cases:

SMITH v. CALIFORNIA, 361 U.S. 147 (1959)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, the proprietor of a bookstore, was convicted in a California Municipal Court under a Los Angeles City ordinance which makes it unlawful "for any person to have in his possession any obscene or indecent writing [or] book . . . [i]n any place of business where . . . books . . . are sold or kept for sale." The offense was defined by the Municipal Court, and by the Appellate Department of the Superior Court, which affirmed the judgment imposing a jail sentence, as consisting solely of the possession, in the appellant's bookstore, of a certain book found upon judicial investigation to be obscene. The definition included no element of scienter -- knowledge by appellant of the contents of the book -- and thus the ordinance was construed as imposing a "strict" or "absolute" criminal liability. The appellant made timely objection below that if the ordinance were so construed it would be in conflict with the Constitution of the United States.

"The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500. Still, it is doubtless competent for the States to create strict criminal liabilities by defining

criminal offenses without any element of scienter -- though even where no freedom-of-expression question is involved, there is precedent in this Court that this power is not without limitations. See *Lambert v. California*, 355 U.S. 225 [1957]. But the question here is as to the validity of this ordinance's elimination of the scienter requirement -- an elimination which may tend to work a substantial restriction on the freedom of speech and of the press. And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Winters v. New York*, 333 U.S. 507, 509-510, 517-518 [1948].

We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth v. United States*. The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors -- in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to

constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.

It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

Reversed.

MR. JUSTICE BLACK, concurring.

The appellant was sentenced to prison for possessing in his bookstore an "obscene" book in violation of a Los Angeles city ordinance. I concur in the judgment holding that ordinance unconstitutional, but not for the reasons given in the Court's opinion.

The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of a book's contents when he possessed it. And if the Constitution's requirement of knowledge is so easily met, the result of this case is that one particular bookseller gains his freedom, but the way is left open for state censorship and punishment of all other booksellers by merely adding a few new words to old censorship laws. Our constitutional safeguards for speech and press therefore gain little. Their victory, if any, is a Pyrrhic one.

Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean no law abridging.

It is true that this particular kind of censorship is considered by many to be "the obnoxious thing in its mildest and least repulsive form" But "illegitimate and unconstitutional practices get their first footing in that way It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 [1886]. While it is "obscenity and indecency" before us today, the experience of mankind -- both ancient and modern -- shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow. Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the Judiciary giving it a foothold here.

MR. JUSTICE FRANKFURTER concurred in a separate opinion.

MR. JUSTICE DOUGLAS concurred in a separate opinion.

MR. JUSTICE HARLAN concurred in part and dissented in part in an opinion.

HAMLING v. UNITED STATES, 418 U.S. 87 (1974)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

A grand jury indicted petitioners on 21 counts of the mails to carry an obscene book, The Illustrated Presidential Report of the Commission on Obscenity and Pornography, and an obscene advertisement, which gave information as to where, how, and from whom and by what means the Illustrated Report might be obtained, and of conspiracy to commit the above offenses. Following a jury trial, petitioners were convicted on 12 counts of mailing and conspiring to mail the obscene advertisement. The United States Court of Appeals affirmed. The jury was unable to reach a verdict with regard to the counts of the indictment which charged the mailing of the allegedly obscene Illustrated Report. The advertisement found obscene is a single sheet brochure mailed to approximately 55,000 persons in various parts of the United States; one side of the brochure contains a collage of photographs from the Illustrated Report; the other side gives certain information and an order blank from which the Illustrated Report could be ordered.

The Court of Appeals accurately described the photographs in the brochure as follows:

"The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilingus; a film strip of six frames depicting lesbian love scenes including a cunnilingus in action and female masturbation with

another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina."

The reverse side of the brochure contains a facsimile of the Illustrated Report's cover, and an order form for the Illustrated Report. It also contains the following language:

"THANKS A LOT, MR. PRESIDENT. A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail.

"The book is a MUST for the research shelves of every library, public or private, seriously concerned with full intellectual freedom and adult selection. Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.

"Even the President dismissed the facts, out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

The Court of Appeals indicated that the actual report of the Commission on Obscenity and Pornography is an official Government document printed by the United States Government Printing Office. The major difference between the Illustrated Report, charged to be obscene in the indictment, and the actual report is that the Illustrated Report contained illustrations, which the publishers of the Illustrated Report said were included "as examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects engaged in for the Commission as basis for their Report."

The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for

violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in Miller.

Petitioners contend that in order for them to be convicted for mailing obscene materials, the Government must prove that they knew the materials mailed were obscene. That statute provides in pertinent part that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . ." is guilty of the proscribed offense. Consistent with the statute, the District Court instructed the jury that in order to prove specific intent on the part of these petitioners, the Government had to demonstrate that petitioners "knew the envelopes and packages containing the subject materials were mailed or placed . . . in Interstate Commerce, and . . . that they had knowledge of the character of the materials." The District Court further instructed that the "[petitioners'] belief as to the obscenity or non-obscenity of the material is irrelevant."

In *Smith v. California*, this Court was faced with a challenge to the constitutionality of a Los Angeles ordinance which had been construed by the state courts as making the proprietor of a bookstore absolutely liable criminally for the mere possession in his store of a book later judicially determined to be obscene, even though he had no knowledge of the contents of the book. The Court held that the ordinance could not constitutionally eliminate altogether a scienter requirement, and that, in order to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book." The Court further noted that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a book-seller for carrying an obscene book in stock."

We think the "knowingly" language of [the statute], and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of

the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

"Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

In 1970 the President's Commission on Obscenity and Pornography issued its report. It was a 646 page report. One member filed a dissenting report of some 60 pages with at least as many pages of exhibits. The report contains many references to many facets of sex: e.g., petting, coitus, oral sexuality, masturbation, and homosexual activities.

What petitioners did was to supply the report with a glossary -- not in dictionary terms but visually. Every item in the glossary depicted explicit sexual material within the meaning of that term as used in the report. Perhaps we should have no reports on obscenity. But imbedded in the First Amendment is the philosophy that the people have the right to know. Sex is more important to some than to others but it is of some importance to all. If officials may constitutionally report on obscenity, I see nothing in the First Amendment that allows us to bar the use of a glossary factually to illustrate what the report discusses.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The 1958 amendments constituted the mailing of obscene matter a continuing offense. The practical effect of this amendment -- intentionally adopted by Congress for that

express purpose -- is to permit prosecution "in the Federal district in which [the disseminator] mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails." Under today's "local" standards construction, therefore, the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials. National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people.

Comments and Queries

Compare the language in Smith that "this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech" with Hamling's reliance on the 1930 decision in Wurzbach that "it is familiar to the criminal law to make him take the risk." QUERY: which the better view? QUERY further: is the Smith language still "good law"?

Note the majority's acknowledgment that "distributors ... may be subjected to varying community standards in the various federal districts into which they transmit the materials." QUERY: does this mean that televised, or videotaped, material may be subjected to the standards of every community in which the signal may be received or the cassette played? Could producers and/or performers be arrested and extradited for trial in any community whose prosecutorial authorities felt their standards had been offended? If so, QUERY: is it desirable that all material on cable or commercial television, or all "videotapes" be governed by the standards of the most "conservative" community in the nation? Would such a situation bring about pressures for the creation of a "national" standard?

Is it troubling, in Hamling, that the brochure offered for sale was "an illustrated version" of an official government document? QUERY: If, as the petitioners claimed, the pictures were "examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects," does that bring them within the ambit of "political speech"? If these were, in fact, facsimiles of pictures shown to subjects of a government research project, can they be held to lack "serious ... political or

scientific value"? Would members of the public have a First Amendment right to view the photographs to judge, for themselves, if the conclusions of the Report were justified?

Also QUERY: is it the "context," or manner, in which they were displayed that provided the basis for the obscenity determination? See Chief Justice Warren's dissent in Kingsley Books, Inc. v. Brown, above, at p. ,and Ginzberg v. United States, below, at pp.

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3. Deviations from the rule

a. Protection of minors

While the law has long recognized that parents have the right to "direct the upbringing and education of children under their control," Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), governments have always been solicitous of their protection. Thus the federal Fair Labor Standards Act regulates the age, hours and conditions under which they can be employed, see Darby v. United States, 312 U.S. 100 (1941), and all the states have laws against endangering the welfare of children or contributing to their delinquency. There are laws restricting the age at which young people can operate an automobile, purchase or consume tobacco products and alcoholic beverages. Similar considerations have led to laws prohibiting minors from participating in the production of -- and, frequently, from possessing -- pornographic materials.

NEW YORK v. FERBER, 458 U.S. 747 (1982)

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.

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. After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts 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.

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 well-being of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). 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 in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.

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. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value." 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.

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.

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.

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

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. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

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.

JUSTICE BLACKMUN concurred in the result.

JUSTICE O'CONNOR concur with a separate opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in *Ginsburg v. New York*, 390 U.S. 629 (1968), the State has a special interest in protecting the well-being of its youth. This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material.

But in my view application of [this] or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment.

JUSTICE STEVENS concurred in the judgment.

OSBORNE v. OHIO, 495 U.S. 103 (1990)

JUSTICE WHITE delivered the opinion of the Court.

In order to combat child pornography, Ohio enacted [a statute], which provides in pertinent part:

“(A) No person shall do any of the following:

“(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

“(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

“(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.”

Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio, police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicts a nude male adolescent posed in a sexually explicit position.

The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in *Stanley v. Georgia* compels the contrary result. In *Stanley*, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate.

Stanley should not be read too broadly. We have previously noted that *Stanley* was a narrow holding, and, since the decision in that case, the value of permitting child pornography has been characterized as "exceedingly modest, if not *De minimis*." *New York v. Ferber*, 458 U.S. 747, 762 (1982). But assuming, for the sake of argument, that Osborne has a First Amendment interests in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. The difference here is obvious: The State does not rely on a paternalistic interest

in regulating Osborne's mind. Rather, Ohio has enacted [this statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

Osborne contends that the State should use other measures, besides penalizing possession, to dry up the child pornography market. Osborne points out that in *Stanley* we rejected Georgia's argument that its prohibition on obscenity possession was a necessary incident to its proscription on obscenity distribution. This holding, however, must be viewed in light of the weak interests asserted by the State in that case. Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.

Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.

To conclude, although we find Osborne's First Amendment arguments unpersuasive, we reverse his conviction and remand for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements of [the offenses].

JUSTICE BLACKMUN concurred.

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

I agree with the Court that appellant's conviction must be reversed. I do not agree, however, that Ohio is free on remand to retry him. In my view, the state law, even as construed authoritatively by the Ohio Supreme Court, is still fatally overbroad, and our decision in *Stanley v. Georgia*, prevents the State from criminalizing appellant's possession of the photographs at issue in this case.

As written, the Ohio statute is plainly overbroad. [It] use simple nudity, without more, as a way of defining child pornography. But as our prior decisions have made clear, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." Wary of the statute's use of the "nudity" standard, the Ohio Supreme Court construed [the statute] to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." The "lewd exhibition" and "graphic focus" tests not only fail to cure the overbreadth of the statute, but they also create a new problem of vagueness.

Even if the statute was not overbroad, our decision in *Stanley v. Georgia*, forbids the criminalization of appellant's private possession in his home of the materials at issue. Appellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. Appellant testified that he had been given the pictures in his home by a friend. There was no evidence that the photographs had been produced commercially or distributed. All were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.

In these circumstances, the Court's focus on *Ferber* rather than *Stanley* is misplaced. *Ferber* held only that child pornography is "a category of material the production and distribution of which is not entitled to First Amendment protection"; our decision did not

extend to private possession. Ferber did nothing more than place child pornography on the same level of First Amendment protection as obscene adult pornography, meaning that its production and distribution could be proscribed. The distinction established in Stanley between what materials may be regulated and how they may be regulated still stands.

The Court today finds Stanley inapposite on the ground that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley." The majority's analysis does not withstand scrutiny. While the sexual exploitation of children is undoubtedly a serious problem, Ohio may employ other weapons to combat it. Indeed, the State already has enacted a panoply of laws prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. Ohio has not demonstrated why these laws are inadequate and why the State must forbid mere possession as well.

Comments and Queries

Note the extensive exceptions contained in subsection (a) of the Ohio statute at issue in Osborne. QUERY: are these sufficient to allay the fears expressed by Justices Brennan and Marshall, in Ferber, that "application" of the prohibition on possession "to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment"? What "depictions" of "value" might not be covered by the exceptions?

What problems might arise from the exception in subsection (b) for a "person [who] knows that the parents, guardian or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred"? What if the parent(s) were paid for giving consent? Could that be successfully prosecuted under the "endangering" or "contributing to the delinquency" statutes? What if the parent(s) were not compensated, but the minor(s) were by, for example, the creation of a "trust fund" for their benefit?

Eradicating child pornography was difficult enough at the time when Ferber and Osborne were decided. The widespread use of computers and the advent of digitalizing technology made that effort far more difficult.

ASHCROFT v. THE FREE SPEECH COALITION, ____ U.S. ____ (2002)

Justice Kennedy delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA) abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, 458 U. S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). *Ferber* recognized that "[t]he *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."

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would

not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. Like the law in *Ferber*, the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.

I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. The CPPA retains that prohibition and adds three other prohibited categories of speech, of which the first and the third are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse."

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children

`having fun' participating in such activity." Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

II

The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. While even minor punishments can chill protected speech, this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea -- that of teenagers engaging in sexual activity -- that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes -- teenage sexual activity and the sexual abuse of children -- have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See *Romeo and Juliet*, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping

it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation."

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network.

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal

penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable

substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted" *Broadrick v. Oklahoma*. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

IV

[The statute] bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." Under [it], the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

The Court has recognized that pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. See *Ginzburg v. United States*, 483 U.S. 463, 474 (1966) ("[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test"). Where a defendant engages in the "commercial exploitation of erotica solely for the sake of their prurient appeal," the context he or she creates may itself be relevant to the evaluation of the materials.

Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside Ginzburg's rationale. Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." As a consequence, the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, §2256(8)(D) is substantially overbroad and in violation of the First Amendment.

Justice Thomas, concurred in the judgment.

Chief Justice Rehnquist, with whom Justice Scalia joined in part, dissented.

Justice O'Connor, with whom The Chief Justice and Justice Scalia join as to Part II, concurring in the judgment in part and dissenting in part.

This litigation involves a facial challenge to the CPPA's prohibitions of pornographic images that "appea[r] to be ... of a minor" and of material that "conveys the impression" that it contains pornographic images of minors. While I agree with the Court's judgment that the First Amendment requires that the latter prohibition be struck down, I disagree with its decision to strike down the former prohibition in its entirety.

I

[Because] no children are harmed in the process of creating such pornography, Ferber does not support the Government's ban on youthful-adult and virtual-child pornography. The Government argues that, even if the production of such pornography does not directly harm children, this material aids and abets child abuse. The Court correctly concludes that the causal connection between pornographic images that "appear" to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech.

I also agree with the Court's decision to strike down the CPPA's ban on material presented in a manner that "conveys the impression" that it contains pornographic depictions of actual children ("actual-child pornography".)

II

I disagree with the Court, however, that the CPPA's prohibition of virtual-child pornography is overbroad. Before I reach that issue, there are two preliminary questions: whether the ban on virtual-child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. This interest is promoted by efforts directed against sexual offenders and actual-child pornography. These efforts, in turn, are supported by the CPPA's ban on virtual-child pornography. Such images whet the appetites of child molesters. Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated. Respondents may be correct that no defendant has successfully employed this tactic. But, given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable.

Respondents argue that, even if the Government has a compelling interest to justify banning virtual-child pornography, the "appears to be ... of a minor" language is not narrowly tailored to serve that interest. They assert that the CPPA would capture even cartoon-sketches or statues of children that were sexually suggestive. Such images surely could not be used, for instance, to seduce children. I agree. A better interpretation of "appears to be ... of" is "virtually indistinguishable from"-- an interpretation that would not cover the examples respondents provide. Not only does the text of the statute comfortably bear this narrowing interpretation, the interpretation comports with the language that Congress repeatedly used in its findings of fact. Finally, to the extent that the phrase "appears to be ... of" is ambiguous, the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring. See *Crowell v. Benson*, 285 U. S. 22, 62 (1932).

Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the "appears to be ... of a minor" language is vague. Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer-generated and contain images that "appea[r] to be ... of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

In sum, I would strike down the CPPA's ban on material that "conveys the impression" that it contains actual-child pornography, but uphold the ban on pornographic depictions that "appea[r] to be" of minors so long as it is not applied to youthful-adult pornography.

Comments and Queries

A prohibition of "real" minors appearing in pornographic films can be enforced by requiring the producers to maintain records of the birth dates of the actors involved. What if any standard can be utilized in determining the age of "virtual" actors? If there is none, QUERY: why isn't the "appears to be" provision intolerably vague on its face? QUERY further: does Justice O'Connor's suggestion that the language be reinterpreted to read "virtually indistinguishable from real children" really resolve the difficulty? The trier of fact can easily discern the image of a "young" child, but how would they be able

to discern between the image a seventeen and eighteen year old? Would Justice O'Connor's qualification that she would uphold the ban "so long as it is not applied to youthful-adult pornography," introduce further vagueness into the statute?

Also QUERY: how, if at all, would O'Connor's "narrowing interpretation," resolve the "redeeming social value" concern raised in Justice Kennedy's reference to Shakespeare's Romeo and Juliet?

Compare Justice Cardozo's statement in Palko v. Connecticut, above, "[o]f that freedom [of speech and thought] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom" with Justice Kennedy's statement here that [t]he right to think is the beginning of freedom ... [and] ... speech is the beginning of thought." QUERY: is there any cognitive basis for the latter statement, or can it best be described as a memorable but inapt expression?

Lastly, can it be argued that the protection of children is such a compelling government interest that it simply outweighs any "incidental" restriction on the otherwise protected speech rights of adults?

b. Adverse impact upon women

AMERICAN BOOKSELLERS ASSOCIATION V. HUDNUT, 771 F.2d 323 (7th Cir., 1985)

Before Cudahy and Easterbrook, Circuit Judges, and Swygert, Senior Circuit Judge.

Easterbrook, Circuit Judge.

Indianapolis enacted an ordinance defining “pornography” as a practice that discriminates against women. “Pornography is to be redressed through the administrative and judicial methods used for other discrimination. The City’s definition of “pornography” is considerably different from “obscenity,” which the Supreme Court has held is not protected by the First Amendment.

To be “obscene” under *Miller v. California*, 413 U.S. 15 (1973), “a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value.” *Brockett v. Spokane Arcades, Inc.*, ___ U.S. ___ (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than “normal, healthy sexual desires” ... are essential elements of “obscenity.”

“Pornography” under the ordinance is “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

“(1) Women are presented as sexual objects who enjoy pain or humiliation; or

“(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

“(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

“(4) Women are presented as being penetrated by objects or animals; or

“(5) Women are presented in scenarios of degradation, injury, abasement, torture, show as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

“(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women other than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, “if a woman is subjected, why should it matter that the work has other value?” Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv.Civ.Rts. – Civ.Lib.L.Rev. 1, 21 (1985).

Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce’s *Ulysses* to Homer’s *Iliad*; both depict women as submissive objects for conquest and domination.

I

The ordinance contains four prohibitions. People may not “traffic” in pornography, “coerce” others into performing in pornographic works, or “force” pornography on

anyone. Anyone injured by someone who has seen or read pornography has a right of action against the maker or seller.

A woman aggrieved by trafficking in pornography may file a complaint “as a woman acting against the subordination of women” with the office of equal opportunity. A man, child, or transsexual may also protest trafficking “but must prove injury in the same way that a woman is injured”

II

The plaintiffs are a congeries of distributors and readers of books, magazines, and films. Collectively the plaintiffs (or their members, whose interests they represent) make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats’s poem “Leda and the Swan” (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland.

III

“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.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious – the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. *Brandenberg v. Ohio*, 395 U.S. 444 (1969). Communists may speak freely and run for office, *DeJonge v. Oregon*, 299 U.S. 353

(1937). The Nazi Party may march through a city with a large Jewish population. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. Denied, 439 U.S. 916 (1978)...People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because “above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas...” *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, of how they may react to sexual encounters, and how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts.

Men who see women depicted as subordinate are more likely to treat them so.

Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury. There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language in the legislature, “(p)ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].”

Racial bigotry, anti-semitism, violence on television, reporters’ biases – these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular cultures. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

Much of Indianapolis’s argument rests on the belief that when speech is “unanswerable,” and the metaphor that there is a “marketplace of ideas” does not apply, the First Amendment does not apply either. The metaphor is honored; Milton’s *Aeropagitica* and John Stewart Mill’s *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of speech a necessary condition of freedom of

speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): “We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity.” If the government may declare truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.*; 418 U.S. 323, 339 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

We come, finally, to the argument that pornography is “low value” speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers’ concerns may be subjected to special regulation. E.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67-70 (1976) (plurality opinion); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). These cases do not sustain statutes that select among viewpoints, however. In *Pacifica* the FCC sought to keep vile language off the air during certain times. The Court held that it may; but the Court would not have sustained a regulation prohibiting acatological descriptions of Republicans but not acatological descriptions of Democrats, or any other form of selection among viewpoints . . .

At all events, “pornography” is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance

applies to graphic sexually explicit subordination in works great and small.* The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. Indianapolis has created an approved point of view and so loses the support of these cases.

IV

The definition of “pornography” is unconstitutional. No construction or excision of particular terms could save it.

Section 8 of the ordinance is a strong severability clause, and Indianapolis asks that we parse the ordinance to save what we can. An attempt to repair this ordinance would be nothing but a blind guess. No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion. Its judgment is therefore

Affirmed.

*Indianapolis argued briefly that *Beauharnais v. Illinois*, 343 U.S. 72 (1952), which allowed a state to penalize “group libel,” supports the ordinance. In *Collin v. Smith*, 578 F.2d at 1205, we concluded that cases such as *New York Times v. Sullivan* had so washed away the foundations of *Beauharnais* that it could not be considered authoritative. If we are wrong in this, however, the case still does not support the ordinance. It is not clear that depicting women as subordinate in sexually explicit ways, even combined with a depiction of pleasure in rape, would fit within the definition of group libel. The well received film *Swept Away* used explicit sex, plus taking pleasure in rape, to make a political statement, not to defame. Work must be an insult or a slur for its own sake to come within the ambit of *Beauharnais*, and a work need not be scurrilous at all to be “pornography” under the ordinance.

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Comments and Queries

The decision was summarily affirmed by the U.S. Supreme Court without argument or opinion. Burger, C.J., and Rhenquist and O'Connor, JJ, dissented, believing that the case should be set for argument. 475 U.S. 1001 (1986).

It is important to note that the Indianapolis ordinance did not create criminal penalties for "trafficking in pornography." Rather, it created a civil right of action by "a woman aggrieved" or by a "man, child, or transsexual," who can "prove injury in the same way that a woman is injured." A successful plaintiff would be entitled to recover damages as determined by a jury, presumably unlimited in amount. The effect might be to bankrupt the "trafficker" and thus, perhaps, prevent the "trafficking" from continuing. QUERY: if the same ordinance had been enacted with criminal penalties, could it have been upheld? If not, should the city be allowed to accomplish through private litigation what it could not accomplish through a criminal statute? Before responding, consider Beauharnais v. Illinois, below, and the difference between "criminal" and "civil" proceedings for defamation.

Consider, also, the extraordinary footnote in which the Court, citing a precedent of its own, concludes that an unreversed decision of the United States Supreme Court, Beauharnais, "could not be considered authoritative." QUERY: is it appropriate for an inferior Court to come to such a conclusion? And QUERY further: what, if any, significance can be read into the fact that the Supreme Court summarily affirmed the decision?

Also QUERY: what, if any, vagueness problems would be introduced by the adoption of the proposed definition of "pornography."

4. Specific federal statutes

a. The use of the mails

Until 1971, the Post Office was a cabinet-level department of the United States government, and a legal monopoly. It was a statutory offense to "compete with the mails." It is now an independent, public corporation (United States Postal Service), and private sector competition is both legal and flourishing, e.g., Federal Express and United Postal Service (UPS). It is, however, still subject to some oversight by Congress and is regulated by federal statutes in a number of ways. These include the civil service status of its employees, see United States Civil Service Commission v. National Association of Letter Carriers, below, at pp. , and limitations on "mailable" matter.

GINZBURG v. UNITED STATES, 383 U.S. 463 (1966)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A judge sitting without a jury in the District Court for the Eastern District of Pennsylvania convicted petitioner Ginzburg and three corporations controlled by him upon all 28 counts of an indictment charging violation of the federal obscenity statute.* Each count alleged that a resident of the Eastern District received mailed matter, either one of three publications challenged as obscene, or advertising telling how and where the publications might be obtained. The Court of Appeals affirmed.

In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York* [383 U.S. 502, 504 (1966)], and as did the courts below, we view the publications against a

background of commercial exploitation of erotica solely for the sake of their prurient appeal. The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.

The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter; and The Housewife's Handbook on Selective Promiscuity, a short book.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering -- "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." EROS early sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal; the facilities of the post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and Liaison thereafter mailed several million circulars soliciting subscriptions from that post office; over 5,500 copies of the Handbook were mailed.

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters.

This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public

confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality -- whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.

Affirmed.

MR. JUSTICE BLACK dissented with an opinion.

MR. JUSTICE DOUGLAS dissented with an opinion.

MR. JUSTICE HARLAN dissented with an opinion.

MR. JUSTICE STEWART, dissenting.

Ralph Ginzburg has been sentenced to five years in prison for sending through the mail copies of a magazine, a pamphlet, and a book. There was testimony at his trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's.

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy

hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.

There does exist a distinct and easily identifiable class of material which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. *Jacobellis v. Ohio*, 378 U.S. 184, at 197. Although arguments can be made to the contrary, I accept the proposition that the general dissemination of matter of this description may be suppressed under valid laws. That has long been the almost universal judgment of our society. But material of this sort is wholly different from the publications mailed by Ginzburg in the present case, and different not in degree but in kind. In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have reference.**

The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment. But, the Court says, Ginzburg can still be sentenced to five years in prison for mailing them. Why? Because, says the Court, he was guilty of "commercial exploitation," of "pandering," and of "titillation." But Ginzburg was not charged with "commercial exploitation"; he was not charged with "pandering"; he was not charged with "titillation." Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny him due process of law. *Cole v. Arkansas*, 333 U.S. 196. But those grounds are not, of course, otherwise valid. Neither the statute under which Ginzburg was convicted nor any other federal statute I know of makes "commercial exploitation" or "pandering" or "titillation" a criminal offense. And any criminal law that sought to do so in the terms so elusively defined by the Court would, of course, be unconstitutionally vague and therefore void. All of these matters are developed in the dissenting opinions of my Brethren, and I simply note here that I fully agree with them.

For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam's Sons. In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother.

*The federal obscenity statute, 18 U.S.C. 1461, provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters may be obtained" is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense"

** ".... Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment"

Comments and Queries

The Court "assume[s] without deciding" that, given the nature of the materials, the prosecution "could not have succeeded" in obtaining a conviction without evidence of the surrounding circumstances. QUERY: could the attending circumstances have

supported a conviction without the materials? If not, QUERY: is the Court saying that the whole can be greater than the sum of its parts?

Or QUERY: is the majority opinion a logical extension of Chief Justice Warren's dissent in Kingsley Books, Inc. v. Brown: "It is the conduct of the individual that should be judged, not the quality of art or literature," above, at p. ? If so, QUERY further: to what extent is the "vagueness" problem increased by a rule providing that "nonobscene" materials can be rendered "obscene" by the context in which they are presented?

Also QUERY: is there some irony in the fact that Justice Brennan, here the author of the most criticized obscenity decision in the history of the Court, was later the author of the classic dissent to the constitutionality of all obscenity statutes, Paris Adult Theatre I v. Slaton, above, at pp. ?

In reading Justice Stewart's footnote, recall his "I know it when I see it" comment in Jacobellis v. Ohio, see above, at p. . QUERY: is there a "vagueness" in this description that may have influenced his decision to Justice Stewart was to join the dissent in Paris Adult Theatre I v. Slaton, above, at pp. .)

SMITH v. UNITED STATES, 431 U.S. 291 (1977)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Between February and October 1974 petitioner, Jerry Lee Smith, knowingly caused to be mailed various materials from Des Moines, Iowa, to post office box addresses in Mount Ayr and Guthrie Center, two communities in southern Iowa. This was done at the written request of postal inspectors using fictitious names. The materials so mailed were delivered through the United States postal system to the respective postmasters serving the addresses. The mailings consisted of (1) issues of "Intrigue" magazine, depicting nude males and females engaged in masturbation, fellatio, cunnilingus, and sexual intercourse; (2) a film entitled "Lovelace," depicting a nude male and a nude female engaged in masturbation and simulated acts of fellatio, cunnilingus, and sexual intercourse; and (3) a

film entitled "Terrorized Virgin," depicting two nude males and a nude female engaged in fellatio, cunnilingus, and sexual intercourse.

What petitioner did clearly was not a violation of state law at the time he did it. It is to be observed, also, that there is no suggestion that petitioner's mailings went to any nonconsenting adult or that they were interstate.

Petitioner was indicted on seven counts of violating 18 U.S.C. 1461, which prohibits the mailing of obscene materials. At the close of the Government's case, and again at the close of all the evidence, petitioner moved for a directed verdict of acquittal on the grounds that the Iowa obscenity statute, proscribing only the dissemination of obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials at issue offended that standard.

The District Court denied those motions and submitted the case to the jury. The court instructed the jury that contemporary community standards were set by what is in fact accepted in the community as a whole. In making that determination, the jurors were entitled to draw on their own knowledge of the views of the average person in the community as well as the evidence presented as to the state law on obscenity and as to materials available for purchase. The jury found petitioner guilty on all seven counts. He was sentenced to concurrent three-year terms of imprisonment, all but three months of which were suspended, and three years' probation.

The fact that the mailings in this case were wholly intrastate is immaterial. That statute was one enacted under Congress' postal power, granted in Art. I, 8, cl. 7, of the Constitution, and the Postal Power Clause does not distinguish between interstate and intrastate matters. This Court consistently has upheld Congress' exercise of that power to exclude from the mails materials that are judged to be obscene.

In this case, petitioner argues that the Court has recognized the right of States to adopt a laissez-faire attitude toward regulation of pornography, and that a holding that 1461 permits a federal prosecution will render the States' right meaningless. Just as the individual's right to possess obscene material in the privacy of his home, however, did

not create a correlative right to receive, transport, or distribute the material, the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State.

Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves. We hold only that the Iowa statute is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness.

The judgment of the Court of Appeals is Affirmed.

MR. JUSTICE POWELL concurred with a separate opinion.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL joined, dissented with an opinion.

MR. JUSTICE STEVENS, dissenting.

Petitioner has been sentenced to prison for violating a federal statute enacted in 1873. In response to a request, he mailed certain pictures and writings from one place in Iowa to another. The transaction itself offended no one and violated no Iowa law. Nevertheless, because the materials proved "offensive" to third parties who were not intended to see them, a federal crime was committed.

In this case the petitioner's communications were intended to offend no one. He could hardly anticipate that they would offend the person who requested them. And delivery in sealed envelopes prevented any offense to unwilling third parties. Since his acts did not even constitute a nuisance, it necessarily follows, in my opinion, that they cannot provide the basis for a criminal prosecution.

Comments and Queries

The majority does not dispute Justice Stevens contention that "the petitioner's communications were intended to offend no one," and it appears he took precautions against doing so. The Court has, of course, held obscenity to be outside of the protection of the First Amendment. But, QUERY: in these circumstances, what is the reason for excluding it? Might some analogy be drawn to the "home privacy" case, Stanley v. Georgia?

Note that the statute applies only to the United States mails and, as noted above, several competing private carriers have developed over the past several years. QUERY, therefore: will a combination of Supreme Court decisions, videotape technology and private postal services ultimately render much obscenity law "moot" because potential customers will be able to obtain shipment through private carriers and "enjoy" the material in the privacy of their home?

b. Racketeer Influenced and Corrupt Organizations Act

The federal Racketeer Influenced and Corrupt Organizations Act (RICO) was passed, in 1970, to reduce the assets available to "organized crime," in general, and "drug trafficking" in particular. It authorized the seizure and "forfeiture" of any assets which had been realized from a "pattern of criminal activity." Previously, the only assets subject to forfeiture were those found to be the "product" of a crime which had resulted in a conviction. Prosecutors frequently complained that this allowed ongoing "corrupt organizations" to continue in business, using funds and property obtained from other, unconvicted, criminal activity. The triggering mechanism for a RICO forfeiture was conviction of a "predicate offense," such as a narcotics sale.

The 1984 amendments to the Act added the sale of obscene materials to the category of "predicate offenses." While several states have since replicated the federal statute, relatively few prosecutions have been brought under the obscenity provisions of any of the laws..

ALEXANDER v. UNITED STATES, 509 U.S. 544 (1993)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was in the so-called "adult entertainment" business for more than 30 years, selling pornographic magazines and sexual paraphernalia, showing sexually explicit movies, and eventually selling and renting videotapes of a similar nature. He received shipments of these materials at a warehouse in Minneapolis, Minnesota, where they were wrapped in plastic, priced, and boxed. He then sold his products through some 13 retail stores in several different Minnesota cities, generating millions of dollars in annual revenues. In 1989, federal authorities filed a 41-count indictment against petitioner and others, alleging, inter alia, operation of a racketeering enterprise in violation of RICO. The indictment charged 34 obscenity counts and 3 RICO counts, the racketeering counts being predicated on the obscenity charges.

Following a jury trial in the District Court, petitioner was convicted of 17 substantive obscenity offenses: 12 counts of transporting obscene material in interstate commerce for

the purpose of sale or distribution, and 5 counts of engaging in the business of selling obscene material. He also was convicted of 3 RICO offenses that were predicated on the obscenity convictions. As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene. Multiple copies of these magazines and videos, which graphically depicted a variety of "hard core" sexual acts, were distributed throughout petitioner's adult entertainment empire.

Petitioner was sentenced to a total of six years in prison, fined \$100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release. In addition to these punishments, the District Court reconvened the same jury and conducted a forfeiture proceeding. The jury found that petitioner had an interest in 10 pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct his racketeering enterprise. Sitting without the jury, the District Court then found that petitioner had acquired a variety of assets as a result of his racketeering activities. The court ultimately ordered petitioner to forfeit his wholesale and retail businesses, including all the assets of those businesses, and almost \$9 million in moneys acquired through racketeering activity. The Court of Appeals affirmed the District Court's forfeiture order.

Petitioner first contends that the forfeiture in this case, which effectively shut down his adult entertainment business, constituted an unconstitutional prior restraint on speech, rather than a permissible criminal punishment. According to petitioner, forfeiture of expressive materials and the assets of businesses engaged in expressive activity, when predicated solely upon previous obscenity violations, operates as a prior restraint because it prohibits future presumptively protected expression in retaliation for prior unprotected speech. Practically speaking, petitioner argues, the effect of the RICO forfeiture order here was no different from the injunction prohibiting the publication of expressive material found to be a prior restraint in *Near v. Minnesota*. As petitioner puts it, the forfeiture order imposed a complete ban on his future expression because of previous unprotected speech. We disagree. By lumping the forfeiture imposed in this case after a full criminal trial with an injunction enjoining future speech, petitioner stretches the term "prior restraint" well beyond the limits established by our cases. To accept petitioner's

argument would virtually obliterate the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments.

The RICO forfeiture order in this case does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities. It only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores, restock his inventory, and hire staff, petitioner can go back into the adult entertainment business tomorrow, and sell as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order. The assets in question were ordered forfeited not because they were believed to be obscene, but because they were directly related to petitioner's past racketeering violations. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO. Indeed, a contrary scheme would be disastrous from a policy standpoint, enabling racketeers to evade forfeiture by investing the proceeds of their crimes in businesses engaging in expressive activity.

Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech. No doubt the monetarily large forfeiture in this case may induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves out of fear that those materials could be found obscene, and thus subject them to forfeiture.

Fort Wayne Books [Inc. v. Indiana, 489 U.S. 46 (1989)] is dispositive of any chilling argument here, since the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine. Each racketeering charge exposes a defendant to a maximum penalty of 20 years' imprisonment and a fine of up to

\$250,000. Needless to say, the prospect of such a lengthy prison sentence would have a far more powerful deterrent effect on protected speech than the prospect of any sort of forfeiture.

We also have rejected a First Amendment challenge to a court order closing down an entire business that was engaged in expressive activity as punishment for criminal conduct. See *Arcara [v. Cloud Books, Inc]*, 478 U.S., at 707 [1986]. ("Forfeiture of a media business purchased by a drug cartel would be constitutionally permissible").

Petitioner's position boils down to this: Stiff criminal penalties for obscenity offenses are consistent with the First Amendment; so is the forfeiture of expressive materials as punishment for criminal conduct; but the combination of the two somehow results in a violation of the First Amendment. We reject this counterintuitive conclusion, which in effect would say that the whole is greater than the sum of the parts.

Petitioner also argues that the forfeiture order in this case -- considered atop his 6-year prison term and \$100,000 fine -- is disproportionate to the gravity of his offenses, and therefore violates the Eighth Amendment, either as an "excessive" penalty for the Government to exact "[o]n the basis of a few materials the jury ultimately decided were obscene." It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question whether the forfeiture was "excessive" must be considered. We think it preferable that this question be addressed by the Court of Appeals in the first instance.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, and with whom JUSTICE SOUTER joins as to Part II, dissenting.

I

The fundamental defect in the majority's reasoning is a failure to recognize that the forfeiture here cannot be equated with traditional punishments such as fines and jail terms.

The federal RICO statute was passed to eradicate the infiltration of legitimate business by organized crime. Earlier steps to combat organized crime were not successful, in large part because traditional penalties targeted individuals engaged in racketeering activity rather than the criminal enterprise itself. Punishing racketeers with fines and jail terms failed to break the cycle of racketeering activity because the criminal enterprises had the resources to replace convicted racketeers with new recruits.

As enacted in 1970, RICO targeted offenses then thought endemic to organized crime. When RICO was amended in 1984 to include obscenity as a predicate offense, there was no comment or debate in Congress on the First Amendment implications of the change. The consequence of adding a speech offense to a statutory scheme designed to curtail a different kind of criminal conduct went far beyond the imposition of severe penalties for obscenity offenses. The result was to render vulnerable to Government destruction any business daring to deal in sexually explicit materials.

Relying on the distinction between prior restraints and subsequent punishments, the majority labels the forfeiture imposed here a punishment, and dismisses any further debate over the constitutionality of the forfeiture penalty under the First Amendment. Our cases do recognize a distinction between prior restraints and subsequent punishments, but that distinction is neither so rigid nor so precise that it can bear the weight the Court places upon it to sustain the destruction of a speech business and its inventory as a punishment for past expression.

It has been suggested that the distinction between prior restraints and subsequent punishments may have slight utility, for in a certain sense, every criminal obscenity statute is a prior restraint because of the caution a speaker or bookseller must exercise to avoid its imposition. A historical example is the sentence imposed on Hugh Singleton in 1579 after he had enraged Elizabeth I by printing a certain tract. See F. Siebert, *Freedom of the Press in England, 1476-1776*, pp. 91-92 (1952). Singleton was condemned to lose his right hand, thus visiting upon him both a punishment and a disability encumbering all further printing. Though the sentence appears not to have been carried out, it illustrates that a prior restraint and a subsequent punishment may occur together. Despite the concurrent operation of the two kinds of prohibitions in some cases, the distinction between them persists in our law, and it is instructive here to inquire why this is so.

Early in our legal tradition, the source of the distinction was the English common law, in particular the oft-cited passage from William Blackstone's 18th-century *Commentaries on the Laws of England*. He observed as follows:

"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 W. Blackstone, *Commentaries* 151-152.

Even as Blackstone wrote, however, subsequent punishments were replacing the earlier censorship schemes as the mechanism for government control over disfavored speech in England. Whether Blackstone's apparent tolerance of subsequent punishments resulted from his acceptance of the English law as it then existed or his failure to grasp the potential threat these measures posed to liberty, or both, subsequent punishment in the broad sweep that he commented upon would be in flagrant violation of the principles of free speech and press that we have come to know and understand as being fundamental to our First Amendment freedoms. Indeed, in the beginning of our Republic, James Madison argued against the adoption of Blackstone's definition of free speech under the First Amendment. Said Madison: "This idea of the freedom of the press can never be

admitted to be the American idea of it," because a law inflicting penalties would have the same effect as a law authorizing a prior restraint. 6 Writings of James Madison 386 (G. Hunt ed. 1906).

As our First Amendment law has developed, we have not confined the application of the prior restraint doctrine to its simpler forms, outright licensing or censorship before speech takes place. It is a flat misreading of our precedents to declare, as the majority does, that the definition of a prior restraint includes only those measures which impose a "legal impediment," on a speaker's ability to engage in future expressive activity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), best illustrates the point. There a state commission did nothing more than warn book-sellers that certain titles could be obscene, implying that criminal prosecutions could follow if their warnings were not heeded. The commission had no formal enforcement powers, and failure to heed its warnings was not a criminal offense. Although the commission could impose no legal impediment on a speaker's ability to engage in future expressive activity, we held that scheme was an impermissible "system of prior administrative restraints."

The operation and effect of RICO's forfeiture remedies is different from a heavy fine or a severe jail sentence, because RICO's forfeiture provisions are different in purpose and kind from ordinary criminal sanctions. The Government's stated purpose under RICO, to destroy or incapacitate the offending enterprise, bears a striking resemblance to the motivation for the state nuisance statute the Court struck down as an impermissible prior restraint in *Near*. The purpose of the state statute in *Near* was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." The particular nature of Ferris Alexander's activities ought not blind the Court to what is at stake here. Under the principle the Court adopts, any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction.

In a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state, public confidence in the institutions devoted to the dissemination of written matter and films is essential. That confidence erodes if it is perceived that speakers and the press are vulnerable for all of their expression based on

some errant expression in the past. Independence of speech and press can be just as compromised by the threat of official intervention as by the fact of it. Though perhaps not in the form of a classic prior restraint, the application of the forfeiture statute here bears its censorial cast.

II

Quite apart from the direct bearing that our prior restraint cases have on the entire forfeiture that was ordered in this case, the destruction of books and films that were not obscene and not adjudged to be so is a remedy with no parallel in our cases. In my view, the forfeiture of expressive material here that had not been adjudged to be obscene, or otherwise without the protection of the First Amendment, was unconstitutional.

Comments and Queries

In Fort Wayne Books, cited by the majority, the state courts had authorized seizure of the bookstore and its entire inventory prior to trial. The Supreme Court upheld the state RICO law, but reversed the seizure, holding that obscenity must first be determined in an "adversary hearing." QUERY: is there an appreciable difference between the seizure of nonobscene material prior to a hearing, and the seizure of nonobscene material after the trial?

One of the reasons given by Justice Stevens in his first obscenity dissent, Marks v. United States, 430 U.S. 188, 198 (1977), was: "However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of our society; otherwise, they would have no value in the marketplace." QUERY: does the fact that Alexander's 13 retail stores were "generating millions of dollars in annual revenues" undercut the necessary jury determination that "'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," and/or that, taken as a whole, they lack "serious literary, artistic, political or scientific value?" See Miller v. California, above.

III. Incitements to violence

A. "Fighting words" and "Invitation to Dispute"

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CHAPLINSKY v. STATE OF NEW HAMPSHIRE, 315 U.S. 568 (1942)

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, Section 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 "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."

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

repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

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

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. City of Griffin*, 303 U.S. 444, 450.

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 has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

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 person 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. ... Such words, as ordinary men know, are

likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. ... The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker -- including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.

Affirmed.

Comments and Queries

Note the Court's dictum that not only insulting or "fighting" words, but "the lewd and obscene, the profane [and] the libelous" are beyond the protection of the First Amendment. Obscenity remains unprotected, see Roth v. United States, 354 U.S. 476 (1957), above at pp. . The term "lewd" has never been defined or applied except, possibly, by the "pandering decision," Ginzberg v. United States, 383 U.S. 463 (1966), see above at pp. . It seems fair to conclude that it has been subsumed in the prevailing definition of obscenity established by Miller v. California, 413 U.S. 15, (1973), above at pp. . Nor has the "profane" been judicially defined; according to Black's Law Dictionary, 1375 (5th ed., 1979) it is that which is "[i]reverent toward God or holy things." Burstyn v. Wilson, 343 U.S. 195 (1952) struck down, as violative of the "establishment" clause, a New York statute which forbade exhibition of any film "treat[ing] any religion with contempt, mockery or ridicule." Beginning with New York Times v. Sullivan, 403 U.S. 713 (1971), see below pp. , a number of decisions have provided some constitutional protection for "libelous" speech. QUERY then: are "obscenity" and "fighting words" the only survivors of Chaplinsky's famous dictum?

In Gooding v. Wilson, 405 U.S. 518 (1972), the appellee was a participant in an "anti-Vietnam" protest outside the U.S. Army's 12th Corps Headquarters. He and others refused orders from the local police to cease blocking a door to the facility and were arrested during the scuffle which followed. During the course of that arrest, he "use[d] to and of" the arresting officers and in their "presence" these words: "White son of a bitch, I'll kill you." "You son of a bitch I'll choke you to death." "You son of a bitch, if you

ever put your hands on me again, I'll cut you to pieces." He was convicted of violating a Georgia statute which provided that "[a]ny person who shall, without provocation or excuse, use to or of another, and in his presence... opprobrious words or abusive language, tending to cause a breach of the peace .. shall be guilty of a misdemeanor." The Supreme Court reversed, holding the statute facially overbroad since its construction by the state's highest court had not "limited [its] application, as Chaplinsky, to words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.' ... Our decisions since Chaplinsky have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression We reaffirm that proposition today." QUERY: how could the Georgia Supreme Court have "narrowed" the statute to insure its constitutionality? Assuming they had done so, should the conviction have been affirmed?

Note the New Hampshire Supreme Court's language, quoted in Chaplinsky, that "[t]he 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." QUERY: is this consistent with the Gooding interpretation that the New Hampshire Court had limited the Chaplinsky statute to words "hav[ing] a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." QUERY further: if the test is the likelihood of a violent response by an individual "to whom the remark is addressed," is there the anomalous result that "fighting words" directed to Mother Teresa are protected by the First Amendment but the same words directed to the town bully are not? Or, if the test is the likelihood of a violent response by an "average" person, would "fighting words" addressed to a particularly volatile individual be protected? Would the result be the same if a violent response actually occurred? Would it matter if the speaker knew of the addressee's volatile temperament? Reasonably should have known?

In his Gooding dissent, Justice Blackmun complained that "by decisions such as this one and, indeed Cohen v. California...the Court, despite its protestations to the contrary, is merely playing lip service to Chaplinsky." QUERY: is Blackmun's view correct?

Pending when Gooding was decided was Lewis v. City of New Orleans, 408 U.S. 913 (1972) ("Lewis I"), which challenged the conviction of a woman who had addressed officers arresting her son as "God damned m____f_____ police." The relevant statute prohibited any person to "curse or revile or use obscene or opprobrious language toward ... any member of the city police." The Court remanded for further consideration in light of Gooding. When the Louisiana Supreme Court once again upheld the conviction, the Supreme Court reversed, condemning these statutes as facially overbroad. 415 U.S. 130 (1974) (Lewis II). Also reversed and remanded for consideration in light of Gooding and Cohen was Rosenfeld v. New Jersey, 408 U.S. 901 (1972), in which, according to the dissent, appellant had addressed a public school board meeting, "using the adjective '____f_____' on four different occasions to describe the teachers, the school board, the

town and his own country.” QUERY: what distinguishes the facts in these cases from those in Chaplinsky? From Gooding?

Every state, and most municipalities, have made it a criminal offense to commit “battery,” i.e. the uninvited use of physical force against the person of another. None make verbal incitement a defense to the charge. QUERY therefore: what “important government interest,” in a state that makes it illegal for one person to strike another in response to a verbal incitement, justifies a statute enacted on the assumption that an “average addressee” will do exactly that?” QUERY further: is there even a “rational basis” for such a statute? If only a “rational basis” exists, how can the statute be upheld against a First Amendment challenge? Or does the statute survive because, like obscenity, “fighting words” are outside the protection of the First Amendment and, therefore, no basis is required for them to be outlawed? If so, compare that result with Brandenburg v. Ohio, 395 U.S. 444 (1969), below at pp. , and Hess v. Indiana, 414 U.S. 105 (1973), below at pp. . Alleged incitements to violence against the government and to a riot in the streets were measured, and found protected, by the test of “clear and present danger.” QUERY: is it not measured, and found protected, by the test of “clear and present danger.” QUERY: is it not a strange constitutional theory which grants First Amendment protection to words that threaten to incite a riot but not to those that threat to provoke a punch in the nose?

The years immediately following World War II were tumultuous ones in the United States. There was fear and hostility toward "communism" as Soviet troops spread into Eastern Europe and the "Cold War" began. There was controversy over "Zionism" associated with the creation of the state of Israel. And there was bitterness over the residual "fascism," which lingered in Franco's Spain and, perhaps, some South American countries. On occasion, all of these controversies converged in one place. Frequently, that occurred at the instigation of Gerald L.K. Smith, a controversial "right wing" figure who, along with the "radio priest," Father Coughlin, had been highly critical of President Franklin Roosevelt before and, to a lesser extent, during the War.

TERMINIELLO v. CITY OF CHICAGO, 337 U.S. 1 (1949)

Mr. Justice DOUGLAS delivered the opinion of the Court.

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."

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v. Oregon*, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why

freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

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.

Reversed.

Mr. Chief Justice VINSON, dissenting.

The Court today reverses the Supreme Court of Illinois because it discovers in the record one sentence in the trial court's instructions which permitted the jury to convict on an unconstitutional basis. The offending sentence had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial. No objection was made to it in the two Illinois appellate tribunals which reviewed the case. Nor was it mentioned in the petition for certiorari or the briefs in this Court. In short, the offending sentence in the charge to the jury was no part of the case until this Court's independent research ferreted it out of a lengthy and somewhat confused record. I think it too plain for argument that a reversal on such a basis does not accord with any principle governing review of state court decisions heretofore announced by this Court.

Mr. Justice FRANKFURTER, with whom joined, Mr. Justice JACKSON and Mr. Justice BURTON, dissented.

Mr. Justice JACKSON, dissenting.

The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello's speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.

But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two. When the trial judge instructed the jury that it might find Terminiello guilty of inducing a breach of the peace if his behavior stirred the public to anger, invited dispute, brought about unrest, created a disturbance or molested peace and quiet by arousing alarm, he was not speaking of these as harmless or abstract conditions. He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence. He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of peace. When the light of the evidence not recited by the Court is thrown upon the Court's opinion, it discloses that underneath a little issue of Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront people who value both liberty and order. This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.

An old proverb warns us to take heed lest we "walk into a well from looking at the stars." To show why I think the Court is in some danger of doing just that, I must bring these deliberations down to earth by a long recital of facts.

Terminiello, advertised as a Catholic Priest, but revealed at the trial to be under suspension by his Bishop, was brought to Chicago from Birmingham, Alabama, to

address a gathering that assembled in response to a call signed by Gerald L. K. Smith, which, among other things, said:

" The same people who hate Father Coughlin hate Father Terminiello. They have persecuted him, hounded him, threatened him, but he has remained unaffected by their anti-Christian campaign against him. You will hear all sorts of reports concerning Father Terminiello. But remember that he is a Priest in good standing and a fearless lover of Christ and America."

The court below heard evidence that the crowd reached an estimated number of 1,500. Picket lines obstructed and interfered with access to the building. The crowd constituted "a surging, howling mob hurling epithets at those who would enter and tried to tear their clothes off." One young woman's coat was torn off and she had to be assisted into the meeting by policemen. Those inside the hall could hear the loud noises and hear those on the outside yell, "Fascists, Hitlers!" and curse words like "damn Fascists." Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. Police were unable to control the mob, which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. About 17 of the group outside were arrested by the police.

Knowing of this environment, Terminiello made a long speech, from the stenographic record of which I omit relatively innocuous passages and add emphasis of what seems especially provocative:

"Father Terminiello: Now, I am going to whisper my greetings to you, Fellow Christians. I will interpret it. I said. 'Fellow Christians,' and I suppose there are some of the scum got in by mistake, so I want to tell a story about the scum:

"And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.

"The subject I want to talk to you tonight about is the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution.

"My friends, it is no longer true that it can't happen here. It is happening here, and it only depends upon you, good people, who are here tonight, depends upon all of us together, as Mr. Smith said. The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world.

"I am not going to talk to you about the menace of Communism, which is already accomplished, in Russia, where from eight to fifteen million people were murdered in cold blood by their own countrymen, and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. That is what they want for you, that howling mob outside.

"Now, let me say, I am going to talk about -- I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. I hope that -- I am a Christian minister. We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person.

"Now, this danger which we face -- let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to condemn them. You remember the Apostles when they went into the upper room after the death of the Master, they went in there, after locking the doors; they closed the windows. (At this time there was a very loud noise as if something was being thrown into the building.)

"Don't be disturbed. That happened by the way, while Mr. Gerald Smith was saying 'Our Father who art in heaven;' (just then a rock went through the window.) Do you wonder they were persecuted in other countries in the world? You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there. Remember there has to be a leader to that mob. He is not out there. He is probably across the street, looking out the window. There must be certain things, money, other things, in order to have successful mob action; there must be rhythm. There must be some to beat a cadence. Those mobs are chanting; that is the caveman's chant. They were trained to do it. They were trained this afternoon. They are being led; there will be violence.

"That is why I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. Put the women on the inside, where there will be no hurt to them. Just walk; don't stop and argue. They want to picket our meetings. They don't want us to picket their meetings. It is the same kind of tolerance, if we said there was a bedbug in bed, 'We don't care for you,' or if we looked under the bed and found a snake and said, 'I am going to be tolerant and leave the snake there' We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

"We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us.

"So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionist Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from."

Such was the speech. Evidence showed that it stirred the audience not only to cheer and applaud but to expressions of immediate anger, unrest and alarm. One called the speaker a "God damned liar" and was taken out by the police. Another said that "Jews, niggers and Catholics would have to be gotten rid of." One response was, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us." The anti-Jewish stories elicited exclamations of "Oh!" and "Isn't that terrible!" and shouts of "Yes, send the Jews back to Russia," "Kill the Jews," "Dirty kikes," and much more of ugly tenor. This is the specific and concrete kind of anger, unrest and alarm, coupled with that of the mob outside, that the trial court charged the jury might find to be a breach of peace induced by Terminiello. It is difficult to believe that this Court is speaking of the same occasion, but it is the only one involved in this litigation.

Terminiello, of course, disclaims being a fascist. Doubtless many of the indoor audience were not consciously such. His speech, however, followed, with fidelity that is more than coincidental, the pattern of European fascist leaders. The street mob, on the other hand, included some who deny being communists, but Terminiello testified and offered to prove that the demonstration was communist -- organized and communist -- led. He offered literature of left-wing organizations calling members to meet and "mobilize" for instruction as pickets and exhorting followers: "All out to fight Fascist Smith."

As this case declares a nation-wide rule that disables local and state authorities from punishing conduct which produces conflicts of this kind, it is unrealistic not to take account of the nature, methods and objectives of the forces involved. This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between

two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent.

I am unable to see the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak. It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State's policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others. There is no claim that the proceedings against Terminiello are designed to discriminate against him or the faction he represents or the ideas that he bespeaks.

A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.

Only recently this Court held that a state could punish as a breach of the peace use of epithets such as "damned racketeer" and "damned fascists," addressed to only one person, an official, because likely to provoke the average person to retaliation. But these are mild in comparison to the epithets "slimy scum," "snakes," "bedbugs," and the like, which Terminiello hurled at an already inflamed mob of his adversaries. *Chaplinsky v. New Hampshire*.

I begin with the oft-forgotten principle which this case demonstrates, that freedom of speech exists only under law and not independently of it. What would Terminiello's theoretical freedom of speech have amounted to had he not been given active aid by the officers of the law? He could reach the hall only with this help, could talk only because they restrained the mob, and could make his getaway only under their protection.

This case demonstrates also that this Court's service to free speech is essentially negative and can consist only of reviewing actions by local magistrates. But if free speech is to be a practical reality, affirmative and immediate protection is required; and it can come only from nonjudicial sources. It depends on local police, maintained by law-abiding taxpayers, and who, regardless of their own feelings, risk themselves to maintain supremacy of law. Terminiello's theoretical right to speak free from interference would have no reality if Chicago should withdraw its officers to some other section of the city, or if the men assigned to the task should look the other way when the crowd threatens Terminiello. Can society be expected to keep these men at Terminiello's service if it has nothing to say of his behavior which may force them into dangerous action?

Because a subject is legally arguable, however, does not mean that public sentiment will be patient of its advocacy at all times and in all manners. So it happens that, while peaceful advocacy of communism or fascism is tolerated by the law, both of these doctrines arouse passionate reactions. A great number of people do not agree that introduction to America of communism or fascism is even debatable. Hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surrounding, be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society.

The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony, and this was not lost on Terminiello. And whether one may be the cause of mob violence by his own personification or advocacy of ideas which a crowd

already fears and hates, is not solved merely by going through a transcript of the speech to pick out "fighting words." The most insulting words can be neutralized if the speaker will smile when he says them, but a belligerent personality and an aggressive manner may kindle a fight without use of words that in cold type shock us. True judgment will be aided by observation of the individual defendant, as was possible for this jury and trial court but impossible for us.

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

I would affirm the conviction.

Mr. Justice BURTON joins in this opinion.

Comments and Queries

Suppose the speaker had been Martin Luther King, Jr., addressing a civil rights rally, and the crowd outside organized by the Ku Klux Klan or the White Citizens Councils of the 1960s. QUERY: should that make any difference in the outcome? Why?

QUERY: Exactly what did Terminiello do that "breach[ed] the peace"? There is no suggestion of a danger of violence inside the hall. Terminiello supposed that "some of the scum got in by mistake," but the one heckler was "taken out by the police." And, unlike Feiner, he had not been asked by the police to stop speaking. Is it that he should just have "known better"? Or, perhaps, QUERY: can his use of personal epithets such as "scum" be considered as "fighting words" under Chaplinsky? But would that require a face-to-face confrontation? Would it matter if the "mob" outside heard what Terminiello was saying? Could they? Would it matter if Terminiello knew, or reasonably should have known, whether they could?

QUERY: does this case present a more aggravated form of the **Problem of the Heckler's Veto**? What if, as Terminiello argues and Justice Jackson seems to agree, the crowd outside had been intentionally assembled to interfere with the speech? If so, QUERY: should Terminiello be required to choose between coerced silence or conviction of disorderly conduct?

Note in Justice Jackson's dissent: "A great number of people do not agree that introduction to America of communism or fascism is even debatable. Hence many speeches, such as that of Terminello, may be legally permissible but ... there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society." QUERY: can this be fairly interpreted to mean that if "a great many people" do not regard an issue as "debatable," they may legitimately be provoked to "violence" by a speaker who persists in disagreeing? If their violent reaction is not "legitimate," should the government be required to prevent or punish it? What if the government argues that it is too expensive to make such an effort? Or that, regardless of cost, it is not feasible because limited police resources must be committed elsewhere?

In 1945-46, Justice Jackson took a leave of absence from the Supreme Court to serve as Chief Allied Prosecutor at the Nuremberg Tribunal, which tried and convicted the principal Nazi leaders of genocide and other World War II crimes. QUERY: could this experience have influenced Jackson's opinion? Whether or not it did, is this an argument against justices accepting duties apart from the Court? See the note on "Extrajudicial Activities" in Kermit L. Hall, The Oxford Companion to the Supreme Court, 270-273 (1992).

Chief Justice Vinson objected that the case was decided on an argument that had never before been raised. QUERY: is that a legitimate complaint? Was the Court just looking for "an easy way out" of deciding the "deeper" issues presented by the case? If so, QUERY: is that legitimate?

Note these lines from Terminello's speech: " ... I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. ... Just walk; don't stop and argue." As Justice Jackson acknowledged, this is "the safer way ... to incite mob action while pretending to deplore it." QUERY: what can be done about the problem of Marc Antony's funeral oration? Can you envision contemporary situations in which the problem might arise? How should, or can, it be dealt with?

In the early days of radio and before the advent of television, "public speaking" was a widespread pastime, both for speaker and listener. There were "soapbox" orators, who improvised a platform and made speeches on street corners to whoever would listen. Others were "platform" speakers, whose appearance in an auditorium was advertised in advance and might well be attended by very large crowds -- both favorably and unfavorably disposed to the speaker's message.

FEINER v. NEW YORK, 340 U.S. 315 (1951)

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.

On the evening of March 8, 1949, petitioner Irving Feiner was addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse. 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.

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.

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. 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. 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.

MR. JUSTICE BLACK, dissenting.

The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York.

Assuming that the "facts" did indicate a critical situation, I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. According to the officers' testimony, the crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MINTON concurs, dissenting.

Public assemblies and public speech occupy an important role in American life. One high function of the police is to protect these lawful gatherings so that the speakers may

exercise their constitutional rights. When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd.

A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of "fighting words." See *Chaplinsky v. New Hampshire*. But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech. Police censorship has all the vices of the censorship from city halls which we have repeatedly struck down.

Comments and Queries

The crux of the Court's opinion is that: "Petitioner was ... neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered." The inference would seem to be that the content was constitutionally protected. If that is so, QUERY: is this the converse of Gitlow? There, the Court seemed to say that the "nature of the words" could be punished regardless of the circumstances? Is Feiner now holding that the circumstances can justify punishment, regardless of the "nature of the words"?

More importantly, QUERY: does this present the classic **Problem of the Heckler's Veto**? Can an audience prevent the delivery of a constitutionally protected message by threatening -- or providing -- a violent response to it? Would it make a difference if the threat had emerged, spontaneously and unexpectedly, from the circumstances? Or if one or more people in the audience had intentionally set out to produce such a result?

Also QUERY: why doesn't the Court respond to Justice Black's argument that before the police "can interfere with a lawful public speaker, they must first make all reasonable efforts to protect him"? Does it appear any such efforts were made in this case? Would it make a difference if the officers on the scene had called for reinforcements, and had been told none were available? Or if the on-scene officers knew that reinforcements were available, but chose not to request them?

2. Advocacy of action

The "criminal syndicalism" statute upheld in Gitlow v. New York, above, at pp. , had been enacted in many other states. One of them was California, and it was brought to bear against a very unusual defendant. Charlotte Anita Whitney, a niece of the late Supreme Court Justice Stephen Field, had been a peaceful social activist for most of her fifty-some years. She was active in the International Workers of the World. In 1919, she joined the Communist Labor Party of California, and actively participated in its first State Convention. There she voted, unsuccessfully, against the revolutionary proposals in its constitution, but remained a member of the organization an alternate member of its State Executive Committee.

WHITNEY v. PEOPLE OF THE STATE OF CALIFORNIA, 274 U.S. 357 (1927)

Mr. Justice SANFORD delivered the opinion of the Court.

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.

"Sec. 2. Any person who: 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism;

"Is guilty of a felony and punishable by imprisonment."

The first count of the information, on which the conviction was had, charged that on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

The question [is] whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

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

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an

unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*.

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 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.

Affirmed.

Mr. Justice BRANDEIS, concurring.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions, thus restricting the rights of free speech and assembly, be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. 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. Our power of review in this case is limited not only to the question whether a right guaranteed by the federal Constitution was denied, but to the particular claims duly made below, and denied. We lack here the power, occasionally exercised on review of judgments of lower federal courts, to correct in criminal cases vital errors, although the objection was not taken in the trial court. This is a writ of error to a state court. Because we may not inquire into the errors now alleged I concur in affirming the judgment of the state court.

Mr. Justice HOLMES joins in this opinion.

Comments and Queries

Whitney's appeals claimed that her conviction violated the First and Fourteenth Amendments. But Brandeis and Holmes, who apparently saw some merit in that contention, concurred in her conviction because she (or her attorney) "did not claim that it was void because there was no clear and present danger of serious evil." QUERY: is it "fair," or consistent with "due process of law," to penalize a defendant for failure to make the right constitutional argument with sufficient specificity? Since Gideon v. Wainwright, 373 U.S. 335 (1963), a defendant in criminal case carrying the possibility of imprisonment has a Fifth Amendment right to the "assistance of counsel," at public expense if necessary. And a conviction can be set aside on grounds of the "ineffective assistance of that counsel." See Strickland v. Washington, 466 U.S. 668 (1984).

For the background of the Whitney case and its impact on society, see Bhagwat, Ashutosh A., "The Story of Whitney v. California: The Power of Ideas," in Constitutional Law Stories 2004, pp. 407-431.

With the end of the "Red scare," the "criminal syndicalism," or "criminal anarchy," laws, fell into disuse along with the federal Smith Act. But it remained on the books in any states, and in one instance, at least, it was invoked.

BRANDENBURG v. OHIO, 395 U.S. 444 (1969)

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." He was fined \$1,000 and sentenced to one to 10 years' imprisonment.

The 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.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.* Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are - we have hundreds, hundreds of members throughout the State of

Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

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

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added:

"Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.** As we said in *Noto v. United States*, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism."

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

Reversed.

*The significant portions that could be understood were:

"How far is the nigger going to - yeah."

"This is what we are going to do to the niggers."

"A dirty nigger."

"Send the Jews back to Israel."

"Let's give them back to the dark garden."

"Save America."

"Let's go back to constitutional betterment."

"Bury the niggers."

"We intend to do our part."

"Give us our state rights." "Freedom for the whites."

"Nigger will have to fight for every inch he gets from now on."

**It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States*, 341 U.S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates v. United States*, 354 U.S. 298, 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I -- a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck v. United States*, 249 U.S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow v. New York*, 268 U.S. 652, 673:

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant

discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. See *Speiser v. Randall*, 357 U.S. 513, 536-537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.

Comments and Queries

Brandenburg explicitly overruled Whitney, which rested directly on the authority of Gitlow, see above, at p. . QUERY: does it also overrule Gitlow? If yes, why doesn't the Court say so?

Note the footnote, which explains the "theory" on which the Smith Act had been upheld in Dennis v. United States. QUERY: is this really what Dennis holds? Or is the Court merely "reaffirming" its "reinterpretation" of the Smith Act in Yates?

Justice Douglas' dissent distinguishes the famous example of someone who "falsely shouts fire in a crowded theatre" on the theory that it is speech "brigaded with action." QUERY: what action? The panicked response of those who heard the words? What if no panic actually occurred? Note that the last sentence of the Schenck opinion reads: "We perceive no ground for saying that success alone warrants making the act a crime."

Almost every municipality has some form of "disorderly conduct" ordinance. In slightly different words, they attempt to protect the community against disruptive behavior while providing safeguards against unacceptable vagueness and the suppression of protected speech. The Supreme Court has generally upheld such statutes against "facial" challenges, but has not hesitated to declare them unconstitutional "as applied" to specific facts.

HESS v. INDIANA, 414 U.S. 105 (1973)

PER CURIAM.

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute.*

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.'" *Gooding v. Wilson*, [405 U.S. 518], 521-522 [1972]. 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 under *Roth v. United States*, and its progeny. Indeed, after *Cohen v. California*, 403 U.S. 15 (1971), 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," *Chaplinsky v. New Hampshire*, 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. Although the sheriff testified that he was offended by the language, he also stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words."

In addition, there was no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded. "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being

invaded in an essentially intolerable manner." *Cohen v. California*, supra, at 21. The prosecution made no such showing in this case.

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*, 395 U.S. 444, 447 (1969). 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 judgment of the Supreme Court of Indiana is Reversed.

*"Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars [\$500] to which may be added imprisonment for not to exceed one hundred eighty 180. days." Ind. Code 35-27-2-1 (1971), Ind. Ann. Stat. 10-1510 (Supp. 1972).

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.

It should be noted at the outset that the case was tried de novo in the Superior Court of Indiana upon a stipulated set of facts, and, therefore, the record is perhaps unusually colorless and devoid of life. Nevertheless, certain facts are clearly established. Appellant was arrested during the course of an antiwar demonstration conducted at Indiana University in May 1970. The demonstration was of sufficient size and vigor to require the summoning of police, and both the Sheriff's Department and the Bloomington Police Department were asked to help university officials and police remove demonstrators blocking doorways to a campus building. At the time the sheriff arrived, "approximately 200-300 persons" were assembled at that particular building.

The doorways eventually were cleared of demonstrators, but, in the process, two students were placed under arrest. This action did not go unnoticed by the demonstrators. As the stipulation notes, "[i]n apparent response to these arrests, about 100-150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed." Thus, by contrast to the majority's somewhat antiseptic description of this massing as being "[i]n the course of the demonstration," the demonstrators' presence in the street was not part of the normal "course of the demonstration" but could reasonably be construed as an attempt to intimidate and impede the arresting officers. Furthermore, as the stipulation also notes, the demonstrators "did not respond to verbal directions" from the sheriff to clear the street. Thus, the sheriff and his deputies found it necessary to disperse demonstrators by walking up the street directly into their path. Only at that point did the demonstrators move to the curbs.

The stipulation contains only one other declaration of fact: that Sheriff Thrasher arrested the appellant, Gregory Hess, for disorderly conduct. The remainder of the stipulation merely summarizes testimony, particularly the testimony of Sheriff Thrasher, two female

witnesses (both students at Indiana University) who were apparently part of the crowd, and Dr. Owen Thomas, a professor of English at the university. The only "established" facts which emerge from these summaries are that "Hess was standing off the street on the eastern curb of Indiana Avenue" and that he said, in the words of the trial court, "We'll take the fucking street later (or again)." The two female witnesses testified, as the majority correctly observes, that they were not offended by Hess' statement, that it was said no louder than statements by other demonstrators, "that Hess did not appear to be exhorting the crowd to go back into the street," that he was facing the crowd, and "that his statement did not appear to be addressed to any particular person or group."

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.

Comments and Queries

The Court holds that "those words could not be punished by the State on the ground that they had 'a tendency to lead to violence'." QUERY: could they have been under the law as it was prior to Brandenburg? Should they be punishable under some theory? If so, what theory?

The dissent contends that "there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police." QUERY: what are they?

C. “Traumatizing” or “offensive” speech.

It is difficult to imagine a more traumatizing event than for elderly Jewish survivors of the holocaust to see an army, no matter how small, of brown-shirted, jack-booted young men, wearing swastika armbands, marching down the street outside their homes. And yet that is precisely what the “National Socialist Party of America” proposed when it filed an application for a parade permit with the municipal officials of the Village of Skokie, Illinois, in May of 1977. The ensuing controversy raged for more than a year and engaged the attention of every level of the federal and state courts.

COLLIN V. SMITH, 578 F.2d 1197 (7th Cir., 1978), cert. den. 439 U.S. 916 (1978).

Before PELL, SPRECHER, and WOOD, Circuit Judges.

PELL, Circuit Judge.

[T]he National Socialist Party of America (NSPA) is a political group described by its leader, Frank Collin, as a Nazi party. Among NSPA’s more controversial and generally unacceptable beliefs are that black persons are biologically inferior to white persons, and should be expatriated to Africa as soon as possible; that American Jews have “inordinate . . . political and financial power” in the world and are “in the forefront of the international Communist revolution.” NSPA members affect a uniform reminiscent of those worn by members of the German Nazi Party during the Third Reich, and display a swastika thereon and on a red, white, and black flag they frequently carry.

The Village of Skokie, Illinois, is a suburb north of Chicago. It has a large Jewish population, including as many as several thousand survivors of the Nazi holocaust in Europe before and during World War II. Other defendants-appellants are Village officials.

When Collin and NSPA announced plans to march in front of the Village Hall in Skokie on May 1, 1977, Village officials responded by obtaining in state court a preliminary injunction against the demonstration. After state courts refused to stay the injunction pending appeal, the United States Supreme Court ordered a stay.* The injunction was subsequently reversed in part, and then in its entirety. On May 2, 1977, the Village enacted three ordinances to prohibit demonstrations such as the one Collin and NSPA had threatened. This lawsuit seeks declaratory and injunctive relief against enforcement of the ordinances.

[The first] Ordinance is a comprehensive permit system for all parades or public assemblies of more than 50 persons. It requires permit applicants to obtain \$300,000 in public liability insurance and \$50,000 in property damage insurance. To parade or assemble without a permit is a crime, punishable by fines from \$5 to \$500.

[The second] Ordinance prohibits (t)he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so. "Dissemination of materials" includes publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance. Violation is a crime punishable by fine of up to \$500, or imprisonment of up to six months.

[The third] Ordinance prohibits public demonstrations by members of political parties while wearing "military-style" uniforms, and violation is punishable as in [the second ordinance].

Collin and NSPA applied for a permit to march on July 4, 1977, which was denied on the ground the application disclosed an intention to violate [the third ordinance].

The district court grant[ed] relief to Collin and NSPA. On its appeal, the Village concedes the invalidity of the insurance requirements as applied to these plaintiffs and of the uniform prohibition.

[O]ur task here is to decide whether the First Amendment protects the activity in which appellees wish to engage, not to render moral judgment on their views or tactics. No

authorities need be cited to establish the proposition, which the Village does not dispute, that First Amendment rights are truly precious and fundamental to our national life. Nor is this truth without relevance to the saddening historical images this case inevitably arouses. It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.

Because the ordinances turn on the content of the demonstration, they are necessarily not time, place, or manner regulations. Legislating against the content of First Amendment activity, however, launches the government on a slippery and precarious path: (A)bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. This is not to say, of course, that content legislation is per se invalid. But analysis of content restrictions must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights.

We first consider [the] ordinance prohibiting the dissemination of materials which would promote hatred towards persons on the basis of their heritage. The Village would apparently apply this provision to NSPA's display of swastikas, their uniforms, and, perhaps, to the content of their placards.

The ordinance cannot be sustained on the basis of some of the more obvious exceptions to the rule against content control. While some would no doubt be willing to label appellees' views and symbols obscene, the constitutional rule that obscenity is unprotected applies only to material with erotic content. Furthermore, although the Village introduced evidence in the district court tending to prove that some individuals, at least, might have difficulty restraining their reactions to the Nazi demonstration, the Village tells us that it does not rely on a fear of responsive violence to justify the ordinance, and does not even suggest that there will be any physical violence if the march is held. The concession also eliminates any argument based on the fighting words doctrine. The Court in *Chaplinsky v. New Hampshire*, 315 U.S.568 (1942)] affirmed a conviction under a statute that, as authoritatively construed, applied only to words with

a direct tendency to cause violence by the persons to whom, individually, the words were addressed. A conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified under *Chaplinsky*. The Illinois Supreme Court has squarely ruled that responsive violence fears and the fighting words doctrine could not support the prohibition of demonstration.

Four basic arguments are advanced by the Village to justify the content restrictions.

First, it is said that the content is “totally lacking in social content,” and that it consists of “false statements of fact” in which there is “no constitutional value.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). We disagree that, if applied to the proposed demonstration, the ordinance can be said to be limited to “statements of fact,” false or otherwise. No handbills are to be distributed; no speeches are planned. To the degree that the symbols in question can be said to assert anything specific, it must be the Nazi ideology, which cannot be treated as a mere false “fact.” 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.

The Village’s second argument, and the one on which principal reliance is placed, centers on *Beauharnais v. Illinois*, 343 U.S. 250 (1952). There a conviction was upheld under a statute prohibiting, in language substantially (and perhaps not unintentionally) similar to that used in the ordinance here, the dissemination of materials promoting racial or religious hatred. The closely-divided Court stated that the criminal punishment of libel of an individual raised no constitutional problems, relying on *Chaplinsky v. New Hampshire*, *supra*. That being so, the Court reasoned that the state could constitutionally extend the prohibition to utterances aimed at groups. In our opinion *Beauharnais* does not support [the] ordinance for two independent reasons. First, the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder. It may be questioned, after cases such as *Cohen v. California* [403 U.S. 15 (1971)]; *Gooding v. Wilson* [405 U.S. 518 (1972)] and *Brandenburg v. Ohio* [395 U.S. 444 (1969)] whether the tendency to induce violence

approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today. Assuming that it would, however, it does not support [the] ordinance because the Village, as we have indicated, does not assert appellees' possible violence, an audience's possible responsive violence, or possible violence against third parties by those incited by appellees, as justifications. [The ordinance] would apparently be applied in the absence of any such threat. The rationale of *Beauharnais*, then, simply does not apply here.

The Village asserts that *Beauharnais* implicitly sanctions prohibiting the use of First Amendment rights to invoke racial or religious hatred even without reference to fears of violence. In the light of our discussion of *Beauharnais*' premises, we do not find the case susceptible of this interpretation. Even if it were, however, we agree with the district court that decisions in the quarter-century since *Beauharnais* have abrogated the *Chaplinsky* dictum, made one of the premises of *Beauharnais*, that the punishment of libel "has never been thought to raise any Constitutional problem." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (criminal libel); and *Gertz v. Robert Welch, Inc.*, *supra*, are indisputable evidence that libel does indeed now raise serious and knotty First Amendment problems.

The Village's third argument is that it has a policy of fair housing, which the dissemination of racially defamatory material could undercut. We reject this argument without extended discussion. That the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights.

The Village's fourth argument is that the Nazi march, involving as it does the display of uniforms and swastikas, will create a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents. The Village points out that Illinois recognizes the "new tort" of intentional infliction of severe emotional distress.

It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of

the Village's residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that "invite(s) dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Yet these are among the "high purposes" of the First Amendment. *Id.* It is perfectly clear that a state may not "make criminal the peaceful expression of unpopular views." *Edwards v. South Carolina*, *supra*, 372 U.S. at 237.

It is said that the proposed march is not speech, or even "speech plus," but rather an invasion, intensely menacing no matter how peacefully conducted. There is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure. The Supreme Court has 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. This case does not involve intrusion into people's homes. There need be no captive audience, as Village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon, which no doubt would be their normal course of conduct on a day when the Village Hall was not open in the regular course of business.

The judgment of the district court is AFFIRMED.

*[Ed] See *Nationalist Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

SPRECHER, Circuit Judge, concurring in part and dissenting in part.

[A]lthough *Beauharnais* is said to have been scarcely noted since 1952, neither has it been overruled. It appears to me that plaintiffs' proposed activities, under the circumstances presented here, might reasonably be viewed as not within the area of constitutionally protected activity. At least the question seems close enough to warrant serious concern and analysis within the factual situation presented. Plaintiffs' proposed actions in this case arguably "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*, supra, 315 U.S. at 576. This conclusion supports a finding at the very least of the validity of the challenged insurance ordinance.

There is no dispute that speech may not be suppressed merely because it offends its listeners. At some point, however, considerations of a neutral desire to maintain the public peace and general welfare come into play in determining whether activities should be allowed. Where the activity is, as here, by its nature and by the circumstances, a threat to a reasonable attempt to maintain the public order, it cannot claim to go unregulated under the auspices that content may not properly be considered.

Such considerations apply with added force where the municipality does not seek to prevent the conduct proposed, but simply proposes to protect against the consequences of such activity. The insurance ordinance at issue here merely attempts to provide this protection.

I would reverse the decision of the district court declaring the insurance requirement of the ordinance unconstitutional.

Comments and Queries

Notice the Court's observation that the Village "does not rely on a fear of responsive violence to justify the ordinance, and does not even suggest that there will be any physical violence if the march is held." QUERY: what if the Village had relied on such a fear? What if it had adduced evidence that its law enforcement resources – even if

augmented by adjacent communities and the State Police – might well be insufficient to control the potential violence?

Notice also that the “Illinois Supreme Court has squarely ruled that responsive violence fears and the fighting words doctrine could not support the prohibition of the demonstration.” QUERY: what if it had not done so?

The Court not only “question[ed] .. whether the tendency to induce violence approach sanctioned implicitly in Beauharnais would pass constitutional muster today” but “agree[d] with the district court that decisions in the quarter century since Beauharnais have abrogated the Chaplinsky dictum.” QUERY: given these sweeping statements, can anything of constitutional significance be read into the denial of certiorari? Or does the Court’s careful distinguishing of the facts of this case from both Beauharnais and Chaplinsky render these statements moot? In either event, should the Circuit Court have engaged in an apparently unnecessary questioning of the validity of Supreme Court precedents?

Justice Blackman, joined by Justice White, dissented from the denial of certiorari, arguing that it should be granted to “resolve any possible conflict that may exist between the ruling of the Seventh Circuit and Beauharnais.” QUERY: why did their seven colleagues nevertheless vote to deny?

After the denial of “cert,” no legal obstacle to the march remained. But the NSPA abruptly cancelled the demonstration. On July 25, 1978, about 25 of its members conducted a rally in a Chicago park instead, with Colin claiming that this had been their intention all along..

At the heart of the Court’s ruling is its statement that “[t]here is room under the First Amendment for government to protect targeted listeners against offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure.” Assuming that to be the state of the law, is there any other possible resolution of the “speech code” cases which follow?

IOTA XI CHAPTER OF SIGMA CHI FRATERNITY v. GEORGE MASON
UNIVERSITY
993 F.2d 386 (4th Cir., 1993)

Before WIDENER and MURNAGHAN, Circuit Judges, and SPROUSE, Senior
Circuit Judge.

SPROUSE, Senior Circuit Judge:

George Mason University appeals from a summary judgment granted by the district court to the IOTA XI Chapter of Sigma Chi Fraternity seeking to nullify sanctions imposed on it by the University because it conducted an "ugly woman contest" with racist and sexist overtones. We affirm.

Sigma Chi has for two years held an annual "Derby Days" event, planned and conducted both as entertainment and as a source of funds for donations to charity. The "ugly woman contest," held on April 4, 1991, was one of the "Derby Days" events. The Fraternity staged the contest in the cafeteria of the student union. As part of the contest, eighteen Fraternity members were assigned to one of six sorority teams cooperating in the events. The involved Fraternity members appeared in the contest dressed as caricatures of different types of women, including one member dressed as an offensive caricature of a black woman. He was painted black and wore stringy, black hair decorated with curlers, and his outfit was stuffed with pillows to exaggerate a woman's breasts and buttocks. He spoke in slang to parody African-Americans. There is no direct evidence in the record concerning the subjective intent of the Fraternity members who conducted the contest. The Fraternity, which later apologized to the University officials for the presentation, conceded during the litigation that the contest was sophomoric and offensive.

Following the contest, a number of students protested to the University that the skit had been objectionably sexist and racist. Two hundred forty-seven students, many of them members of the foreign or minority student body, executed a petition, which stated: "[W]e are condemning the racist and sexist implications of this event in which male members dressed as women. One man in particular wore a black face, portraying a negative stereotype of black women."

On April 10, 1991, the Dean for Student Services, Kenneth Bumgarner, discussed the situation with representatives of the objecting students. That same

day, Dean Bumgarner met with student representatives of Sigma Chi, including the planners of and participants in the "ugly woman contest." He then held a meeting with members of the student government and other student leaders. In this meeting, it was agreed that Sigma Chi's behavior had created a hostile learning environment for women and blacks, incompatible with the University's mission. The Dean met again with Fraternity representatives on April 18, and the following day advised its officers of the sanctions imposed. They included suspension from all activities for the rest of the 1991 spring semester and a two-year prohibition on all social activities except pre-approved pledging events and pre-approved philanthropic events with an educational purpose directly related to gender discrimination and cultural diversity. The University's sanctions also required Sigma Chi to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women. A few weeks later, the University made minor modifications to the sanctions, allowing Sigma Chi to engage in selected social activities with the University's advance approval.

We initially face the task of deciding whether Sigma Chi's "ugly woman contest" is sufficiently expressive to entitle it to First Amendment protection. From the mature advantage of looking back, it is obvious that the performance, apart from its charitable fund-raising features, was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the Fraternity recognized as much. The answer to the question of whether the First Amendment protects the Fraternity's crude attempt at entertainment, however, is all the more difficult because of its obvious sophomoric nature.

As the Supreme Court announced in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61(1981), "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment ... fall within the First Amendment guarantee." Expression devoid of "ideas" but with entertainment value may also be protected because "[t]he line between the informing and the entertaining is too elusive." *Winters v. New York*, 333 U.S. 507, 510 (1948).

As evidenced by their affidavits, University officials sanctioned Sigma Chi for the message conveyed by the "ugly woman contest" because it ran counter to the views the University sought to communicate to its students and the community. The mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well.

[The University, however, urges us to weigh Sigma Chi's conduct against the substantial interests inherent in educational endeavors. The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express. We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that "the manner of [its action] cannot consist of selective limitations upon speech." The First Amendment forbids the government from "restrict[ing] expression because of its message [or] its ideas." *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972). The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint.

The decision of the district court is affirmed.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ____ F2d ____
(2001)

DAVID WARREN SAXE, et al. v. STATE COLLEGE AREA SCHOOL DISTRICT

Before: ALITO, RENDELL, and DUHE, Circuit Judges.

ALITO, Circuit Judge:

The plaintiffs in this case challenge the constitutionality of a public school district's "anti-harassment" policy, arguing that it violates the First Amendment's guarantee of freedom of speech. The District Court, concluding that the policy prohibited no more speech than was already unlawful under federal and state anti-discrimination laws, held that the policy is constitutional and entered judgment for the school district. We reverse.

The Policy begins by setting forth its goal -- "providing all students with a safe, secure, and nurturing school environment" -- and noting that "[d]isrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual." The second paragraph contains what appears to be the Policy's operative definition of harassment:

“Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.”

The Policy continues by providing several examples of "harassment":

“Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation or written material or pictures.”

The Policy provides that "[a]ny harassment of a student by a member of the school community is a violation of this policy." It establishes procedures for the reporting, informal mediation, and formal resolution of complaints. In addition, the Policy sets a list of punishments for harassment, "including but not limited to warning, exclusion,

suspension, expulsion, transfer, termination, discharge . . ., training, education, or counseling."

Plaintiff David Saxe is a member of the Pennsylvania State Board of Education and serves as an unpaid volunteer for SCASD. He is the legal guardian of both student-plaintiffs, who are enrolled in SCASD schools. After the Anti-Harassment Policy was adopted, Saxe filed suit in District Court, alleging that the Policy was facially unconstitutional under the First Amendment's free speech clause. In his Complaint, he alleged that

“[a]ll Plaintiffs openly and sincerely identify themselves as Christians. They believe, and their religion teaches, that homosexuality is a sin. Plaintiffs further believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality. Plaintiffs also feel compelled by their religion to speak out on other topics, especially moral issues.”

Plaintiffs further alleged that they feared that they were likely to be punished under the Policy for speaking out about their religious beliefs, engaging in symbolic activities reflecting those beliefs, and distributing religious literature. They sought to have the Policy declared unconstitutionally vague and overbroad and its operation permanently enjoined.

II.

The District Court dismissed the plaintiffs' free speech claims based on its conclusion that "harassment," as defined by federal and state anti-discrimination statutes, is not entitled to First Amendment protection. The Court rejected the plaintiffs' characterization of the Policy as a "hate speech code," holding instead that it merely prohibits harassment that is already unlawful under state and federal law. The Court observed:

“Harassment has never been considered to be protected activity under the First Amendment. In fact, the harassment prohibited under the Policy already is unlawful. The Policy is a tool which gives SCASD the ability to take action itself against harassment which may subject it to civil liability.”

We disagree with the District Court's reasoning. There is no categorical "harassment exception" to the First Amendment's free speech clause. Moreover, the SCASD Policy

prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.

B.

There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. Harassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f 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 offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

For this reason, we cannot accept SCASD's contention that the application of anti-harassment law to expressive speech can be justified as a regulation of the speech's "secondary effects." *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)] did acknowledge that content-discriminatory speech restrictions may be permissible when the content classification merely "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.'" *R.A.V.*, 505 U.S. at 389 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). The Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. . . . The emotive impact of speech on its audience is not a 'secondary effect.'"

In short, we see little basis for the District Court's sweeping assertion that "harassment" -- at least when it consists of speech targeted solely on the basis of its expressive content -- "has never been considered to be protected activity under the First Amendment." Such a

categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech.

C.

In any event, we need not map the precise boundary between permissible anti discrimination legislation and impermissible restrictions on First Amendment rights today. Assuming for present purposes that the federal anti-discrimination laws are constitutional in all of their applications to pure speech, we note that the SCASD Policy's reach is considerably broader.

For one thing, the Policy prohibits harassment based on personal characteristics that are not protected under federal law. Titles VI and IX [of the Civil Rights Act of 1964], taken together with the other relevant federal statutes, cover only harassment based on sex, race, color, national origin, age and disability. The Policy, in contrast, is much broader, reaching, at the extreme, a catch-all category of "other personal characteristics" (which, the Policy states, includes things like "clothing," "appearance," "hobbies and values," and "social skills"). Insofar as the policy attempts to prevent students from making negative comments about each others' "appearance," "clothing," and "social skills," it may be brave, futile, or merely silly. But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse -- the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.

D.

The District Court justifies its ruling by a syllogism: (1) the SCASD Policy covers only speech that is already prohibited under federal and state anti-harassment laws; (2) such prohibited speech is not entitled to First Amendment protection; (3) therefore, the Policy poses no First Amendment problems. This reasoning is flawed in both its major and minor premises. First, the Policy -- even narrowly interpreted -- covers substantially more speech than applicable federal and state laws. Second, the courts have never embraced a categorical "harassment exception" from First Amendment protection for speech that is within the ambit of federal anti-discrimination laws.

III.

Accordingly, we must examine whether the Policy may be justified as a permissible regulation of speech within the schools.

We begin by reviewing the Supreme Court's cases demarcating the scope of a student's right to freedom of expression while in school. The Court set out the framework for student free speech claims in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, a group of students was suspended for wearing black armbands to protest American involvement in the Vietnam War. The Court held that the wearing of the armbands to make a political statement was "closely akin to 'pure speech'" and thus was constitutionally protected.

Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court upheld the school's suspension of a high school student who, at a school assembly, nominated a peer for class office through "an elaborate, graphic, and explicit sexual metaphor."

[I]n *Hazelwood School District v. Kuhlmeier*, 484 U.S. 258 (1988), the Court upheld, against First Amendment challenge, a principal's deletion of student articles on teen pregnancy from a school-sponsored newspaper. Distinguishing *Tinker*, the Court noted the school had not opened the newspaper up as a public forum and therefore could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities as long as [its] actions are reasonably related to legitimate pedagogical concerns."

Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

IV.

We turn now to the SCASD Policy itself. Because we hold that the Policy, even narrowly read, is unconstitutionally overbroad, we do not reach the merits of Saxe's vagueness claim.

A regulation is unconstitutional on its face on overbreadth grounds where there is a "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). To render a law unconstitutional, the overbreadth must be "not only real but substantial in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Certainly, some of these purported definitions of harassment are facially overbroad. No one would suggest that a school could constitutionally ban "any unwelcome verbal . . . conduct which offends . . . an individual because of "some enumerated personal characteristics. Nor could the school constitutionally restrict, without more, any "unwelcome verbal . . . conduct directed at the characteristics of a person's religion." The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See *Tinker*, 393 U.S. at 509 (school may not prohibit speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); see also *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich.1989) (striking down

university speech code: "Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.").

It is apparent from these elements that SCASD cannot take solace in the relatively more permissive Fraser or Hazelwood standards. First, the Policy does not confine itself merely to vulgar or lewd speech; rather, it reaches any speech that interferes or is intended to interfere with educational performance or that creates or is intended to create a hostile environment. While some Fraser-type speech may fall within this definition, the Policy's scope is clearly broader. Second, the Policy does not contain any geographical or contextual limitations; rather, it purports to cover "[a]ny harassment of a student by a member of the school community." Thus, its strictures presumably apply whether the harassment occurs in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility. Obviously, the Policy covers far more than just Hazelwood-type school-sponsored speech; it also sweeps in private student speech that merely "happens to occur on the school premises." Hazelwood, 484 U.S. at 271. As a result, SCASD cannot rely on Hazelwood's more lenient "legitimate pedagogical concern" test in defending the Policy from facial attack.

In short, the Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. SCASD must therefore satisfy the Tinker test by showing that the Policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. Applying this test, we conclude that the Policy is substantially overbroad.

As an initial matter, the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech "which has the purpose or effect of " interfering with educational performance or creating a hostile environment. This ignores Tinker's requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.

The Policy, then, appears to cover substantially more speech than could be prohibited under Tinker's substantial disruption test. Accordingly, we hold that the Policy is unconstitutionally overbroad.

Comments and Queries

Notice that IOTA XI is decided on the ground that the University's action punished speech because of its disapproved content; the regulation in Saxe was struck down as "overbroad." QUERY: is this really a distinction without a difference? Put another way, if "overbreadth" and "vagueness" were not available, would the School District's policy still have been invalidated on the same ground as used in IOTA XA?

See also the District Court decisions in Doe v. University of Michigan, 721 F.Supp. 852 (D.Mich., 1989) and UWM Post v. Board of Regents of the University of Wisconsin, 774 F.Supp. 1163 (E.D.Wis., 1989). Both invalidated "speech codes" on First Amendment grounds, and neither was appealed by the university. QUERY: could this have been on the age-old legal advice that it is better to lose in a lower court than a higher one?

Private colleges and universities are, of course, not subject to the restrictions of the First and Fourteenth Amendments. But even their rulemaking is not completely free from constitutional scrutiny. See, for example, the Stanford University "code," which ran afoul of a state statute providing that private institutions could not enact regulations which would violate the First Amendment if they were public. The California Supreme Court struck it down in Corry v. Stanford, ___ Cal. ___ (1995).

For arguments in support of such "codes," see, e.g., Delgado, Richard, "Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling," 17 *Harvard Civil Rights-Civil Liberties Review*, 133 (1982) and Matsuda, Mari, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Michigan Law Review* 2320 (1989).

D. "Bias motivated" expression

Beginning with the Civil Rights Act of 1866, there have been innumerable efforts, at all levels of government, to prohibit discrimination on account of race. The language of that Act, as we have seen above, at pp. , was later included in the 14th Amendment to the Constitution. But neither constitutional provisions nor legislative efforts have completely eradicated discrimination. Among the continuing efforts have been "anti bias" laws, which fall into two categories: those prohibiting "hate motivated" conduct, and those which make such motivation an "aggravating" factor, increasing the penalty provided for other crimes.

R.A.V. v. ST. PAUL, 505 U.S. 377 (1992)

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 that lived across the street from the house where petitioner was staying. 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, 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," i.e., "conduct that itself inflicts injury or tends to incite immediate

violence . . . , " (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)), and therefore the ordinance reached only expression "that the first amendment does not protect." 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."

I

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*. 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, 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." *Chaplinsky*, *supra*, at 572. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, *supra* ("fighting' words"); see generally *Simon & Schuster*, *supra*, at 124 (KENNEDY, J., concurring in judgment). Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and for obscenity, see *Miller v. California*, 413 U.S. 15 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

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, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," (WHITE, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.

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. Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech."

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 a "mode of speech," *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951); 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.

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusiv[e]," (WHITE, J., concurring in judgment) - a First Amendment "absolutism" whereby "[w]ithin a particular 'proscribable' category of expression, . . . a government must either proscribe all speech or no speech at all," (STEVENS, J., concurring in judgment). That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation, but a "content discrimination" limitation, upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content. See, e.g., *Sable Communications*, 492 U.S., at 124-126 (upholding [a statute] which prohibits obscene telephone communications).

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 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. And to take a final example, a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud is in its view greater there.

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," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). 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. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. 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. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) 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.

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. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs, because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not

condoned by the majority." 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.

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, *Leathers v. Medlock*, 499 U.S., at 448, requires that that weapon be employed only where it is "necessary to serve the asserted [compelling] interest." 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. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

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.

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.

I

A

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. *Chaplinsky v. New Hampshire*, 315 U.S. 568, [571-572] (1942), made the point in the clearest possible terms:

"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. . . . 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."

Thus, as the majority concedes, this Court has long held certain discrete categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts "fire" in a crowded theater may not claim the protection of the First Amendment. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764 (1982); *Miller v. California*, 413 U.S. 15, 20 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957). And the Court has observed that, "[l]eaving aside the special considerations when public officials

[and public figures] are the target, a libelous publication is not protected by the Constitution." *Ferber, supra*, at 763.

All of these categories are content-based. But the Court has held that the First Amendment does not apply to them, because their expressive content is worthless or of de minimis value to society. We have not departed from this principle, emphasizing repeatedly that, "within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber, supra*, at 763-764. This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are "not within the area of constitutionally protected speech." *Roth, supra*, at 483. The present Court submits that such clear statements "must be taken in context," and are not "literally true." To the contrary, those statements meant precisely what they said: the categorical approach is a firmly entrenched part of our First Amendment jurisprudence.

Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection -- at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because "[t]he government may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed." Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, *Ferber, supra*, at 763-764, but that the government may not treat a subset of that category differently without violating the First

Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.

Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. *Chaplinsky*, 315 U.S., at 572. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.

Therefore, the Court's insistence on inventing its brand of First Amendment underinclusiveness puzzles me. The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression, but the Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that, in this case, is evil and worthless in First Amendment terms, until the city of St. Paul cures the underbreadth by adding to its ordinance a catchall phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."

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.

B

Assuming, arguendo, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." St. Paul has urged that its ordinance, in the words of the majority, "helps to ensure the basic human rights of members of groups that

have historically been subjected to discrimination. . . ." The Court expressly concedes that this interest is compelling, and is promoted by the ordinance. Nevertheless, the Court treats strict scrutiny analysis as irrelevant to the constitutionality of the legislation:

"The dispositive question . . . is whether content discrimination is reasonably necessary in order 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."

Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.

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.

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in *Chaplinsky* -- words "which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." However, the Minnesota court was far from clear in identifying the "injur[ies]" inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that "the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias." I therefore understand the court to have ruled that St.

Paul may constitutionally prohibit expression that, "by its very utterance," causes "anger, alarm or resentment."

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. In the First Amendment context, [c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face.

III

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best, and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

JUSTICE BLACKMUN, concurring in the judgment.

I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. As JUSTICE WHITE points out, this weakens

the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden from categorizing, as the Court has done here, we shall reduce protection across the board. It is sad that, in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence but, instead, will be regarded as an aberration -- a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with JUSTICE WHITE that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

Comments and Queries

The majority does not disagree with the central premise of the concurrences: that, apart from any other defects, the ordinance is clearly "overbroad" because it criminalizes not only expressive conduct which is equivalent to "fighting words," but also that which "causes only hurt feelings, offense or resentment." QUERY: why not a unanimous Court, striking down the ordinance on that basis? Is there merit in Justice Blackmun's concern that the Court "has been distracted" by issues of "politically correct speech" and "cultural diversity"?

The majority's "underinclusiveness" doctrine has continued into later cases. See, e.g. Cincinnati v. Discovery Network, Inc., below at pp. , assuming that all newsracks could be excluded from the city streets, but not only those containing certain commercial publications, and 44 Liquormart, Inc. v. Rhode Island, below, at pp. , rejecting the contention that truthful commercial advertising of a product could be prohibited because the legislature could have banned the product entirely. QUERY: is this "all or nothing" approach wise?

Notice that the majority cites Beauharnais v. Illinois as having "recognized" defamation as a "traditional" limitation on free speech. QUERY: does this undercut the view of the 7th Circuit Court of Appeals, expressed in Colin v. Smith, above, at pp. , and American Booksellers Association v. Hudnut, above, at pp. , that Beauharnais may no longer be "good law"?

Lastly, QUERY: could this case have been decided on the basis of the same reasoning employed in Texas v. Johnson and United States v. Eichman, below at pp. ? Would that have been a good result? Why or why not?

For the Court's decision when confronted with a broader "anti cross burning," see Virginia v. Black, below at pp. .

It is clear, after R.A.V., that otherwise legal conduct cannot be criminalized solely because it was motivated by racial bias. But the decision left open the question of whether such a motivation might be used as a "matter in aggravation" of otherwise illegal conduct, and thus a basis for enhancing the penalty for that offense.

DAWSON v. DELAWARE, 503 U.S. 159 (1992)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Shortly after midnight on December 1, 1986, petitioner David Dawson and three other inmates escaped from the Delaware Correctional Center near Smyrna, Delaware. Dawson stole a car and headed south. He proceeded to the home of Richard and Madeline Kisner. Mrs. Kisner was alone in the house, preparing to leave for work. Dawson brutally murdered Mrs. Kisner, stole the Kisners' car and some money, and fled further south.

A jury convicted Dawson of first-degree murder, possession of a deadly weapon during the commission of a felony, and various other crimes. The trial court then conducted a penalty hearing before the jury to determine whether Dawson should be sentenced to death for the first-degree murder conviction. The prosecution gave notice that it intended to introduce expert testimony regarding the origin and nature of the Aryan Brotherhood, as well as the fact that Dawson had the words "Aryan Brotherhood" tattooed on the back of his right hand.

Before the penalty phase began, the parties agreed to a stipulation regarding the Aryan Brotherhood evidence. The stipulation provided:

"The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware."

In return for Dawson's agreement to the stipulation, the prosecution agreed not to call any expert witnesses to testify about the Aryan Brotherhood. Dawson, in turn, presented mitigating evidence based on the testimony of two family members and on the fact that he had earned good time credits in prison for enrolling in various drug and alcohol programs. The jury found three statutory aggravating circumstances, each making Dawson eligible for the death penalty under Delaware law; it determined (1) that the murder was committed by an escaped prisoner, (2) that the murder was committed during the commission of a burglary, and (3) that the murder was committed for pecuniary gain. The jury further concluded that the aggravating evidence outweighed the mitigating evidence, and recommended that Dawson be sentenced to death. The trial court, bound by that recommendation, imposed the death penalty.

The Supreme Court of Delaware affirmed the convictions and the death sentence. We granted certiorari to consider whether the admission of this evidence was constitutional error. We hold that its admission in this case was error, and so reverse.

We have held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs. Because his right to associate with the

Aryan Brotherhood is constitutionally protected, Dawson argues, admission of evidence related to that association at his penalty hearing violated his constitutional rights. We think this submission is, in the light of our decided cases, too broad. These cases emphasize that "the sentencing authority has always been free to consider a wide range of relevant material." *Payne v. Tennessee*, 501 U.S. 808 820-821 (1991).

Although we cannot accept Dawson's broad submission, we nevertheless agree with him that, in this case, the receipt into evidence of the stipulation regarding his membership in the Aryan Brotherhood was constitutional error. The brief stipulation proved only that an Aryan Brotherhood prison gang originated in California in the 1960's, that it entertains white racist beliefs, and that a separate gang in the Delaware prison system calls itself the Aryan Brotherhood.

Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim.

Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances. But the inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter. Delaware counters that even these abstract beliefs constitute a portion of Dawson's "character," and thus are admissible in their own right under Delaware law. Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in

this case, because the evidence proved nothing more than Dawson's abstract beliefs. Cf. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but, on the present record, one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware failed to do more, we cannot find the evidence was properly admitted as relevant character evidence.

For the foregoing reasons, we vacate the judgment of the Supreme Court of Delaware, and remand for further proceedings not inconsistent with this opinion.

JUSTICE BLACKMUN concurred with a separate opinion.

JUSTICE THOMAS, dissenting.

Dawson's membership in the Aryan Brotherhood prison gang had relevance at sentencing. Under Delaware law, after a jury finds a statutory aggravating factor, it may consider "all relevant evidence in aggravation or mitigation" relating to either the crime or the "character and propensities" of the defendant. Under this provision, Dawson's character became an issue in determining whether he should receive the death penalty.

To prove his good character, Dawson introduced evidence that he had acted kindly toward his family, and that he had earned good time credits while in prison. Dawson also introduced evidence of his membership and participation in various respectable organizations, including the Green Tree Program (described only as a "drug and alcohol program"), Alcoholics Anonymous, and certain therapy and counseling groups.

The Court asserts that the gang membership evidence had no relevance, because it did nothing more than indicate Dawson's "abstract" racist "beliefs." The Court suggests that

Dawson's membership in a prison gang would be relevant if the gang had endorsed or committed "unlawful or violent acts" such as drug use, escape, or the murder of other inmates. Yet, because the State failed to prove the Aryan Brotherhood's activities, the Court reasons, the jury could do no more than infer that Dawson shared the gang's racist beliefs. I disagree. In my judgment, a jury reasonably could conclude from Dawson's membership in a prison gang that he had engaged in some sort of forbidden activities while in prison. The evidence also tended to establish future dangerousness, and to rebut Dawson's attempt to show that he was kind to others.

The description of the Aryan Brotherhood as a "racist" prison gang conveyed additional information about Dawson's character. In *Barclay v. Florida*, 463 U.S. 939 (1983), the plurality found it relevant that a black gang conspired not merely to commit crimes, but to commit them against white persons out of racial hatred. Even if Dawson's white racist prison gang does not advocate "the murder of fellow inmates," a jury reasonably could infer that its members in one way or another act upon their racial prejudice. The stipulation itself makes clear that the Aryan Brotherhood does not exist merely to facilitate formulation of abstract racist thoughts, but to "respon[d]" to gangs of racial minorities. The evidence thus tends to establish that Dawson has not been "a well-behaved and well-adjusted prisoner," *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), which itself is an indication of future dangerousness.

The stipulation also tended to rebut Dawson's evidence of good character. In capital cases, we have held that the sentence imposed should reflect a "reasoned moral response" not only to the crime, but also to the "background" and "character" of the defendant himself. Dawson introduced mitigating character evidence that he had acted kindly towards his family. The stipulation tended to undercut this showing by suggesting that Dawson's kindness did not extend to members of other racial groups. Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial.

Note, particularly, the majority statement that Dawson's membership in the Aryan Brotherhood "had no relevance" because "the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim." QUERY: does it follow that the jury was being asked to enhance Dawson's penalty simply because he was a "racist" and associated with "racists"? If so, is that a legitimate basis for enhancement? The Court believed not, and reasoned that the enhancement was unconstitutionally based not on the defendant's "character" but on his "abstract beliefs." QUERY: might there have been the more specific concern that drawing a negative inference from his membership in the "gang" violated his right to "freedom of association," see, e.g., Boy Scouts of America v. Dale, above at pp. . Or does his imprisonment reduce, or even eliminate, his right of "free association." Before answering, consider Pell v. Procunier, 417 U.S. 817, 822: "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system"

More generally, the Court's opinion states that Delaware did not prove any criminal acts or tendencies on the part of the "Brotherhood," and that the jury, therefore, had no warrant upon which to reason from his "racist beliefs" to his "future dangerousness." QUERY: Is the fact that the "Brotherhood" is a "prison gang" sufficient to permit such an inference? If so, is the "stipulated" fact that "the prison gang ... began in the 1960's in California in response to other gangs of racial minorities" sufficient to negate, or mitigate, such an inference?.

WISCONSIN v. MITCHELL, 508 U.S. 476 (1993)

CHIEF JUSTICE REHNQUIST delivered the opinion of the 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, 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 [a] provision [which] 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. . . ." The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

Mitchell appealed his 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 Supreme Court held that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought."

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.

The State argues that the statute does not punish bigoted thought, but punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First

Amendment challenge. To be sure, our cases reject the "view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Thus, a physical assault is not, by any stretch of the imagination, expressive conduct protected by the First Amendment. See *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence").

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. The defendant's motive for committing the offense is one important factor.

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. *Dawson v. Delaware*, 503 U.S. 159 (1992). In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because "the evidence proved nothing more than [the defendant's] abstract beliefs," we held that its admission violated the defendant's First Amendment rights. In so holding, however, we emphasized that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those

beliefs and associations are protected by the First Amendment." Thus, in *Barclay v. Florida*, 463 U.S. 939 (1983), we allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant to death.

Mitchell suggests that *Dawson* and *Barclay* are inapposite because they did not involve application of a penalty-enhancement provision. But in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature.

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."

Nothing in our decision last Term in *R.A.V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city, i.e., those "that contain . . . messages of 'bias-motivated' hatred," we held that it violated the rule against content-based discrimination.

But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression, i.e., "speech" or "messages," 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." 4 W. Blackstone, *Commentaries*.

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.

Comments and Queries

Note the Court's argument that this decision is consistent with R.A.V. since the ordinance invalidated there "only proscribed a class of 'fighting words' deemed particularly offensive... i.e., those 'that contain ... messages of "bias motivated hatred'." Suppose that, here, instead of prohibiting all aggravated assaults, the legislature had prohibited only aggravated assaults involving "bias motivated hatred." QUERY: would not such a statute be just as clearly "underinclusive" as the R.A.V. ordinance? More realistically, QUERY: what if the legislature had enacted two separate statutes: one prohibiting all aggravated assaults, carrying a maximum penalty of two years, and another prohibiting only bias-motivated aggravated assaults, carrying a maximum penalty of seven years? If the second statute would be "underinclusive," QUERY further: would that be an argument against the result in this case or against R.A.V.'s "underinclusiveness" doctrine?

Whatever your answers to the above questions, consider the Court's separate determination that the enhancement provision is justified by the legislative judgment that "bias motivated" crimes threaten greater societal harms, such as "retaliatory crimes ... distinct emotional harms .. community unrest." QUERY: should criminal punishments be determined solely by the illegal act committed? Or by the impact of that act on society? Or those impacts which the actor might reasonably have foreseen? Under such a theory, QUERY: should the murderer of Dr. Martin Luther King, Jr. have been judged more culpable (and, therefore, more liable to the death penalty) because he reasonably should have foreseen the race riots that it engendered? Or the murderer of President Kennedy because the assassination might have triggered a nuclear war? Before replying, consider the justification for the long-standing practice of "victim impact statements" during the penalty phase of criminal trials: "[T]he assessment of harm caused by the

defendant as a result of the crime has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment, Payne v. Tennessee, 501 U.S. 808, 825 (1991).

Lastly, consider the Court's claim that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws." The antidiscrimination statutes, specifically Title VII of the Civil Rights Act of 1964, provide only for monetary remedies. QUERY: is that a legitimate parallel to this criminal statute, which provides for increased imprisonment?

"MODERN" APPLICATIONS OF THE RIGHT

I. The Public Forum

A. Efforts at definition

The "Hague Organization" controlled Jersey City, New Jersey for many years. Its "boss" was Mayor Frank "I am the Law" Hague, who was not fond of those who disagreed with him or who sought to organize groups he could not control. This made him especially unhappy with union organizers.

HAGUE v. COMMITTEE FOR INDUSTRIAL ORGANIZATION, 307 U.S. 496 (1939)

Mr. Justice BUTLER:

The judgment of the court in this case is that the decree is modified and as modified affirmed.

Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS took no part in the consideration or decision of the case. Mr. Justice ROBERTS has an opinion in which Mr. Justice BLACK concurs, and Mr. Justice STONE an opinion in which Mr. Justice REED concurs. The CHIEF JUSTICE concurs in an opinion. Mr. Justice McREYNOLDS and Mr. Justice BUTLER dissent for reasons stated in opinions by them respectively.

Mr. Justice ROBERTS delivered an opinion in which Mr. Justice BLACK concurred.

Individual citizens [and] labor organizations brought suit against the Mayor and [other officials] of Jersey City, New Jersey. The bill alleges that acting under a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, the petitioners, and their subordinates, have denied respondents the right to hold lawful meetings in Jersey City.

What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute

as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power.

Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.

Comments and Queries

Note that Justice Roberts, often inaccurately reported as having "delivered the opinion of the Court," was actually joined only by Justice Black. With seven justices sitting, his was not even a plurality opinion. Its authority comes from the frequency with which it has been cited approvingly in subsequent cases.

Another means of preventing union activities was to require organizers to register with municipal authorities. Such an ordinance was invalidated in Thomas v. Collins, 323 U.S. 516, (1945): "If the exercise of the rights of free speech and assembly cannot be

made a crime, we do not think this can be accomplished by ... requiring previous registration ... If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause."

Just as municipalities may not ban all assemblies so as to prevent disorder, they may not ban all leafleting on the ground that it may cause litter: "Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. ... There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw paper on the streets." Schneider v. Irvington, 308 U.S. 147, (1939). Nor may the distribution of literature be conditioned on the permission of some official. Lovell v. Griffin, 303 U.S. 444 (1938).

Hague has been accepted as defining the "traditional" public forum. More difficult question have arisen concerning the opening, or "designation," of additional "fora," and the treatment of "nonfora" public property.

LEHMAN v. CITY OF SHAKER HEIGHTS, 418 U.S. 298 (1974)

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join.

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. Petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October.

The general election was scheduled for November 3. Petitioner's proposed copy contained his picture and read:

"HARRY J. LEHMAN IS OLD-FASHIONED! ABOUT HONESTY,
INTEGRITY AND GOOD GOVERNMENT

"State Representative - District 56 [X] Harry J. Lehman."

Advertising space on the city's transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides: "The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder."

When petitioner applied for space, he was informed by Metromedia that, although space was then available, the management agreement with the city did not permit political advertising. The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups. There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles.

Petitioner sought declaratory and injunctive relief in the state courts of Ohio without success. We granted certiorari in order to consider the important First and fourteenth Amendment question the case presented.

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated."

We disagree. Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that "[p]urveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers." [Lehman v. City of Shaker Heights], 34 Ohio St. 2d [143], at 146. This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

The judgment of the Supreme Court of Ohio is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the judgment.

A streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.

While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it. Commercial advertisements may be as offensive and intrusive to captive audiences as any political message. But the validity of the commercial advertising program is not before us since we are not faced with one complaining of an invasion of privacy through forced exposure to commercial ads. Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

I would reverse. In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for

communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other. Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted. Applying these principles, the Court has long recognized the public's right of access to public streets and parks for expressive activity. *Hague v. CIO*, 307 U.S. 496, 515-516 (1939). More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, *Edwards v. South Carolina*, 372 U.S. 229 (1963), but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security and thus need not be opened to the general public, *Adderley v. Florida*, 385 U.S. 39 (1966).

In the circumstances of this case, however, we need not decide whether public transit cars must be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.

The plurality opinion, however, contends that as long as the city limits its advertising space to "innocuous and less controversial commercial and service oriented advertising," no First Amendment forum is created. I find no merit in that position. Certainly, noncommercial public service advertisements convey messages of public concern and are clearly protected by the First Amendment. And while it is possible that commercial advertising may be accorded less First Amendment protection than speech concerning

political and social issues of public importance, it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial. There can be no question that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid. To hold otherwise, and thus sanction the city's preference for bland commercialism and noncontroversial public service messages over "uninhibited, robust, and wide-open" debate on public issues, would reverse the traditional priorities of the First Amendment.

The city contends that its ban against political advertising is bottomed upon its solicitous regard for "captive riders" of the rapid transit system, who are "forced to endure the advertising thrust upon [them]." Since its rapid transit system is primarily a mode of transportation, the city argues that it may prohibit political advertising in order to shield its transit passengers from sometimes controversial or unsettling speech. Whatever merit the city's argument might have in other contexts, it has a hollow ring in the present case, where the city has voluntarily opened its rapid transit system as a forum for communication. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers. There is certainly no evidence in the record of this case indicating that political advertisements, as a class, are so disturbing when displayed that they are more likely than commercial or public service advertisements to impair the rapid transit system's primary function of transportation. In the absence of such evidence, the city's selective exclusion of political advertising constitutes an invidious discrimination on the basis of subject matter, in violation of the First and Fourteenth Amendments.

Should passengers chance to glance at advertisements they find offensive, they can "effectively avoid further bombardment of their sensibilities simply by averting their

eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971). Surely that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech.

The city's remaining justification is equally unpersuasive. The city argues that acceptance of "political advertisements in the cars of the Shaker Heights rapid transit, would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City." Clearly, such ephemeral concerns do not provide the city with carte blanche authority to exclude an entire category of speech from a public forum. "The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2nd 51, 61 (1967).

Comments and Queries

Some "traditional" First Amendment theory holds that "political speech" is at its "core" and "commercial speech" enjoys less protection. QUERY: what justification is there for allowing the City to "invert" these priorities? Can this decision be seen as an argument for eliminating the distinction between "commercial" and "noncommercial" speech?

Note that the crucial fifth vote was provided by Justice Douglas, to whom the "content" of the message was "irrelevant." QUERY: under Douglas' "captive audience" theory, could any commuter require that all advertising be eliminated? How would Douglas reconcile such a result with *Cohen v. California*, (requiring those who might be offended to "avert their eyes") below, at pp. , which he joined?

Ongoing changes in lifestyles, living patterns and social organization have made the "public forum" an evolving concept. The "company town," familiar to the first half of the twentieth century, was held to be sufficiently similar to a public municipality that it

could not forbid the distribution of religious literature on the streets. Marsh v. Alabama, 326 U.S. 501 (1946). Privately owned shopping malls, on the other hand, could refuse to permit the distribution of "antiwar" literature, Lloyd Corporation v. Tanner, 407 U.S. 551 (1972). But the states (in this instance, its Supreme Court, interpreting the California constitution) may require them to be opened to "expressive activity," subject to reasonable time, place and manner restrictions. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS v. LEE, 505 U.S.
672 (1992)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we consider whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment.

The relevant facts are not in dispute. Petitioner International Society for Krishna Consciousness, Inc. (ISKCON), is a not-for-profit religious corporation whose members perform a ritual known as sankirtan. The ritual consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." The primary purpose of this ritual is raising funds for the movement.

Respondent Walter Lee, now deceased, was the police superintendent of the Port Authority of New York and New Jersey and was charged with enforcing the regulation at issue. The Port Authority owns and operates three major airports in the greater New York City area: John F. Kennedy International Airport (Kennedy), La Guardia Airport (La Guardia), and Newark International Airport (Newark). The three airports collectively form one of the world's busiest metropolitan airport complexes. They serve approximately 8% of this country's domestic airline market and more than 50% of the trans-Atlantic market. By decade's end, they are expected to serve at least 110 million passengers annually.

The airports are funded by user fees and operated to make a regulated profit. Most space at the three airports is leased to commercial airlines, which bear primary responsibility for the leasehold. The Port Authority retains control over unleased portions, including La Guardia's Central Terminal Building, portions of Kennedy's International Arrivals Building, and Newark's North Terminal Building (we refer to these areas collectively as the "terminals"). The terminals are generally accessible to the general public, and contain various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types. Virtually all who visit the terminals do so for purposes related to air travel. These visitors principally include passengers, those meeting or seeing off passengers, flight crews, and terminal employees.

The Port Authority has adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings. The regulation effectively prohibits ISKCON from performing sankirtan in the terminals. As a result, ISKCON brought suit alleging that the regulation worked to deprive its members of rights guaranteed under the First Amendment.

It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Education Association. v. Perry Local Educators' Association*. 460 U.S. 37 (1983).

These cases reflect, either implicitly or explicitly, a "forumbased" approach for assessing restrictions that the government seeks to place on the use of its property. Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. The second category of public property is the designated public forum, whether of a limited or unlimited character -- property that the State has opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.

The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the "reasonableness" review governing nonpublic fora, should that prove the appropriate category. Like the Court of Appeals, we conclude that the terminals are nonpublic fora, and that the regulation reasonably limits solicitation.

The suggestion that the government has a high burden in justifying speech restrictions relating to traditional public fora made its first appearance in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 516 (1939). Justice Roberts, concluding that individuals have a right to use "streets and parks for communication of views," reasoned that such a right flowed from the fact that streets and parks . . . 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.

We confirmed this observation in *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), where we held that a residential street was a public forum.

Our recent cases provide additional guidance on the characteristics of a public forum. These precedents foreclose the conclusion that airport terminals are public fora. Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. Even within the rather short history of air transport, it is only [i]n recent years [that] it has become a common practice for various religious and nonprofit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities. Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. In short, there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioner's favor.

Petitioners attempt to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that they claim historically occurred at various "transportation nodes" such as rail stations, bus stations, wharves, and Ellis Island. Even if we were inclined to accept petitioners' historical account describing speech activity at these locations, an account respondent contests, the relevant unit for our inquiry is an airport, not "transportation nodes" generally. When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. The "security magnet," for example, is an airport commonplace that lacks a counterpart in bus terminals and train stations. And public access to air terminals is also not infrequently restricted -- just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible. To blithely equate airports with other transportation centers, therefore, would be a mistake.

The differences among such facilities are unsurprising, since airports are commercial establishments funded by users fees and designed to make a regulated profit, and where

nearly all who visit do so for some travel related purpose. As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting "the free exchange of ideas." To the contrary, the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression. Even if we look beyond the intent of the Port Authority to the manner in which the terminals have been operated, the terminals have never been dedicated (except under the threat of court order) to expression in the form sought to be exercised here: i.e., the solicitation of contributions and the distribution of literature.

Airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel. The Federal Government is in accord; the Secretary of Transportation has been directed to publish a plan for airport development necessary to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense and to meet identified needs of the Postal Service. Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum.

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness. We have no doubt that, under this standard, the prohibition on solicitation passes muster.

We have on many prior occasions noted the disruptive effect that solicitation may have on business. Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. Passengers who wish to avoid the solicitor may have to alter their paths, slowing both themselves and those

around them. The result is that the normal flow of traffic is impeded. This is especially so in an airport, where "[a]ir travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation." Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours' worth of subsequent inconvenience.

In addition, [face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.] The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. This sidewalk area is frequented by an overwhelming percentage of airport users. Thus the resulting access of those who would solicit the general public is quite complete. In turn, we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.

The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but, viewed against the fact that "pedestrian congestion is one of the greatest problems facing the three terminals," the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive.

Moreover, "[t]he justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON." For if ISKCON is given

access, so too must other groups. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely. As a result, we conclude that the solicitation ban is reasonable.

Affirmed.

JUSTICE O'CONNOR, concurring in *ISKCON v. Lee* and concurring in the judgment in *Lee v. ISKCON*, post.

I concur in the Court's opinion in *ISKCON v. Lee*, and agree that publicly owned airports are not public fora. That airports are not public fora, however, does not mean that the government can restrict speech in whatever way it likes. The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints. For example, in *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), we unanimously struck down a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport (LAX) without even reaching the question whether airports were public fora. We found it obvious that such a ban cannot be justified even if LAX were a nonpublic forum, because no conceivable governmental interest would justify such an absolute prohibition of speech. Moreover, we have consistently stated that restrictions on speech in nonpublic fora are valid only if they are "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view." The determination that airports are not public fora thus only begins our inquiry.

The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances. In this case, the "special attributes" and "surrounding circumstances" of the airports operated by the Port Authority are determinative. Not only has the Port Authority chosen not to limit access to the airports under its control, it has created a huge complex open to travelers and nontravelers alike. The airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph

offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs. The International Arrivals Building at JFK Airport even has two branches of Bloomingdale's.

In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are "consistent with . . . preserving the property" for air travel, but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.

Applying that standard, I agree with the that the ban on solicitation is reasonable. The record in this case confirms that the problems of congestion and fraud that we have identified with solicitation in other contexts have also proved true in the airports' experience. Because airport users are frequently facing time constraints, and are traveling with luggage or children, the ban on solicitation is a reasonable means of avoiding disruption of an airport's operation.

In my view, however, the regulation banning leafleting -- or, in the Port Authority's words, the "continuous or repetitive . . . distribution of . . . printed or written material" -- cannot be upheld as reasonable on this record. With the possible exception of avoiding litter, see *Schneider v. State Town of Irvington*, 308 U.S. 147, 162 (1939), it is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.

Moreover, the Port Authority has not offered any justifications or record evidence to support its ban on the distribution of pamphlets alone. Of course, it is still open for the Port Authority to promulgate regulations of the time, place, and manner of leafleting which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

JUSTICE KENNEDY concurring in the judgments.

While I concur in the judgments affirming in these cases, my analysis differs in substantial respects from that of the Court. In my view, the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles. The Port Authority's blanket prohibition on the distribution or sale of literature cannot meet those stringent standards, and I agree it is invalid under the First and Fourteenth Amendments. The Port Authority's rule disallowing in-person solicitation of money for immediate payment, however, is, in my view, a narrow and valid regulation of the time, place, and manner of protected speech in this forum, or else is a valid regulation of the nonspeech element of expressive conduct. I would sustain the Port Authority's ban on solicitation and receipt of funds.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment in *Lee v. ISKCON*, post, and dissenting in *ISKCON v. Lee*.

I agree with JUSTICE KENNEDY's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such. The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks, and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech. To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.

We need not say that all "transportation nodes" or all airports are public forums in order to find that certain metropolitan airports are. Thus, the enquiry may and must relate to the particular property at issue and not necessarily to the "precise classification of the property." It is true that property of some types will invariably be public forums. No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. One can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use. But that would be no reason to conclude that one of the more usual variety of metropolitan airports is not a public forum.

I also agree with JUSTICE KENNEDY's statement of the public forum principle: We should classify as a public forum any piece of public property that is "suitable for discourse" in its physical character, where expressive activity is "compatible" with the use to which it has actually been put. Applying this test, I have no difficulty concluding that the unleased public areas at airports like the metropolitan New York airports at issue in these cases are public forums.

II

From the Court's conclusion sustaining the total ban on solicitation of money for immediate payment, I respectfully dissent. We have held the solicitation of money by charities to be fully protected as the dissemination of ideas.

Even if I assume, *arguendo*, that the ban on the petitioners' activity at issue here is both content-neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest, see, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) and availability of "ample alternative channels for communication," *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

As JUSTICE KENNEDY's opinion indicates, respondent comes closest to justifying the restriction as one furthering the government's interest in preventing coercion and fraud.* The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Since there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban, the regulation cannot be sustained to avoid coercion.

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent. Petitioners claim, and respondent does not dispute, that, by the Port Authority's own calculation, there has not been a single claim of fraud or misrepresentation since 1981. As against these facts, respondent's brief is ominous in adding that [t]he Port Authority is also aware that members of [International Society for Krishna Consciousness] have engaged in misconduct elsewhere. This is precisely the type of vague and unsubstantiated allegation that could never support a restriction on speech.

* Respondent also attempts to justify his regulation on the alternative basis of "interference with air travelers," referring in particular to problems of "annoyance" and "congestion." The First Amendment inevitably requires people to put up with annoyance and uninvited persuasion. Indeed, in such cases, we need to scrutinize restrictions on speech with special care. In their degree of congestion, most of the public spaces of these airports are probably more comparable to public streets than to the fairground as we described it in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). Consequently, the congestion argument, which was held there to justify a regulation confining solicitation to a fixed location, should have less force here. Be that as it may, the conclusion of a majority of the Court today that the Constitution forbids the ban on the sale, as well as the distribution, of leaflets puts to rest respondent's argument that congestion justifies a total ban on solicitation. While there may, of course, be congested locations where solicitation could severely compromise the efficient flow of pedestrians, the proper response would be to tailor the restrictions to those choke points.

LEE v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, 505 U.S.
830 (1992)

PER CURIAM.

For the reasons expressed in the opinions of JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, [in *International Society for Krishna Consciousness, v. Lee*] ante, the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority airport terminals is invalid under the First Amendment is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Leafleting presents risks of congestion similar to those posed by solicitation. It presents, in addition, some risks unique to leafleting. And of course, as with solicitation, these risks must be evaluated against a backdrop of the substantial congestion problem facing the Port Authority and with an eye to the cumulative impact that will result if all groups are permitted terminal access. Viewed in this light, I conclude that the distribution ban, no less than the solicitation ban, is reasonable. I therefore dissent from the Court's holding striking the distribution ban.

I will not trouble to repeat in detail all that has been stated in *International Society for Krishna Consciousness v. Lee*, ante, describing the risks and burdens flowing to travelers and the Port Authority from permitting solicitation in airport terminals. Suffice it to say that the risks and burdens posed by leafleting are quite similar to those posed by solicitation. The weary, harried, or hurried traveler may have no less desire and need to

avoid the delays generated by having literature foisted upon him than he does to avoid delays from a financial solicitation. And while a busy passenger perhaps may succeed in fending off a leafleter with minimal disruption to himself by agreeing simply to take the proffered material, this does not completely ameliorate the dangers of congestion flowing from such leafleting. Others may choose not simply to accept the material, but also to stop and engage the leafleter in debate, obstructing those who follow. Moreover, those who accept material may often simply drop it on the floor once out of the leafleter's range, creating an eyesore, a safety hazard, and additional cleanup work for airport staff.

Comments and Queries

Note that the Court divides public property into three types: the "traditional" public forum, that "opened" or "designated" as such, and "all other." Traditional fora can, presumably, be ascertained by history and past practice. QUERY: what criteria exist for determining when property has been "opened" to that purpose? Is it a question of function? Or similarity to traditional fora? Or the fact that the property has been opened to public access? Or a combination of all three?

If function is the criteria, compare United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981), upholding a prohibition on depositing nonstamped "mailable matter" in letter boxes, with Southeastern Promotions, Inc. v. Conrad, 420 U.S. 546 (1975), overturning the refusal of a municipal auditorium to lease its facilities for a production of the musical "Hair." Both are publicly owned facilities intended for the dissemination of information. Is the Post Office's need for revenue a sufficient basis for the distinction? Or the fear of cluttering mailboxes?

If similarity, compare Grace v. United States, 461 U.S. 171 (1983), striking down a statute forbidding demonstrations in the plaza outside the Supreme Court building, with Boos v. Barry, 485 U.S. 312 (1988), upholding a District of Columbia ordinance banning display, within 500 feet, of any sign that would bring a foreign embassy into "odium" or "disrepute." Both concerned protests on the public streets. One might disturb the Court's functions; the other might jeopardize foreign relations. Is that a sufficient basis for distinction?

If access, why did United States v. Albertini, 472 U.S. 675 (1985), sustain an order barring a "peace activist" from attending an "open house" at an Air Force base on the basis of his misconduct at a military installation nine years before? In this respect, compare Flower v. United States, 407 U.S. 197 (1972), reversing a conviction where the base was an "open post," through which public transportation, private vehicular and pedestrian traffic was allowed to flow freely, with Greer v. Spock, 424 U.S. 828 (1976),

upholding an exclusion order from a basic training facility, on the ground that “the notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is .. historically and constitutionally false.”

The nature of the protest and its compatibility with the purpose of the forum also appears to be relevant. Compare Brown v. Louisiana, 383 U.S. 131 (1966), which reversed a breach of the peace conviction for refusal to end a silent protest at a public library with Adderley v. Florida, 385 U.S. 39 (1966), which sustained a trespass conviction for a demonstration conducted on the grounds of a jail.

To what extent does the nature of the First Amendment activity, and its effect on third persons, affect the public forum status? See Frisby v. Schultz and Madsen v. Women's Health Center, Inc., below, at pp.

B. "Time, Place and Manner" regulations

1. In general

One of the earliest and most obvious problems involved in the constitutional right of free speech, either real or symbolic, is that different people may seek to exercise the same right conflicting ways. The result could be a shouting contest to determine who would be heard or a physical struggle to utilize the same street corner. Different groups seeking to parade or demonstrate might very well desire use of the same streets at the same time. Or different streets, but in such a way that all the main intersections of a town would be occupied at once, thus preventing emergency vehicles -- police cars, fire engines, ambulances -- from reaching the place where they are needed.

Other problems arise from neighbors, travelers, passers-by, those whose work brings them into the "free speech" sphere, and whose right privacy, free access, and a decent quality of life may well come into conflict with the exercise of First Amendment rights.

All of these situations would seem to require some form of regulation. Thus, early on, the Court sustained the right of a municipality to ban sound trucks emitting "loud and raucous noises," Kovacs v. Cooper, 336 U.S. 77 (1949), and to prohibit door-to-door commercial solicitations without the consent of the owner or occupant, Breard v. Alexandria, 341 U.S. 622 (1951). But, just as obviously, the right to regulate implies the discretion to decide.

WARD v. ROCK AGAINST RACISM, 491 U.S. 781 (1989)

JUSTICE KENNEDY delivered the opinion of the Court.

In the southeast portion of New York City's Central Park there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. 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.

Rock Against Racism is an unincorporated association which, in its own words, is "dedicated to the espousal and promotion of antiracist views." Each year from 1979 through 1986, RAR has sponsored a program of speeches and rock music at the bandshell. RAR has furnished the sound equipment and sound technician used by the various performing groups at these annual events.

Over the years, the city received numerous complaints about excessive sound amplification at respondent's concerts from park users and residents of areas adjacent to the park. The city considered various solutions to the sound-amplification problem [and] concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

We granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. Because the Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its legitimate governmental interests, and because the ordinance is valid on its face, we now reverse.

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

The bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government's right

to regulate expression is subject to the protections of the First Amendment. Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981). We consider these requirements in turn.

A

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. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

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," and it satisfies the requirement that time, place, or manner regulations be content neutral.

B

The city's regulation is also "narrowly tailored to serve a significant governmental interest." Despite respondent's protestations to the contrary, it can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome

noise." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984). This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquillity, and privacy of the home," *Frisby v. Schultz*, 487 U.S., at 484, but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. *Kovacs v. Cooper*, 336 U.S., at 86-87 [1949].

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.

The Court of Appeals recognized the city's substantial interest in limiting the sound emanating from the bandshell. The court concluded, however, that the city's sound-amplification guideline was not narrowly tailored to further this interest, because "it has not [been] shown . . . that the requirement of the use of the city's sound system and technician was the least intrusive means of regulating the volume." In the court's judgment, there were several alternative methods of achieving the desired end that would have been less restrictive of respondent's First Amendment rights.

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984). Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, *supra*, at 689. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.

The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concert-ground," also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to

respondent's concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

C

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.

JUSTICE BLACKMUN concurs in the result.

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

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference.

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines. A time, place, and manner regulation of expression must be content neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication. The Guidelines indisputably are content neutral as they apply to all bandshell users irrespective of the message of their music. They also serve government's significant interest in limiting loud noise in public places by giving the city exclusive control of all sound equipment.

My complaint is with the majority's serious distortion of the narrow tailoring requirement. Our cases have not, as the majority asserts, "clearly" rejected a less-restrictive-alternative test. On the contrary, just last Term, we held that a statute is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, *supra*, at 485.

The Court's past concern for the extent to which a regulation burdens speech more than would a satisfactory alternative is noticeably absent from today's decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the

contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.

The Court of Appeals examined "how much control of volume is appropriate [and] how that level of control is to be achieved," but the majority admonishes that court for doing so, stating that it should have "defer[red] to the city's reasonable determination." The majority thus instructs courts to refrain from examining how much speech may be restricted to serve an asserted interest and how that level of restriction is to be achieved. If a court cannot engage in such inquiries, I am at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.

Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly survive constitutional scrutiny. Government's interest in avoiding loud sounds cannot justify giving government total control over sound equipment, any more than its interest in avoiding litter could justify a ban on handbill distribution. In both cases, government's legitimate goals can be effectively and less intrusively served by directly punishing the evil -- the persons responsible for excessive sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally limiting noise but has chosen not to enforce it.

By holding that the Guidelines are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning. Today, the majority enshrines efficacy but sacrifices free speech.

Comments and Queries

Notice that both the majority and minority would require the regulation "be narrowly tailored" to the governmental interest involved. They disagree, however, on what that requires. To the majority it cannot be "substantially broader than necessary." The minority would require that it "targets and eliminates no more than the exact source

of the 'evil'." QUERY: as a practical matter, what is the difference? Does one risk too much discretion and the other require an infeasible precision?

Note the specific holding that "[m]usic, as a form of expression and communication, is protected under the First Amendment." QUERY: all "music," however defined? Is the method of expression protected as well? See Barnes v. Glen Theatre, below, at pp. .

Time, place and manner restrictions may, in some cases, extend to a complete ban on a method of communication, provided "alternate channels" remain open. For instance, a municipality's interest in preventing "visual clutter" may justify a ban on "off-site" commercial billboards, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) and the posting political signs on the cross-arms of utility poles," Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

CITY OF LADUE V. GILLES, 513 U.S. 43 (1994)

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Margaret P. Gilles owns one of the 57 single-family homes in the Willow Hill subdivision of Ladue. On December 8, 1990, she placed on her front lawn a 24- by 36-inch sign printed with the words "Say No to War in the Persian Gulf, Call Congress Now." After that sign disappeared, Gilles put up another but it was knocked to the ground. When Gilles reported these incidents to the police, they advised her that such signs were prohibited in Ladue. The City Council denied her petition for a variance. Gilles then filed this action alleging that Ladue's sign ordinance violated her First Amendment right of free speech.

The District Court issued a preliminary injunction against enforcement of the ordinance. Gilles then placed an 8.5- by 11-inch sign in the second story window of her home stating, "For Peace in the Gulf." The Ladue City Council responded to the injunction by

repealing its ordinance and enacting a replacement. Like its predecessor, the new ordinance contains a general prohibition of "signs" and defines that term broadly. The ordinance prohibits all signs except those that fall within one of ten exemptions. Thus, "residential identification signs" no larger than one square foot are allowed, as are signs advertising "that the property is for sale, lease or exchange" and identifying the owner or agent. Also exempted are signs "for churches, religious institutions, and schools," "[c]ommercial signs in commercially or industrial zoned districts," and on-site signs advertising "gasoline filling stations." Unlike its predecessor, the new ordinance contains a lengthy "Declaration of Findings, Policies, Interests, and Purposes," part of which recites that the

"proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambiance of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children."

Gilleo amended her complaint to challenge the new ordinance, which explicitly prohibits window signs like hers. The District Court held the ordinance unconstitutional, and the Court of Appeals affirmed.

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs -- just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in

expressing its views to the people." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate," and thereby to "control . . . the search for political truth." *Consolidated Edison Co. of New York v. Public Service Commission of New York* 447 U.S. 530, 538 (1980).

The City argues that its sign ordinance implicates neither of these concerns, and that the Court of Appeals therefore erred in demanding a "compelling" justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among the side effects of various kinds of signs. Because only a few residents will need to display "for sale" or "for rent" signs at any given time, permitting one such sign per marketed house does not threaten visual clutter. Because the City has only a few businesses, churches, and schools, the same rationale explains the exemption for on-site commercial and organizational signs. Moreover, some of the exempted categories (e.g., danger signs) respond to unique public needs to permit certain kinds of speech. Even if we assume the validity of these arguments, the exemptions in Ladue's ordinance nevertheless shed light on the separate question of whether the ordinance prohibits too much speech.

Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place. See, e.g., *Cincinnati v. Discovery Network, Inc.*, 507 U.S. ____ (1993). In this case, at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's aesthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.

Under the Court of Appeals' content discrimination rationale, the City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If,

however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property. She asserts a constitutional right to display an anti-war sign at her own home. Therefore, we first ask whether Ladue may properly prohibit Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to permit certain other signs. In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.

In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), we held that the City's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in *Linmark*. Moreover, whereas the ordinance in *Linmark* applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same

opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. Griffin*, 303 U.S. 444, 451-452 (1938); handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); the door-to-door distribution of literature, *Martin v. Struthers*, 319 U.S. 141, 145-149 (1943), and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.

Ladue contends, however, that its ordinance is a mere regulation of the "time, place, or manner" of speech, because residents remain free to convey their desired messages by other means, such as hand-held signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.* A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An

espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.

Affirmed.

*See Aristotle 2, Rhetoric, Book 1, ch. 2, in 8 Great Books of the Western World, Encyclopedia Britannica 595 (M. Adler ed., 2d ed. 1990) ("We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided").

JUSTICE O'CONNOR filed a concurring Opinion.

Comments and Queries

Compare Ladue with Erznoznik v. Jacksonville, 422 U.S. 205 (1975), which struck down an ordinance prohibiting drive-in theatres from showing films containing nudity. To the majority, this was an attempt to regulate non-obscene content. The dissenters thought it "not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task from their task and cause accidents." QUERY: under what circumstances, if at all, can displays on private property, visible from the street, be regulated? To prevent "shock" or "offense" to passers-by? They can simply "avert their eyes," as they were required to do with marchers in Nazi uniforms, see Collin v. Smith, above, at pp. , and a jacket lettered with an expletive, Cohen v. California, see below, at pp. . In the interest of traffic safety? Do drivers have a correlative duty not to "avert their eyes" from the road?

For a somewhat Draconian response to an unwanted nude "peep show," see Schad v. Borough of Mt. Ephriam, 452 U.S. 61, 68 (1981). A zoning ordinance banned all live entertainment except for the "noncommercial ... such as singing Christmas carols at an office party. Apparently a high school could perform a play if it did not charge admission. However, the ordinance prohibits the production of plays in commercial theatres." (ftn. 5) It was struck down: "[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." QUERY: what government interest could be "sufficiently substantial" to justify such a ban? Would it be relevant whether such "entertainment" is available in a neighboring municipality?

QUERY: under the theory of "Declarations of Findings," could the city have prohibited any display visible from the street which "would create ugliness ... and may cause safety and traffic hazards"? Christmas decorations? Extravagant drapes or furniture? Could it have required uniformity in window coverings? Regulated the style of architecture and landscaping? Note that any or all of these regulations might be allowable if the residence were in a designated "historic district" or if the deed to the property contained restrictions to that effect.

2. Licensing requirements

It seems obvious that municipality must have "authority to control the use of its public streets for parades or processions" so as to afford "the opportunity for proper policing ... to prevent confusion by overlapping parades ... secure convenient use of the streets by other travelers, and ... minimize the risk of disorder." Cox v. New Hampshire, 312 U.S. 569 (1941). In addition, privately conducted activities in the public streets or parks require some support from the municipal authorities, ranging from some "clean up" after the event to traffic direction, crowd control and, at the extreme, security against violence. These activities can be expensive, often requiring payment of "overtime" to the police, park employees and others. It is hardly surprising that the municipality should seek some reimbursement for those costs.

FORSYTH COUNTY v. NATIONALIST MOVEMENT, 505 U.S. 123 (1992)

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First and Fourteenth Amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.

I

Petitioner Forsyth County is a primarily rural Georgia county approximately 30 miles northeast of Atlanta. It has had a troubled racial history. "As a direct result" of two [Civil Rights] demonstrations, the Board of Commissioners enacted [an] Ordinance "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." [It] was amended on June 8, 1987 to provide that every permit applicant "shall pay in advance for such permit, for the use of the County, a sum not more than \$1,000.00 for each day such parade, procession, or open air public meeting shall take place." In addition, the county administrator was empowered to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed."

In January, 1989, The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. [and] sought to "conduct a rally and speeches for one and a half to two hours" on the courthouse steps on a Saturday afternoon. The county imposed a \$100 fee. The Movement did not pay the fee, and did not hold the rally. Instead, it instituted this action requesting a temporary restraining order and permanent injunction prohibiting Forsyth County from interfering with the Movement's plans.

The District Court denied the temporary restraining order and injunction. It found that, although "the instant ordinance vests much discretion in the County Administrator in determining an appropriate fee," the determination of the fee was "based solely upon content-neutral criteria; namely, the actual costs incurred investigating and processing the application." Although it expressed doubt about the constitutionality of that portion of the ordinance that permits fees to be based upon the costs incident to maintaining public order, the District Court found that "the county ordinance, as applied in this case, is not unconstitutional."

The Court of Appeals reversed this aspect of the District Court's judgment. We granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum.

II

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in "the archetype of a traditional public forum," *Frisby v. Schultz*, 487 U.S. 474, 480 (1988), is a prior restraint on speech. Although there is a "heavy presumption" against the validity of a prior restraint, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, see *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. See *Freedman v.*

Maryland. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

A

Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S., at 150-151. The reasoning is simple: if the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

In the present litigation, the county has made clear how it interprets and implements the ordinance. The ordinance can apply to any activity on public property -- from parades, to street corner speeches, to bike races -- and the fee assessed may reflect the county's police and administrative costs. Whether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses is decided by the county administrator.

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standards," *Niemotko*, 340 U.S., at 271, guiding the hand of the Forsyth County administrator. The decision how

much to charge for police protection or administrative time -- or even whether to charge at all -- is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

B

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As construed by the county, the ordinance often requires that the fee be based on the content of the speech.

The county envisions that the administrator, in appropriate instances, will assess a fee to cover "the cost of necessary and reasonable protection of persons participating in or observing said . . . activit[y]." In order to assess accurately the cost of security for parade participants, the administrator "must necessarily examine the content of the message that is conveyed," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "ha[s] nothing to do with content." *Ward*, 491 U.S., at 792, quoting *Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O'CONNOR, J.).

The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. This Court has held time and again: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." The county offers only one justification for this ordinance: raising revenue for police services. While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee.

Petitioner insists that its ordinance cannot be unconstitutionally content based, because it contains much of the same language as did the state statute upheld in *Cox v. New Hampshire*, 312 U.S. 569 (1941). Although the Supreme Court of New Hampshire had interpreted the statute at issue in *Cox* to authorize the municipality to charge a permit fee for the "maintenance of public order," no fee was actually assessed. Nothing in this Court's opinion suggests that the statute, as interpreted by the New Hampshire Supreme Court, called for charging a premium in the case of a controversial political message delivered before a hostile audience. In light of the Court's subsequent First Amendment jurisprudence, we do not read *Cox* to permit such a premium.

C

Petitioner, as well as the Court of Appeals and the District Court, all rely on the maximum allowable fee as the touchstone of constitutionality. Petitioner contends that the \$1,000 cap on the fee ensures that the ordinance will not result in content-based discrimination. The ordinance was found unconstitutional by the Court of Appeals because the \$1,000 cap was not sufficiently low to be "nominal." Neither the \$1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance, because, in this context, the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax.

The judgment of the Court of Appeals is affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

We granted certiorari in this case to consider the following question:

"Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum, or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of \$1,000.00 per day of the activity."

The answer to this question seems to me quite simple, because it was authoritatively decided by this Court more than half a century ago in *Cox v. New Hampshire*, 312 U.S. 569 (1941). There we confronted a state statute which required payment of a license fee of up to \$300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." Under the state court's construction, the fee provision was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute.

Two years later, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court confronted a municipal ordinance that required payment of a flat license fee for the privilege of canvassing door-to-door to sell one's wares. Pursuant to that ordinance, the city had levied the flat fee on a group of Jehovah's Witnesses who sought to distribute religious literature door-to-door for a small price. The Court held that the flat license tax, as applied against the hand distribution of religious tracts, was unconstitutional, on the ground that it was "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." In making this ruling, the Court distinguished *Cox* by stating that "the fee is not

a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." 319 U.S., at 116. This language, which suggested that the fee involved in Cox was only nominal, led the Court of Appeals in the present case to conclude that a city is prohibited from charging any more than a nominal fee for a parade permit. But the clear holding of Cox is to the contrary. In that case, the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee, as it stated that the fee provision "had a permissible range from \$300 to a nominal amount." The use of the word "nominal" in Murdock was thus unfortunate, as it represented a mistaken characterization of the fee statute in Cox. But a mistaken allusion in a later case to the facts of an earlier case does not, by itself, undermine the holding of the earlier case. I believe that the decision in Cox squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

Instead of deciding the particular question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. But, because the lower courts did not pass on these issues, the Court is forced to rely on its own interpretation of the ordinance in making these rulings. Because there are no such factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a "heckler's veto," but would instead remand the case to the lower courts to initially consider these issues.

Comments and Queries

The holding of Forsyth would seem to be that the ordinance is unconstitutional both because it vests "unbridled discretion in a government official" and is "often ...based on the content of speech." But QUERY: does it go further? An ordinance that imposed a substantial flat fee, for example, \$500, for each permit, would likely be struck down as burdening "too much speech," Ladue v. Gilleo, immediately above, as well as silencing

those who could not afford the amount. Is the result, then, that only a "nominal" fee can ever be charged regardless of the event?

QUERY: what would be the result if a municipality established that it could not afford the additional costs of security, sanitation and maintenance the event required? Could it deny the permit? Could the courts require that taxes be increased to raise the necessary revenue? Could the State be required to assist with funds and/or personnel? Could adjoining municipalities be required to do so? Would it make a difference if the event, such as a protest of the MLK holiday, were to be conducted on an annual basis?

QUERY further: would it make a difference if the event were connected with, or in promotion of, a commercial event -- such as the circus parade referred to in Cox?

The clearest example of a municipal regulation granting “unbridled discretion” to the licensing official can be found in Niemotko v. Maryland, 340 U.S. 268, 269 (1951): “Appellants' applications to a City Council for permits to use a city park for Bible talks were denied, for no apparent reason except the Council's dislike for appellants and disagreement with their views. ... There was no ordinance prohibiting or regulating the use of the park and there were no established standards for the granting of permits; but permits customarily had been granted for similar purposes ... The lack of standards in the license-issuing "practice" renders that "practice" a prior restraint in contravention of the Fourteenth Amendment, and the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection.” Decisions such as Forsyth County, immediately above, effectively eliminated this discretion. However some applicants, especially those espousing “nontraditional views,” argued that an even stricter standard ought to be imposed, patterned upon restrictions the Court had imposed on state statutory provisions for the licensing of motion pictures.

THOMAS v. CHICAGO PARK DISTRICT, ___ U.S. ___ (2002)

Justice SCALIA delivered the opinion of the Court.

[T]he Chicago Park District is responsible for operating public parks and other public property in Chicago. Pursuant to its authority to “establish by ordinance all needful rules

and regulations for the government and protection of parks ... and other property under its jurisdiction,” the Park District adopted an ordinance that requires a person to obtain a permit in order to “conduct a public assembly, parade, picnic, or other event involving more than fifty individuals,” or engage in an activity such as “creat[ing] or emit[ting] any Amplified Sound.”

Petitioners have applied to the Park District on several occasions for permits to hold rallies advocating the legalization of marijuana. The Park District has granted some permits and denied others. Not satisfied, petitioners filed an action alleging that the Park District’s ordinance is unconstitutional on its face.

In *Freedman v. Maryland*, 380 U. S. 51 (1965), we confronted a state law that enacted a strikingly similar system of prior restraint for motion pictures. It required that every motion picture film be submitted to a Board of Censors before the film was shown anywhere in the State. The Board enjoyed authority to reject films that it considered “ ‘obscene’ “ or that “ ‘tend[ed], in the judgment of the Board, to debase or corrupt morals or incite to crimes,’ “ characteristics defined by the statute in broad terms. The statute punished the exhibition of a film not submitted to the Board for advance approval, even where the film would have received a license had it been properly submitted. It was no defense that the content of the film was protected by the First Amendment.

We recognized in *Freedman* that a scheme conditioning expression on a licensing body’s prior approval of content “presents peculiar dangers to constitutionally protected speech. In response to these grave “dangers of a censorship system,” we held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint: “(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.”

Petitioners contend that the Park District, like the Board of Censors in *Freedman*, must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial. We reject those contentions. *Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The Park District's ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park. The picnicker and soccer-player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event.

Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. See *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 131 (1992). We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review. Petitioners contend that the Park District's ordinance fails this test.

We think not. As we have described, the Park District may deny a permit only for one or more of the reasons set forth in the ordinance. It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and

place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit. Moreover, the Park District must process applications within 28 days, and must clearly explain its reasons for any denial. These grounds are reasonably specific and objective, and do not leave the decision “to the whim of the administrator.” Forsyth County, 505 U. S., at 133.

Comments and Queries

There would seem to be a fundamental difference between the licensing of motion pictures and the granting of permits for, perhaps competing, events in public venues. The former are exhibited in privately owned theaters, whose management is responsible for scheduling. Any government intervention, then, can only be for the purpose of restricting that scheduling, as in the “Sunday Closing” laws, or controlling the content of the material. (For a concise summary of the constitutionality and demise of the “blue laws,” see Hall, Kermit L., ed., *The Oxford Companion to the Supreme Court*, pp. 847-848.) QUERY: is there any other basis on which to impose the Freedman “rule” on public licensure?

3. Bans on Solicitation

As early as 1943, in a suit brought by the Jehovah's Witnesses, the Court struck down a municipal ordinance which had the effect of banning the door-to-door distribution of religious circulars. "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." Martin v. Struthers, 319 U.S. 141, 146-147. Eight years later, the Court held that the same "freedom" did not extend to the sale of magazine subscriptions. "It would be a misuse of the great guarantees of free speech and free press to use them to force a community to admit the solicitors of publications to the home premises of its residents." Beard v. Alexander, 341 U.S. 622, 645 (1951). Neither of these decisions resolved the ongoing tension between a solicitor's right of free speech and a householder's right to privacy. Fifty years after Beard, a "compromise" ordinance came before the Court.

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., v. VILLAGE OF STRATTON ___ U.S. ___ (2002)

Justice Stevens delivered the opinion of the Court.

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?

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. [T]he Jehovah's Witnesses claim to follow the example of Paul, teaching publicly, and from house to house. Acts 20:20. They take literally the mandate of the Scriptures, Go ye into all the world, and preach the gospel to every creature. Mark 16:15. In doing so they believe that they are obeying a commandment of God. Moreover, because they lack significant financial resources, the ability of the

Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.

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 solicitation 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.

The text of the Villages ordinance prohibits canvassers from going on private property for the purpose of explaining or promoting any cause, unless they receive a permit and the residents visited have not opted for a no solicitation sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Villages interest in protecting the privacy of its residents and preventing fraud. Yet, even though the Village has explained that the ordinance was adopted to serve those interests, it has never contended that it should be so narrowly interpreted. To the contrary, the Villages 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, Jehovahs 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. It would seem to extend to residents casually soliciting the votes of neighbors, or ringing doorbells to enlist support for employing a more efficient garbage collector.

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 mayors 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 decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of ones privacy as possible. The requirement that a canvasser must be identified in a permit application filed in the mayors office and available for public inspection necessarily results in a surrender of that anonymity.

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 mayors permission.

The breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Villages stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village, however, argues that the ordinance is nonetheless valid because it serves the two additional interests of protecting the privacy of the resident and the prevention of crime.

With respect to the former, it seems clear that 107 of the ordinance, which provides for the posting of No Solicitation signs and which is not challenged in this case, coupled with the residents unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. The annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit.

With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance.

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners coreligionists from petty prosecutions reflected the Courts 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.

Justice Breyer, with whom Justice Souter and Justice Ginsburg joined, concurred.

Justice Scalia, with whom Justice Thomas joined, concurred in the judgment.

Chief Justice Rehnquist, dissenting.

There is no support in our case law for applying anything more stringent than intermediate scrutiny to the ordinance. The ordinance is content neutral and does not bar anyone from going door-to-door in Stratton. It merely regulates the manner in which one must canvass: A canvasser must first obtain a permit. It is, or perhaps I should say was, settled that 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 v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Court suggests that Stratton's regulation of speech warrants greater scrutiny. But it would be puzzling if regulations of speech taking place on *another citizens* private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.

The next question is whether the ordinance serves the important interests of protecting privacy and preventing fraud and crime. With respect to the interest in protecting privacy, the Court concludes that [t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit. True, but that misses the key point: the permit requirement results in fewer uninvited knocks. Those who have complied with the permit requirement are less likely to visit residences with no trespassing signs, as it is much easier for the authorities to track them down.

Of course, the Stratton ordinance does not guarantee that no canvasser will ever commit a burglary or violent crime. The Court seems to think this dooms the ordinance, erecting an insurmountable hurdle that a law must provide a fool-proof method of preventing crime. In order to survive intermediate scrutiny, however, a law need not solve the crime problem, it need only further the interest in preventing crime. Some deterrence of serious criminal activity is more than enough to survive intermediate scrutiny.

The final requirement of intermediate scrutiny is that a regulation leave open ample alternatives for expression. Undoubtedly, ample alternatives exist here. Most obviously, canvassers are free to go door-to-door after filling out the permit application. And those without permits may communicate on public sidewalks, on street corners, through the mail, or through the telephone.

Intermediate scrutiny analysis thus confirms what our cases have long said: A discretionless permit requirement for canvassers does not violate the First Amendment. Today, the Court elevates its concern with what is, at most, a negligible burden on door-to-door communication above this established proposition. Ironically, however, today's decision may result in less of the door-to-door communication that the Court extols. As the Court recognizes, any homeowner may place a No Solicitation sign on his or her property, and it is a crime to violate that sign. In light of today's decision depriving Stratton residents of the degree of accountability and safety that the permit requirement provides, more and more residents may decide to place these signs in their yards and cut off door-to-door communication altogether.

Comments and Queries

Notice that, in sentences several paragraphs apart, the Court finds that the “prevention of fraud, the prevention of crime, and the protection of private property” are “important interests that the Village may seek to safeguard” ... [but that the ordinance] ... “is not tailored to the Village’s stated interests.” QUERY: does this mean that the ordinance is being subjected to “strict scrutiny”? If it is, why doesn’t the Court say so?

Might it be because of the concerns voiced by Justice Kennedy in his concurring opinion in Simon & Shuster, Inc. v. New York State Crime Victims Board, above, at pp. ?

Notice also this statement in the majority opinion: “Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village’s interest” (emphasis supplied) QUERY: why? Do “commercial” solicitors have a greater propensity to commit fraud, or are they more invasive of privacy, than political or religious proselytizers? Or is the Court suggesting a narrowing of the “political” versus “commercial” speech distinction referred to in earlier cases? See the section on “Commercial Solicitations,” below at pp.

Finally, note the Court’s observation that the unchallenged “No Solicitation” section of the ordinance “provides ample protection for the unwilling listener.” QUERY: would the result have been different if that section had not been included?

II. Symbolic Speech

A. Political protests

It is highly doubtful those who wrote and ratified the First Amendment understood "speech" and "press" in any more than their literal sense: "spoken" and "written words." And yet one the most famous political protests of colonial times contained neither. It was the symbolic act of dumping English tea into Boston Harbor as a protest against the hated tax. Both the colonists, and those who learned of their defiance, believed they were "saying something". Their message was understood by the British Parliament, which closed the Port of Boston in response.

The concept of "conduct" as sufficiently expressive to qualify for protection as "speech" first arose in Stromberg v. California, 283 U.S. 359 (1931), which invalidated a California statute forbidding anyone to "publicly display" a "red flag" on the theory that it demonstrated opposition to organized government. The protection was then extended to some forms of labor picketing in Thornhill v. Alabama, 310 U.S. 88 (1940), see below, at pp. .

UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968)

MR. 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."

I.

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, and within five days he is issued a registration certificate. 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. This initial classification is not necessarily permanent, and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified. After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.

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 is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. Under the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. And the Act made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added 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. 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.

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.

II.

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 meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter v. United States*, 334 U.S. 742, 756 (1948). Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. 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.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the registrant has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective

Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. The essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment is concerned with abuses involving any issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

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. 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.

III.

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.

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN concurred in a separate opinion.

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. The instant case [should be] restored to the calendar for reargument on the question of the constitutionality of a peacetime draft.

Comments and Queries

QUERY: To qualify as "symbolic speech," is it sufficient that the actor intended the act to be communicative? Or must it be understood as such by the recipient? Or could reasonably be understood, whether it actually was or not?

Parsed out, the O'Brien "test" is that the statute or regulation will be upheld "if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression and, (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." QUERY: does the 1965 Amendment satisfy each of these conditions? QUERY further: even if the Amendment's "purpose" was not to suppress speech, is it "unrelated" to suppression?

Regardless of your answer(s) to the above questions, QUERY: was the outcome of the case influenced, either consciously or unconsciously, by the ongoing "war" in

Vietnam? Compare Schenck: "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 as long as men fight" Further QUERY: should the freedom of speech and press be restricted in time of war? Does it matter, as justice Douglas suggests, whether it is a "declared" war?

Lastly, QUERY: what would be the result if O'Brien had burned a photocopy of his draft card? Or an "old" card, which had been replaced by a more recent one based on changes in the information he was required to supply to his local board?

This decision also presents the **Problem of the Wiser Speech**. On rare occasions, the Court has, apparently, invalidated a statute because of the unconstitutional motive of its sponsors. See, e.g. Grosjean v. American Press Co., 297 U.S. 233 (1936), striking down a statute imposing a 2% gross receipts tax on, and only on, publications that included paid advertisements and circulated more than 20,000 copies a week. It appeared that the legislature was attempting to penalize those newspapers considered most critical of it. The general rule, however, has been to the contrary. See Barenblatt v. United States, 360 U.S. 109 (1959). One of the concerns is that, if the courts scrutinize their motives, legislators will simply "sanitize" their speeches, and the records of their deliberations will be less reliable. QUERY: why isn't the legislative intent relevant to whether the governmental interest is "unrelated to the suppression of free expression"? If it is relevant, are there sufficient policy considerations for the courts to ignore it? The fear of artificially "wiser" speeches and a "sanitized record"? The fear of imputing the improper motives of one or a few members to the majority of the legislature? What if no member articulates even a "rational basis" for the enactment?

Protests against the United States' involvement in Vietnam were by no means limited to those subject to the draft. They came from people of every age, from school children to the famous 70 year-old "baby doctor," Benjamin Spock. And they occurred in almost every conceivable place.

TINKER v. DES MOINES SCHOOL DISTRICT, 393 U.S. 503 (1969)

MR. 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, filed by petitioners through their fathers, prayed for an injunction restraining officials of the school district from disciplining the petitioners and sought nominal damages. After an evidentiary hearing, the District Court upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The [Circuit] 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.

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. 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.

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, *Terminiello v. Chicago*, 337 U.S. 1 (1949); 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," Burnside v. Byars, [363 F.2d 744, 749 (1967)] 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 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 revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper.

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.

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 co-extensive with those of adults. "[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." [Ginsberg v. New York, 390 U.S. 629, 649-650.]

MR. JUSTICE WHITE concurred in a separate opinion.

MR. JUSTICE BLACK, dissenting.

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, 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. This Court has already rejected such a notion. In *Cox v. Louisiana*, 379 U.S. 536, 554 (1965), for example, the

Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.

Comments and Queries

Tinker is remembered for its statement that: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom speech or expression at the schoolhouse gate." Yet the rights of students have been held to be substantially less in the case of assembly speeches, Bethel School District No. 403 v. Fraser, and school newspapers, Hazelwood School District v. Kuhlmeier, see, below, pp. . QUERY: why is this case different? Can it be argued that this is an even stronger case for regulation since the conduct occurred in the classroom?

Also QUERY: would the result be different if the "anti-armband" regulation had been in place for some time rather than being enacted after the principals "became aware" of the planned protest? If it had already been applied to other students wearing different armbands?

And QUERY: how important is it that the "school authorities" failed "to prohibit the wearing of all symbols of political or controversial significance"? Might the

principals determine that some "symbols" -- for example, those that could be perceived as impugning the service in Vietnam of young men who might be related to other students -- are more potentially disruptive than others? Would it make a difference if the principals knew that there would be brothers of servicemen in the same schools, or classrooms, as the protesters?

There were also other, less formal, protests against the conflict in Vietnam, and the selective service "draft" to which it led.

COHEN v. CALIFORNIA, 403 U.S. 15 (1971)

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 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, 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.

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." 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. 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.

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.*

This is not 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. *Roth v. United States*, 354 U.S. 476 (1957).

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. 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." 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.

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 theory 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. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). 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.

The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

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. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures - and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

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.

*It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.
2. I am not at all certain that the California Court of Appeal's construction of [the statute] is now the authoritative California construction.

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.

Comments and Queries

QUERY: why cannot the state "excise as 'offensive conduct' one particular scurrilous epithet from the public discourse"? After all, it (along with six others) has been "excised" from use in the electronic media, Federal Communication Commission v. Pacifica Foundation, below, at pp. . QUERY further: are the familiar reasons for distinguishing the commercial airwaves – limited bandwidth and the possibly traumatic effect of spontaneous, unwanted intrusion of such language on unwilling hearers – sufficiently persuasive?

Also QUERY: could the jacket's message "tend to incite an immediate breach of the peace," by someone supportive of the draft? Or the parent or brother or sister of a draftee killed in Vietnam? Would that be enough to bring this case within the "fighting words" exception of Chaplinsky v. New Hampshire, above, at pp. .

The Court described California's argument as "the self-defeating proposition that to avoid physical censorship ... by ... the violent and lawless, the State may ... effectuate that censorship themselves." As written, this appears to be an unequivocal response to the problem of the "heckler's veto." But QUERY: would the result have been different if Cohen had worn his jacket to a "support our troops" rally? Regardless of your answer to that question, QUERY: if the Court really means what it says, is Feiner v. New York, above at pp. , still "good law"? What effect, if any, does it have on Chaplinsky?

The landscaped Mall running from the Capital to the Lincoln Memorial is one of the most familiar sights in the United States. It has long been a site for protest and demonstration. The "Bonus Army" of World War I veterans encamped there in 1932 until they were forcibly removed by federal troops. Marian Anderson sang there, from the steps of the Lincoln Memorial, after the Daughters of the American Revolution refused her use of their nearby Hall on account of her race. Martin Luther King gave his famous "I have a Dream" speech from the same place. After his funeral, an army of civil rights supporters established another camp there, called Resurrection City, but this one disbanded peacefully when public health dangers became apparent.

Nearby is Lafayette Park, a relatively small, formal park and garden fronting the formal grounds of the White House.

CLARK v. COMMUNITY FOR CREATIVE NON-VIOLENCE, 468 U.S. 288 (1984)

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 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. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a "garden park with a . . . formal landscaping of flowers and trees, with

fountains, walks and benches." National Park Service, U.S. Department of the Interior, White House and President's Park, Resource Management Plan 4.3 (1981). The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by, inter alia, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington metropolitan area.

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. 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: 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. We granted the Government's petition for certiorari.

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*, 391 U.S. 367, 376 (1968), 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.

Petitioners submit 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 [the regulation], which prohibits "camping" on park lands, that is, the use of park lands for living accommodations, such as sleeping, storing personal belongings, making fires, digging, or cooking. 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. 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.

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.

The foregoing analysis demonstrates that the Park Service regulation is sustainable under the four-factor standard of *United States v. O'Brien*, for validating a regulation of expressive conduct, which, in the last analysis, is little, if any, different from the standard applied to time, place or manner restrictions. No one contends that aside from its impact

on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce. And for the reasons we have discussed above, there is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to the suppression of expression.

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 *United States v. 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.

Reversed.

CHIEF JUSTICE BURGER, concurring.

It trivializes the First Amendment to seek to use it as a shield in the manner asserted here. And it tells us something about why many people must wait for their "day in court" when the time of the courts is pre-empted by frivolous proceedings that delay the causes of litigants who have legitimate, nonfrivolous claims. This case alone has engaged the time

of 1 District Judge, an en banc court of 11 Court of Appeals Judges, and 9 Justices of this Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The proper starting point for analysis of this case is a recognition that the activity in which respondents seek to engage -- sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness -- is symbolic speech protected by the First Amendment. The majority assumes, without deciding, that the respondents' conduct is entitled to constitutional protection. The majority's approach denatures respondents' asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgment. A realistic appraisal of the competing interests at stake in this case requires a closer look at the nature of the expressive conduct at issue and the context in which that conduct would be displayed.

The primary purpose for making sleep an integral part of the demonstration was "to re-enact the central reality of homelessness," and to impress upon public consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations.

The Court's erroneous application of the standard for ascertaining a reasonable time, place, and manner restriction is revealed by the majority's conclusion that a substantial governmental interest is served by the sleeping ban because it will discourage "around-the-clock demonstrations for days" and thus further the regulation's purpose "to limit wear and tear on part properties." The majority cites no evidence indicating that sleeping engaged in as symbolic speech will cause substantial wear and tear on park property. The majority acknowledges that a proper time, place, and manner restriction must be "narrowly tailored." Here, however, the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities -- such as feigned sleeping -- that is no less burdensome.

By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity. The consistent imposition of silence upon all may fulfill the dictates of an evenhanded content neutrality. But it offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270.¹⁵

Second, the disposition of this case reveals a mistaken assumption regarding the motives and behavior of Government officials who create and administer content-neutral regulations. What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate -- on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity -- the political power of the former is likely to be far greater than that of the latter.

Comments and Queries

The Court found that it "need not differ" with the Court of Appeals' conclusion that sleeping, under the circumstances, would be protected "expressive conduct." Unlike the dissent, however, it did not say that it was. QUERY: is it?

Compare the majority's discussion of "time, place and manner" with its decision, five years later, in Ward v. Rock Against Racism, above, at pp. . QUERY: is the analysis consistent? In both cases, the Supreme Court disagreed with the Court of Appeals. What, essentially, is the source of their disagreement?

The Court also upheld the regulations under the four-part O'Brien test. QUERY: are each of the conditions satisfied? Is the test "in the last analysis ... little, if any, different from the standard applied to time, place or manner restrictions"? QUERY further: Does the opinion, in effect, "merge" the "tests" set forth in these decisions?

In the first of the flag “desecration” cases, Street v. New York, 394 U.S. 576 (1969), a conviction for the public burning of the American flag was overturned because the five-to-four majority was “unable to say with certainty” that it was based upon the act itself rather than the contemptuous words that accompanied it. Dissenting, Justice Black protested that “[i]t passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense.” The following year, an appeal from a conviction based upon “wearing a vest fashioned out of a cut-up American flag” was dismissed for lack of an adequate record, Cowgill California 396 U.S. 371, (1970). But two justices qualified their vote with the observation that “whether symbolic expression by displaying a ‘mutilated’ American flag is protected ... cannot [be regarded] as insubstantial.”

In 1974, two such cases reached the Court. A Massachusetts statute forbidding “contemptuous” treatment was held “void of vagueness,” setting free a defendant who had worn “a likeness of the flag on the seat of his pants.” Smith v. Goguen, 415 U.S. 566 (1974). More significant was Spence v. Washington, 418 U.S. 405 (1974), in which the conviction was for “improper use” by hanging out of an apartment window an upside down flag to which a “peace symbol” had been attached, on both sides, with removable black tape. A per curiam opinion reversed, noting that the flag was neither permanently disfigured or destroyed. Rather, Spence had “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 .. [h]is message was direct, likely to be understood, and within the contours of the First Amendment.” Speaking for three dissenters, then Justice Rehnquist found the First Amendment inapplicable to the statute which “simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications.”

At age 32, Gregory Lee Johnson was a member of the Revolutionary Communist Youth Brigade. Interviewed five years after the events set forth below, he gave as his motive: “I believe we live in a sick and dying empire that is desperately clutching at its symbols and attempting to enforce patriotic allegiance and obedience from the people and suppress anti-patriotic opposition.” (Associated Press, March 19, 1989)

TEXAS v. JOHNSON, 491 U.S. 397 (1989)

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.

I

While the Republican National Convention was taking place in Dallas in 1984, 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 protester 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 protesters 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 [the] Texas Penal Code.* After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. 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.

II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e. g., *Spence v. Washington*, 418 U.S. 405, 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e. g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968). If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien*, *supra*, at 376, 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*, *supra*, at 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970); and of picketing about a wide variety of causes.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. 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, *supra*, at 376, we have limited the applicability of O'Brien's relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression."

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. Although the State stresses the disruptive behavior of the protesters during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high

purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*, *supra*, at 447. 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.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. 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.

IV

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.

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," 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. Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.

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 *Street v. New York*, 394 U.S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be

intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."

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.

Texas' focus on the precise nature of Johnson's expression 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. Indeed, in *Schacht v. United States*, we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to "wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." 398 U.S., at 60. This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "is an act having a high likelihood to cause a breach of the peace," and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned. 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. 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.

Affirmed.

*Texas Penal Code Ann. 42.09 (1989) provides in full:

" 42.09. Desecration of Venerated Object

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

"(b) For purposes of this section, `desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

"(c) An offense under this section is a Class A misdemeanor."

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 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.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co.v. Eisner*, 256 U.S. 345, 349 (1921). 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 symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. The flag identifies United States merchant ships, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States v. Guthrie*, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star-Spangled Banner" to be our national anthem. In 1949, Congress declared June 14th to be Flag Day. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. Both Congress and the States have enacted numerous laws regulating misuse of the American flag.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. 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.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this "restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." As the Court stated, "when a word [or symbol] acquires value `as the result of organization

and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]." Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 [571-572] (1942), a unanimous Court said:

"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."

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to many -- and left him with a

full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers -- or any other group of people -- were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. 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. 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*, 319 U.S. 624, 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others -- perhaps simply because they misperceive the intended message -- will be seriously offended. The case has nothing to do with "disagreeable ideas." It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

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. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

Comments and Queries

Note the Court's holding that the State's interest in preventing breaches of the peace "is not implicated on this record" because no actual breach occurred and accepting the argument that "every flag burning necessarily possesses that potential" would

“eviscerate Brandenburg.” Query: doesn’t this ignore a third alternative? What if “a careful consideration of the actual circumstances surrounding” the flag burning indicated that a breach was “likely” to occur? Would the act be protected? Would it matter whether the actor had intended a breach to occur?

The Court holds that the government may not “assume that every expression of a provocative idea will incite a riot,” but must make a “careful consideration of the actual circumstances surrounding such expression, asking whether [it] ‘is directed to inciting or producing imminent lawless action and is likely to incite or produce such action’.”

QUERY: is the Court saying that expression may be punished if it “is directed to...and is likely to” produce such a reaction regardless of the nature of the expression? Does it mean that words or symbolic conduct, in themselves perfectly protected by the First Amendment lose that protection if their intent and likely consequence are to provoke a violent response? Would it be the same result if that were not the intent, but the speaker or actor knew it would be the likely result? Reasonably should have known?

Affirmative answers to these questions might resolve the problem of Mark Antony’s funeral oration, and answer the question left open in Terminiello, see above, at p. . But they would also profoundly alter the “clear and present danger” test: “The question in every case is whether the words used are used in such circumstances and are of such a nature ...”

Remember Professor Chaffee’s observation, above at p. , that “the trouble with the bad-motive test is that courts and juries would apply it only to the exponents of unpopular views.” QUERY: if the nature of the words or expressive conduct are not enough to provide constitutional protection, might controversial messages be “chilled” by fear of adverse jury findings on the issue of the speaker’s intent?

Query also: is the Court’s reliance on Brandenburg misplaced? Note that Johnson was not advocating that anyone should do anything; at worst, he was risking a violent reaction by those present. Is the distinction important? Should it be?

Senator Bob Kerrey of Nebraska, who won the Congressional Medal of Honor for valor in the Vietnam conflict, defended Johnson as follows: “John Stuart Mill in his 1859 essay ‘On Liberty’ offered three reasons that the expression of opinion should rarely be limited. First, the supposed opinion might be right; its suppression might deprive mankind of the opportunity of ‘exchanging error for truth.’ Second, even though the opinion might be false, it may contain ‘a portion of the truth’ and ‘it is only by the collision of adversarial opinions,’ each of which contains partial truth, ‘that the remainder of the truth has any chance of being supplied.’ Third, even if the opinion to be silenced is to be completely wrong, in silencing it mankind loses ‘what is almost as great a benefit as that (of truth), the clearer perception and livelier impression of truth, produced by its collision with error.’ ... [F]lag burning is clearly in the third category. It does not persuade us that the burner holds an opinion that is true. It persuades us that his opinion is untrue. And it gives us the opportunity to see what true freedom and true patriotism is.” (Congressional Record, Senate, July 18, 1989, 8102-3) Query: what do you think?

Dissenting in Street, 394 U.S. 576, 616-7, Justice Fortas maintained that “the flag is a special kind of [personal property] ... A person may ‘own’ a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense, but it is property burdened with particular obligations and restrictions.” Likewise, Justice White, concurring in Smith v. Goguen, 415 U.S. 56, 587, expressed the belief that “[t]he flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess or use it.” Query: does this suggest that the United States has, or might obtain, a “copyright interest” in the flags, even those privately “owned”? If so, could that be sufficient to prevent individuals from altering the appearance of the flag, which is prescribed by statute? Or using it for purposes other than those prescribed? Would it buttress the ultimate argument that even those who possess “copies” of the flag cannot “desecrate” it?

Note Chief Justice Rehnquist’s effort to develop this concept by his citation of San Francisco Arts & Athletics, Inc. v. United States Olympic Committee. But see footnote 19 to the majority opinion, which asserts that San Francisco Arts merely upheld a statute “prohibit[ing] certain commercial and promotional uses of the word ‘Olympic’ ... [and does not] ... even begin to tell us whether the Government may criminally punish physical conduct toward the flag engaged in as a means of political protest.” Query: does it?

Johnson was announced on June 21st, and the furor was immediate. Resolutions of disapproval were passed, almost unanimously, in both houses of Congress. Within a week, the President announced he would “push for” a constitutional amendment to overturn the decision. But a legislative strategy intervened. Several scholars, including Professor Laurence Tribe, opined that the Texas statute had been invalidated only because it limited its prohibition to conduct which “offended others.” Thus, the theory went, a “content neutral” statute, outlawing all flag burning whether or not it gave offense, could survive scrutiny. Such a bill, amended to require accelerate Supreme Court review of any district court judgment on its constitutionality, passed the House on October 5th and the Senate exactly one week later. President Bush, expressing doubts about its constitutionality, allowed the bill to become law without his signature.

The inevitable happened quickly. In both the District of Columbia and Washington state, a small number of people were indicted for burning American flags in public demonstrations against government policies in general and the passage of the Flag Protection Act. Both district courts held the Act unconstitutional and dismissed the indictments.

UNITED STATES v. EICHMAN, 496 U.S. 310 (1990)

(Together with United States v. Haggerty, et al.)

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.

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. We first held that *Johnson's* flag burning was "conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." We next considered and rejected the State's contention that, under *United States v. O'Brien*, 391 U.S. 367 (1968), we ought to apply the deferential standard with which we have reviewed Government regulations of conduct containing both speech and nonspeech elements where "the governmental interest is unrelated to the suppression of free expression." We reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of *O'Brien*" because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." We therefore subjected the statute to "the most exacting scrutiny," and we concluded that the State's asserted interests could not justify the infringement on the demonstrator's First Amendment rights.

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."

The Government concedes in these cases, as it must, that appellees' flag burning constituted expressive conduct but invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment. Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This we decline to do. 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.

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.

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 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 Government'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.

"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." *Johnson*. Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.

Affirmed.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

The Court's opinion ends where proper analysis of the issue should begin. Of course "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." None of us disagrees with that proposition. But it is equally well settled that certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the

interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.

Contrary to the position taken by counsel for the flag burners in *Texas v. Johnson*, it is now conceded that the Federal Government has a legitimate interest in protecting the symbolic value of the American flag. Obviously that value cannot be measured, or even described, with any precision. It has at least these two components: In times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a reminder of the paramount importance of pursuing the ideals that characterize our society.

The first question the Court should consider is whether the interest in preserving the value of that symbol is unrelated to suppression of the ideas that flag burners are trying to express. In my judgment the answer depends, at least in part, on what those ideas are. A flag burner might intend various messages.

The Government's legitimate interest in preserving the symbolic value of the flag is, however, essentially the same regardless of which of many different ideas may have motivated a particular act of flag burning. The prosecution in these cases does not depend upon the object of the defendants' protest. It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.

These cases therefore come down to a question of judgment. Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag? This question, in turn, involves three different judgments: (1) The importance of the individual interest in selecting the

preferred means of communication; (2) the importance of the national symbol; and (3) the question whether tolerance of flag burning will enhance or tarnish that value. The opinions in *Texas v. Johnson* demonstrate that reasonable judges may differ with respect to each of these judgments.

Given all these considerations, plus the fact that the Court today is really doing nothing more than reconfirming what it has already decided, it might be appropriate to defer to the judgment of the majority and merely apply the doctrine of *stare decisis* to the cases at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in these cases as well.

Comments and Queries

As part of the legislative strategy which had passed the Flag Protection Act instead of a constitutional amendment, a political deal had been struck: if the Act were held to be unconstitutional, the Amendment would be brought back for a vote in both houses of Congress. By the time *Eichman* was decided, that amendment had already been re-introduced. It provided: “The Congress and the States shall have the power to prohibit the physical desecration of the Flag of the United States.”

On June 21, 1990, exactly one year after the decision in *Johnson*, the House of Representatives defeated the proposed amendment by a vote of 254 to 177, 34 short of the required two-thirds. Five days later, by 58-42, the amendment also failed in the Senate. There have been periodic attempts since that time; since 1994, the amendment has prevailed in the House, but has consistently been defeated in the Senate.

One of the most frequently made arguments against the proposed “flag Amendment” has been that if the “desecration” of one “venerated” object can be criminalized – either because of the inherent value of the symbol or the offense many will take at its desecration – why not others as well? Several come to mind, many of them religious in nature. One of these, given the unique history of its misuse, poses especially difficult problems.

VIRGINIA v. BLACK, et al, ___ U.S. ___ (2003)*

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.

I

Barry Black [was] convicted of violating Virginia's cross-burning statute:

"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."

II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. See W. Scott, *The Lady of The Lake*, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. 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. Although the Ku Klux Klan started as a social club, it soon changed into something far different. 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 Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. 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*. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. Cross burning thereby became associated with the first Ku Klux Klan. 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. Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence.

The decision of this Court in Brown v. Board of Education, 347 U. S. 483 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

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." Capitol Square

Review and Advisory Bd. v. Pinette, 515 U. S., at 771 (Thomas, J. concurring). 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.

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.

III

A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." 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." Whitney v. California, 274 U. S. 357, 374 (1927) (Brandeis, J., dissenting).

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. See, e.g., Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech,

the prevention and punishment of which has never been thought to raise any Constitutional problem").

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, supra, at 572; see also R.A.V. v. City of St. Paul [505 U.S.] at 383 (listing limited areas where the First Amendment permits restrictions on the content of speech). 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." Watts v. United States, 394 U. S. 705, 708 (1969) (per curiam).

"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.

B

In R.A.V., we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'" was unconstitutional. We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. The ordinance did not cover "[t]hose 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." This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects."

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:

"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."

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he Federal Government can criminalize only those threats of violence that are directed against the President ... since the reasons why threats of violence are outside the First Amendment ... have special force when applied to the person of the President." And a State may "choose to prohibit only that obscenity which is the most patently offensive in its purview -- i.e., that which involves the most lascivious displays of sexual activity." 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.

IV

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." The prima facie evidence provision renders the statute unconstitutional.

It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'" 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. The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim.

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. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's

hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002). 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.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand.

*All references to the other respondents have been deleted.

Justice Stevens, concurred in a brief opinion.

Justice Thomas, dissenting.

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.

To me, the majority's brief history of the Ku Klux Klan only reinforces [the] common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods. In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

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.

The plurality 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." [But] as I explained above, the inference is rebuttable and Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Because I would uphold the validity of this statute, I respectfully dissent.

Justice Scalia, with whom Justice Thomas partially joined, concurred in part, concurred in the judgment in part and dissented in part.

Justice Souter, with whom Justice Kennedy and Justice Ginsburg join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction we considered in *R. A. V. v. St. Paul*, 505 U. S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in R.A.V. or any acceptable variation of it. [N]o content-based statute should survive even under a pragmatic recasting of R.A.V. without a high probability that no "official suppression of ideas is afoot." I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U. S. 307, 319 (1979).

Comments and Queries

Notice that the majority and dissenting justices, except perhaps Justice Thomas, agree that "cross burning" is a form of "symbolic speech," which the state could not simply ban. Rather, it is the historical context of cross burning which can make it a "true threat," and, thus, outside the protection of the First Amendment. The statute's constitutional defect was its provision that the burning, in and of itself, "shall be prima facie evidence of an intent to intimidate." In laymen's terms this means that prosecutors would not have to prove what was on the defendant's mind when he burned the cross – why he did it. The jury can infer from the fact that he did it that his intent was to intimidate. QUERY: as a practical matter, doesn't this "shift the burden of proof" to the defendant to disprove the inference? If so, QUERY further, doesn't this, as a practical matter violate the traditional requirement that in a criminal case the government has the burden of proof "beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged," In re Winship, 397 U.S. 358, 363 (1970)?

Note Justice Thomas' statement that "Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt." But QUERY: how meaningful is this requirement if the jury can simply conclude "well, he burned the cross, didn't he? That's enough" This seems to be the point the dissenters are trying to make in the last paragraph above. So, QUERY: how persuasive do you find their argument?

Notice Justice Thomas' comment that "the majority errs in imputing an expressive component to the activity in question." QUERY: can this statement be taken literally in light of his subsequent statement that cross burning "instills in its victim well-grounded fear of physical violence"? If it does that, it surely expresses something. What it expresses is undoubtedly despicable and, if a "true threat," falls outside First Amendment protection and is punishable as a crime. What, then, is the point Justice Thomas is trying to make in the quoted language?

More importantly, QUERY: is there any way Justice Thomas' opinion can be squared with the 7th Circuit decision in Colin v. Smith, above at pp. . Remember that the Supreme Court denied certiorari in that case. Is that significant?

B. "Erotic" performances

In Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66 (1981), the Court struck down a zoning ordinance banning all live entertainment in the Borough. The result was to invalidate the convictions of proprietors of an "adult" entertainment complex in which among other things, "a customer could sit in a booth, insert a coin, and ... watch a live dancer, usually nude, performing behind a glass panel." In its opinion, the Court observed, quoting Jenkins v. Georgia, above, at p. , that "nudity alone does not place otherwise protected material outside the mantle of the First Amendment." It then cited Southern Productions, Ltd. v. Conrad, 420 U.S. 546 (1975), which invalidated a municipal theater's refusal to lease its facilities for the production of "Hair," a musical containing scenes of nudity, and Erznoznik v. City of Jacksonville, 422 U.S. 206 (1975), which struck down an ordinance prohibiting "drive-in theatres" to exhibit motion picture featuring nude scenes. The Court then added: "Furthermore ... nude dancing is not without its First Amendment protection from official regulation."

The decision was not without precedent. A generation before, the Court held that nudity alone did not constitute obscenity and could not justify banning photographs from the mails. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). In 1989, Rock Against Racism, above, at pp. , had explicitly held that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Schad extended that protection to "live entertainment, such as musical and dramatic works."

BARNES v. GLEN THEATRE, INC., 501 U.S. 560 (1991)

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these establishments. They claim that the First amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts appear from the pleadings and findings of the District Court, and are uncontested here. The Kitty Kat Lounge, Inc. (Kitty Kat) is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity

requires that the dancers wear "pasties" and a "G-string" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first \$60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time.

Several of our cases support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that, while the state may license establishments such as the ones involved here and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioner contends, on the other hand, that Indiana's restriction on nude dancing is a valid "time,

place or manner" restriction under cases such as *Clark v. Community for Creative Non-Violence*.

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward v. Rock Against Racism*, although we have on at least one occasion applied it to conduct occurring on private property. See *Renton v. Playtime Theatres, Inc.* In *Clark*, we observed that this test has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*, and we turn, therefore, to the rule enunciated in *O'Brien*.

Applying the four-part *O'Brien* test, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State, and furthers substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the state's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin, and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common law roots of the offense of "gross and open indecency" in *Winters v. New York*, 333 U.S. 507, 515 (1948). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct -- including appearing in the nude in public -- are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*,

saying: "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."

Respondents contend that, even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the state seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the O'Brien test, viz: the governmental interest must be unrelated to the suppression of free expression.

But we do not think that, when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the state, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity.

It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the O'Brien test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion above, the governmental interest

served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose.

Reversed.

JUSTICE SCALIA, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.

JUSTICE SOUTER, concurring in the judgment.

I agree that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien*. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing "matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult

films displaying "specified anatomical areas" at issue in Renton. In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes.

The third O'Brien condition is that the governmental interest be "unrelated to the suppression of free expression," and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression.

The fourth O'Brien condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Accordingly, I find O'Brien satisfied, and concur in the judgment.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the Court now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment. . . ." This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions."

Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the Court states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." For guidance, the plurality turns to *United States v. O'Brien*.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana legislature had in mind when it enacted the Indiana statute, but the Court nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." The plurality goes on to conclude that Indiana's statute "was enacted as a general prohibition," on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." The plurality also holds that the basis for banning nude dancing is unrelated to free expression, and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the Court and JUSTICE SCALIA in his concurring opinion overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien*, involved anything less than truly general proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] the State prohibited sodomy, regardless of where the conduct might occur, including the home, as was true in that case. By contrast, in this case, Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the Court or JUSTICE SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley v. Georgia*, 394 U.S. 557, (1969), in which we held that States could not punish the mere possession of obscenity in the privacy of one's own home.

We are told by the Attorney General of Indiana that, in *State v. Baysinger*, 272 Ind. 236 (1979), the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as *Salome* or *Hair*. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets or operas. Thus, the Indiana statute is not a general prohibition of the type we have upheld in prior cases.

The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms, since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. As the State now tells us, and as JUSTICE SOUTER agrees, the State's goal in applying what it describes as its "content-neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the O'Brien test, that the governmental interest be unrelated to the suppression of free expression, is satisfied, because, in applying the statute to nude dancing, the State is not "proscribing nudity because of the erotic message conveyed by the dancers." The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing, but public nudity, which may be prohibited despite any incidental impact on expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the Court concedes that nude dancing conveys an erotic message, and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that "'[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981).

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings, but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The plurality's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case. In the words of Justice Harlan, "[I]t is largely because governmental officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some "entertainment" with his beer or shot of rye." *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21, n. 3 (CA2 1974), *aff'd in part*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

As I see it, our cases require us to affirm, absent a compelling state interest supporting the statute. Neither the Court nor the State suggest that the statute could withstand scrutiny under that standard.

Comments and Queries

QUERY: is Barnes consistent with Schad? In either case, why isn't Schad discussed in the majority opinion -- either to distinguish or overrule it?

Justice Souter concurs based on Renton's "secondary effects" theory. But QUERY: how will the addition of "pasties and a G-string" reduce the incidence of "prostitution, sexual assault, and associated crimes"? If Souter is saying only that the Court should defer to the legislative judgment, QUERY further: what if the statute required that the dancers be "fully clothed"? Or banned such dancing altogether?

The dissent refers to the Indiana Attorney General's statement that the statute "cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved," such as a performance of "Salome" or "Hair." QUERY: how is this consistent with the majority's statement that "Indiana ... has proscribed public nudity across the board"? QUERY further: what is the difference between the nudity here and nudity in a theatrical production such as "Hair" or "Salome"? Is it that the latter involves "the communication of ideas"? What ideas? Is there no idea involved in the performance here? The majority claims that the "minimal clothing" requirement "does not deprive the dance of whatever erotic message it conveys." Therefore QUERY: is an "erotic message" devoid of any "idea"?

CITY OF ERIE et.al. v. PAP'S A.M., tdba "KANDYLAND, " ____ U.S. ____ (2000)

Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A.M. (hereinafter Pap's), which operated a nude dancing establishment in Erie,

challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, although noting that this Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), had upheld an Indiana ordinance that was "strikingly similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the United States Constitution. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

III

Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.

To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson*, 491 U.S. 397, 403 (1989); see also *United States v. O'Brien*, 391 U.S., at 377. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard.

In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." In other words, the Government regulation prohibiting the

destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing.

IV

Applying that standard here, we conclude that Erie's ordinance is justified under O'Brien. The first factor of the O'Brien test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.

In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. would further Erie's interest in preventing such secondary effects.

To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but O'Brien requires only that the regulation further the interest in combating such effects. It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but

the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

The ordinance also satisfies O'Brien 's third factor, that the government interest is unrelated to the suppression of free expression, as discussed [above]. The fourth and final O'Brien factor--that the restriction is no greater than is essential to the furtherance of the government interest--is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis.

Justice Scalia, with whom Justice Thomas joins, concurring in the judgment.

I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. The traditional power of government to foster good morals (bonos mores), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing itself is immoral, have not been repealed by the First Amendment.

Justice Stevens , with whom Justice Ginsburg joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in Barnes with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

I

The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects

is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. Yet it is perfectly clear that in the present case--to use Justice Powell's metaphor in *American Mini Theatres*--the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship.

II

The Court's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." To believe that the mandatory addition of pasties and a G-string will have any kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible.

Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. Indeed, both the text of the ordinance and the reasoning in the Court's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing "precisely because of its communicative attributes."

III

In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater . . . productions such as *Equus*, *Hair*, *O[h!] Calcutta[!]*? Under your ordinance would these things be prevented ... ?" Counsel responded: "No, they wouldn't, Your Honor." Indeed, as stipulated in the record, the city permitted a production of *Equus* to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production.

This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art.... We're talking about what is indecent and immoral.... We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion."

Justice Souter, concurring in part and dissenting in part.

I agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien*, and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings.

Comments and Queries

The precedential importance of this decision was its holding that ordinances of this sort were to be determined according to the *O'Brien* test: "the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service system, and not at suppressing the message of draft resistance ... So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects" QUERY: if the ordinance had prohibited the playing of "rap music" or the showing of non-obscene videos advocating "free love" in order to combat the same "effects," would the *O'Brien* test be equally appropriate? Why or why not? If *O'Brien* were applied, what result?

Note the majority's description of the factual findings of the Erie City Council as made by those with "first hand knowledge," who "can make particularized, expert judgments about the resulting harmful secondary effects." QUERY: is this an example of appropriate, or excessive, judicial deference to legislative findings? Before answering, consider the observations of one Council member, quoted in Justice Stevens' dissent: "We're not talking about theater or art .. We're talking about what is indecent or immoral

..” We’re not prohibiting nudity, we’re prohibiting nudity when it’s used in a lewd and immoral fashion.” QUERY: is this a “content neutral” judgment? Or simply an example of the **Problem of the Wiser Speech**? Compare with Southeast Productions, Ltd. v. Conrad, above at pp. .

Compare the Court’s observation that “requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but O’Brien requires only that that the regulation further the interest in combating such effects” with the holding in Ward v. Rock Against Racism, above at pp. , that “the requirement of narrow tailoring is satisfied ‘so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation’.” QUERY: is O’Brien’s “symbolic speech” test melding with Ward’s “time, place and manner” test? And, QUERY further: is it likely that both may meld into the “narrow tailoring” requirement of “strict scrutiny”? If yes, would that dilute the test as expressed in San Antonio Independent School District v. Rodriguez, above at pp. ?

Finally, QUERY: is it possible that the reasoning of the plurality opinion is simply a more sophisticated means of achieving the more “visceral” decision expressed in the concurring opinion of Justices Scalia and Thomas?

For the separate rationale allowing states and municipalities to ban nudity or sexually explicit performances in places where alcohol is served, see Newport v. Iacobucci, 479 U.S. 92 (1986) and insightful commentaries in Tribe, American Constitutional Law, 2nd ed., 1988, at 478, fn. 15 and 917-918, fn. 89.

THE RIGHT IN CONFLICT WITH THE RIGHTS OF OTHERS

I. Reputation and Privacy

A. Defamation

1. Civil Remedies

Remember that in striking down a state's effort to suppress a newspaper because of its continued attacks on the conduct and integrity of public officials, the Court observed that "[r]emedies for libel remain available and unaffected," Near v. Minnesota, 283 U.S. 697 (1931). And the famous Chaplinsky dictum included "the libelous" among those "narrowly limited classes of speech the prevention and punishment of which has never been thought to raise any Constitutional problem," 315 U.S. 568 (1942). A newspaper advertisement concerning an ugly racial confrontation, occurring at the height of the civil rights struggle, changed all of that.

NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 254 (1964)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

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.

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:

"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."

"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.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Respondent served such a demand upon each of the petitioners. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter.

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.

Because of the importance of the constitutional issues involved, we granted certiorari. 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.

II

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"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust" The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.

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

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. 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. 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. The First Amendment, said

Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C. S. D. N. Y. 1943).

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. 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." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* (1876), p. 571.

Erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," *N.A.A.C.P. v. Button*, 371 U.S. 415, 433.

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. Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards

are not available to the defendant in a civil action. 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 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*, 372 U.S. 58, 70.

The state rule of law is not saved by its allowance of the defense of truth. A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. 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*, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and

effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, supra, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

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

III.

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.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent.

We conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" - although respondent's own proofs tend to show that it was - that opinion was at least a reasonable

one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point - a request that respondent chose to ignore.

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

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

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.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

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. This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech" *Wood v. Georgia*, 370 U.S. 375, 389. The public official certainly has equal if not greater access than most private citizens to media of communication.

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

Comments and Queries

Prior to Sullivan, laws governing defamation – whether libel (in writing) or slander (by the spoken word) – were exclusively within the “police power” of the states and, as set forth in the headnote above, there was no constitutional rule limiting the laws they might choose to enact. Pretty clearly, the Supreme Court “made up” the “Sullivan rule” in response to the specific concerns presented by the case. QUERY: was the Court justified in doing so? Bear in mind that a libel plaintiff can bring suit against a publication “wherever a substantial number of copies are regularly sold and distributed.” Keeton v. Hustler Magazine, Inc., 465 U.S. 770 781 (1984). So, before answering, consider that, without the “Sullivan rule,” fear of huge monetary awards imposed by hostile local juries for minor factual errors would effectively coerce the media into not covering or “slanting” important news. Is this, then, a case of “judicial activism” or a necessary preservation of the First Amendment guarantee of freedom of the press? Or both?

Consider also Justice Hugo Black’s comment, dissenting in Griswold v. Connecticut, 381 U.S. 479, 522 (1965): “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.” In reflecting on Black’s dictum, recall that a constitutional amendment requires approval by two-thirds of both Houses of Congress and ratification by three-quarters of the States. So QUERY: is Sullivan an example of the “constitutional conundrum” in which the problem is grave and immediate but the political process is unable or unwilling to resolve it? Should it make a difference whether the political process is institutionally incapable or simply unwilling to do so? For a classic example of the former, see Baker v. Carr, 369 U.S. 186 (1962), mandating legislative reapportionment when state legislators holding their seats by virtue of misapportioned districts could not reasonably be expected – nor would their “over-represented” constituents tolerate them – to do so voluntarily. For the latter, Brown v. Board of Education, 347 U.S. 483 (1954), requiring desegregation of the public schools after an ongoing “deal” between southern Democrats and farm belt Republicans in the United States Senate maintained the “old” filibuster rule (requiring 67 votes to cut off debate) and, thereby, prevented the passage of civil rights legislation in the decade following World War II.

In any event, notice that this new standard is clear in its definition of “‘actual malice’ – that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”

The rationale for Sullivan was protecting the public interest in news coverage of the activities of public officials. But is the public interest limited to the conduct of its officials? Are there “nonofficial” figures whose activities can have an equally significant effect on public events? The almost obvious answer was given by Chief Justice Warren, concurring in Curtis Publishing Co. v. Butts, 388 U.S. 130, (1967). “All of us agree that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to “public figures” as well as “public officials.”

The next question, of course, was how to define the term. Curtis held that Wally Butts, “the athletic director of the University of Georgia [who] had overall responsibility for the administration of its athletic program,” was a “public figure.” The plurality opinion, which applied as well to the companion case, Associate Press v. Walker, 389 U.S. 28 (1967), accorded the same status to a retired Major General who had been a leader in the resistance to Court ordered integration of the University of Mississippi. He “had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957 ... and had made a number of strong statements against such action which had received wide publicity.” The Court made no effort to formulate an over-arching definition, but observed that “Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements. Whitney v. California, 274 U.S. 357, 377 (Brandeis, J. dissenting).”

Definition by example can go only so far, however, and it was inevitable that the Court attempt a more general definition, which it did in Gertz v. Robert Welch, Inc., immediately below.

An understanding of the cases that follow requires knowledge of the three types of damages available in defamation cases. “Compensatory” or “special” reimburse the plaintiff for monetary losses suffered as a result of the falsehood. “Presumed” are those which cannot be specifically proven but, in the nature of things, “must have been” suffered because of the serious nature of the defamation. The latter is often referred to as libel per se. “Punitive” are imposed regardless of the extent of the plaintiff’s loss – though in most cases there must be some – because the defendant’s conduct was so outrageous as to require punishment by additional damages).

GERTZ v. ROBERT WELCH, INC., 418 U.S. 323 (1974)

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.

I

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.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy,

originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

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[n] action for libel in the United States District Court. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel per se under Illinois law and that consequently petitioner need not plead special damages.

Because some statements in the article constituted libel per se under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded \$50,000 to petitioner.

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.

III

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 Co. v. Sullivan*, 376 U.S., at 270. 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*, 315 U.S. 568, 572 (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, *Debates on the Federal Constitution of 1787*, p. 571 (1876). And punishment 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 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*, *supra*, at 279: "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 infeasible immunity from

liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. 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. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button*, 371 U.S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to 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.

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. As the Court pointed out in *Garrison v. Louisiana*, 379 U.S., at 77, the public's interest extends to "anything which might touch on an official's fitness for office Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public

figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

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*, 388 U.S., at 164 (Warren, C. J., concurring in result). 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. 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.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of

defamatory falsehood on a less demanding showing than that required by New York Times. We endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who established liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

V

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 pervasive 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. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the New York Times standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN concurred.

MR. CHIEF JUSTICE BURGER dissented.

MR. JUSTICE DOUGLAS, dissenting.

I have stated before my view that the First Amendment would bar Congress from passing any libel law. This was the view held by Thomas Jefferson and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798 - a

criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. The general consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment.

With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress.

It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

MR. JUSTICE BRENNAN, dissenting.

I adhere to my view that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

MR. JUSTICE WHITE, dissenting.

For some 200 years - from the very founding of the Nation - the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.

The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by *New York Times*. But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that the ordinary citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher

beyond the circulation to the public of a damaging falsehood. Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

The Court evinces a deep-seated antipathy to "liability without fault." But this catchphrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so - that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom, particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination

that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

I continue to subscribe to the New York Times decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems from its willingness "to sacrifice good sense to a syllogism" - to find in the New York Times doctrine an infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

Recovery under common-law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not "pervasive[ly] involve[d] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," is simply not forbidden by the First Amendment.

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, this trend may provoke a new and radical imbalance in the communications process. It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head.

Comments and Queries

The Court's somewhat disjointed definition seems to be that "public figures" are those "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention ... 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 usually enjoy." QUERY: is this

persuasive? Whether it is or not, does Elmer Gertz qualify under it? Would your answer be different if, in addition to the facts as set forth in the Opinion, he were also the elected President of the Chicago Bar Association? The American Bar Association? Or that year's Chair of the Chicago United Way's multi-million dollar fund drive?

Two subsequent cases illustrated, and perhaps limited, the concept of a "public figure." It did not extend to the socialite wife of a wealthy industrialist in matters concerning their divorce proceedings, Time, Inc. v. Firestone, 424 U.S. 448 (1976). Nor did it include a research scientist who had received almost half a million dollars of federal funding in his suit against a United States Senator who had publicly criticized this as "wasteful spending," Hutchinson v. Proxmire, 443 U.S. 111 (1979).

Notice, also, the Court's observation that "instances of totally involuntary public figures must be exceedingly rare. ... More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." QUERY: is this true? What about people taken hostage by terrorists or common criminals? Accident victims or the victims of crime? Witnesses to crimes or other events of public interest? Perhaps foreseeing these possibilities, the Court later refers to "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Somewhat mirroring the language from Butts quoted above, it held that Gertz was not a public figure because "he did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an effort to influence its outcome." It may have been this sentence that gave rise to the sometimes-made distinction between "thrust" and "vortex" figures, i.e., between those who "voluntarily inject" themselves and those who are "drawn into" the "vortex" of a public issue.

Bear in mind that, while this was a five-to-four decision, the dissents were badly splintered in their rationale. Justice Douglas reiterated his "absolutist" position. Justice Brennan would extend the Sullivan rule to "media reports of the involvement of private individuals in events of public or general interest." Justice White, on the other hand, objects to the Court's holding that state laws may not impose "liability without fault" since this may "force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish." QUERY: with which, if any, of these positions do you agree? Specifically, Justice White seems to place the relative interests of the parties above the public "right to know." QUERY: is this a fair characterization of his position? If so, QUERY further: is the balance he proposes appropriate?

With respect to the imposition of "punitive damages," QUERY: why should they be paid to the plaintiff who has already been compensated for his loss? But if not to the plaintiff, then to whom?

Note, lastly, the decision's most famous sentence: "Under the First Amendment there is no such thing as a false idea." A footnote refers the reader to President Jefferson's first Inaugural Address: "If there be any among us who would wish to

dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” For a “communitarian critique” of this “libertarian viewpoint,” see Jeffrey Abramson and Elizabeth Bussiere, “Free Speech and Free Press: A Communitarian Perspective,” published in Civil Rights and Civil Liberties, David M. O’Brien, ed., 1999.

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS, 472 U.S. 749 (1985)

Notice the increasing sweep of the Court’s requirement of “actual malice.” In Sullivan, it applied only to suits brought by a *public official concerning matters “relating to his official conduct.”* Butts and Walker extended the requirement to “*public figures ... involved in issues in which the public has a justified and important interest.*” At p. . Again the rule applied to the recovery of any damages, although the justices could not agree on the standard of proof required. The plurality of four would have required “a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” At p. The Chief Justice’s concurrence would apply Sullivan’s “actual malice” standard. Gertz adopted the “actual malice” standard, and extended the requirement to *private individuals involved in a matter of “public or general interest,”* but only as to “presumed or punitive damages.” As long “as they do not impose liability without fault,” the states were left free to devise their own standards of proof for the recovery of “actual” or “compensatory” damages.

The remaining question – whether some or all of the Gertz standard should be applied to *private individuals in suits not involving matters of “public or general interest”* – was finally addressed and resolved in the case that follows.

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE REHNQUIST and JUSTICE O’CONNOR joined.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows “actual malice,”

that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of Gertz applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz v. Robert Welch, Inc.*, this Court had ruled broadly that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it.

The Vermont Supreme Court reversed. Recognizing disagreement among the lower courts about when the protections of *Gertz* apply, we granted certiorari.

III

In *New York Times Co. v. Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Noting that "freedom of expression upon public questions is secured by the First Amendment," and that "debate on public issues should be uninhibited, robust, and wide-open," the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false 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." In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e. g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called *American Opinion*, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman

in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

IV

We have never considered whether the Gertz balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was "strong and legitimate." A State should not lightly be required to abandon it.

The First Amendment interest, on the other hand, is less important than the one weighed in Gertz. We have long recognized that not all speech is of equal First Amendment

importance. It is speech on "'matters of public concern'" that is "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). In contrast, speech on matters of purely private concern is of less First Amendment concern. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.

While such speech is not totally unprotected by the First Amendment, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, *Law of Torts* 112, p. 765 (4th ed. 1971). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages - even absent a showing of "actual malice."

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, [461 U.S. 138], 147-148 [(1983)]. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. This particular interest warrants no special protection when - as in this case - the speech is wholly false and clearly damaging to the victim's business reputation. Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report

involves any "strong interest in the free flow of commercial information." There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S., at 771-772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. The market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I continue to believe that *Gertz* was ill-conceived, and therefore agree with JUSTICE WHITE that *Gertz* should be overruled. I also agree generally with JUSTICE WHITE'S observations concerning *New York Times Co. v. Sullivan*. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

JUSTICE WHITE, concurring in the judgment.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "[T]here 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." Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurrently happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a

decidedly weak need to depend on for the vindication of First Amendment interests - "it is the rare case where the denial overtakes the original charge.

Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." Rosenbloom, 403 U.S., at 46-47 (opinion of BRENNAN, J.).

Also, by leaving the lie uncorrected, the New York Times rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The New York Times rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Gertz is subject to similar observations. Although rejecting the New York Times malice standard where the plaintiff is neither a public official nor a public figure, there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge.

Although there was much talk in Gertz about liability without fault and the unfairness of presuming damages, all of this, as was the case in New York Times, was done in the name of the First Amendment, purportedly to shield the press and others writing about public affairs from possibly intimidating damages liability. But if protecting the press from

intimidating damages liability that might lead to excessive timidity was the driving force behind New York Times and Gertz, it is evident that the Court engaged in severe overkill in both cases.

We are not talking in these cases about mere criticism or opinion, but about misstatements of fact that seriously harm the reputation of another, by lowering him in the estimation of the community or to deter third persons from associating or dealing with him. The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact.

The question before us is whether Gertz is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the Gertz holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), to credit reporting - a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law - and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL'S plurality opinion affirming the judgment below would not apply the Gertz limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice - a clear and convincing showing of knowing falsehood or reckless disregard for the truth - should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience.

The question presented here is narrow. Neither the parties nor the courts below have suggested that respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the

requirement of Gertz that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible. Gertz provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of JUSTICE POWELL and JUSTICE WHITE have cut away the protective mantle of Gertz.

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of Gertz. Arguing that at most Gertz should protect speech that "deals with a matter of public or general importance," JUSTICE WHITE, decides that the credit report at issue here falls outside this protected category. The plurality opinion of JUSTICE POWELL offers virtually the same conclusion.

Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," is an important part of our public discourse. The Court made clear in the context of discussing labor relations speech in *Thornhill v. Alabama*, *supra*:

"It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U.S., at 102-103.

The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Bd.*, 425 U.S., at 761. More importantly, an announcement of the bankruptcy of a local company is

information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in *Thornhill*, such a bankruptcy "in a single factory may have economic repercussions upon a whole region." And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record.

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.

Our economic system is predicated on the assumption that human welfare will be improved through informed decision-making. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S., at 20. The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In every case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising - an offer to buy or sell goods and services or encouraging such buying and selling. Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardly dissipates rapidly when the speech is not advertising.

Even if not at "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), the expression at issue in this case is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damages awards.

The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify appropriate regulation designed to prevent the social losses caused by false credit reports. And in the libel context, the States' regulatory interest in protecting reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damages awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, *Greenmoss Builders* should be permitted to recover for any actual damage it can show resulted from *Dun & Bradstreet's* negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages.

Comments and Queries

Notice that Justice White would over-rule *Gertz* and now believes that *Sullivan* "struck an improvident balance between the public's right to be fully informed ... and the competing interest of those who have been defamed to vindicate their reputation." But he does not say that he would over-rule *Sullivan* or how he would modify it so as to rectify the "imbalance." Whether or not you agree with his position, QUERY: what modifying rule could you formulate that would satisfy Justice White' concern?

One of White's two reasons for concurring in the judgment is that he is "unreconciled" to *Gertz*. QUERY: is it appropriate for a Justice to use ongoing disagreement with precedent as a basis for dissent? At what point does the law become sufficiently "settled" that it is used as the basis for decision regardless of personal disagreement with it? The traditional basis for over-ruling precedent has been "historical conditions that may change as the nation develops and occasionally it becomes clear that a legal interpretation of the past was made in error." Walker, Thomas G., "Precedent," in

The Oxford Companion to the Supreme Court, Kermit L. Hall, ed., 1992. Assuming this to be so, QUERY: does Gertz fall within this category? Or does the “traditional” rule simply provide too narrow a basis?

Notice the dissenters’ argument that “announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community” due to the “economic repercussions” it may have and because it would “inform citizens opinions about economic regulations.” Under this reasoning, QUERY: might, by extension, the financial records of any enterprise become matters of “potentially great concern”? If so, QUERY further: what, if any, feasible limits might be placed on the concept of “matters of public interest”? Regardless of your answer to these questions, QUERY: is the argument irrelevant here since Greenmoss Builders was not, and never had been, in bankruptcy? Or is the fact that they might have been sufficient to create the public interest? Remember that in the latter event, negligence in collecting the information would have been an insufficient basis for recovery. Or might the jury have been allowed to find “reckless disregard” for truth inasmuch as Dun & Bradstreet, a reputable and well known reporting agency, had relied on a seventeen year old high school student to review the bankruptcy records?

Take note also of the dissent’s claim that “[i]t is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record.” Yet in Time, Inc. v. Firestone, above, the Court “reject[ed] petitioner’s claim for automatic extension of the New York Times privilege to all reports of judicial proceedings. . . . The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues And while participants in some litigation may be legitimate “public figures,” either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.” At p. . QUERY: is the dissent really suggesting that all litigation is a matter of public concern and all parties are, therefore, “public figures” What about witnesses? Jurors? The lawyers involved? Remember, in this connection, the statement in Gertz, above, that to categorize the plaintiff as “a de facto public official” because of his participation in the civil suit against Officer Nuccio “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.” So, QUERY further: would the dissenters over-rule Gertz and hold that all lawyers are “public officials”? Or, somewhat more narrowly, that those engaged in litigation become, automatically, “public figures”? Would this be a desirable result?

The following year, divided five-to-four, the Court held “that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover

damages without also showing that the statements at issue are false.” Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 769 (1986). Whether the same burden applies in cases involving “nonmedia” defendants remains an open question.

2. Criminal Penalties

“Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained by a judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of publication. The same truthful statement might be the basis of a criminal libel action.” Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967).

The concept goes back almost as far as the Magna Carta. The first libel statute, passed in 1275, penalized “any false news or tales whereby discord ... may grow between the king and his people.” Soon, of course, “falsity” became irrelevant in the application of the law because its purpose was to prevent “discord” not to spread or enhance objective “truth.” By the seventeenth century, the statute was being interpreted to prohibit “written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever.” See Stone, Geoffrey R., Perilous Times: Free Speech in Wartime, 2004, p. 42.

Charges brought under the “seditious Libel” statute were almost impossible to defend. Truth was not a defense and the judge, not the jury, determined whether the statement was libelous. This remained the law in England until 1792, when Parliament approved the “Libel Act” proposed by Charles James Fox, providing that truth was a defense to the charge and that the jury determine whether the material was libelous.

Fortunately, libel laws did not travel well. In the “New World,” with the exception of the infamous prosecution of the printer John Peter Zenger for his unflattering remarks about the British Governor of Massachusetts, they were largely ignored until the Sedition Act of 1798 was passed in the Adams administration. That statute prohibited the “false and malicious writing against the government of the United States, or either house of Congress, or the president, with the intent to defame them or excit[ing] against them .. the hatred of the good people of the United States.” The argument for passage was that it was important to maintain respect for the government during what was widely perceived as an imminent war with France. War was avoided, however, and the Act expired according to its terms in 1801. Thomas Jefferson, by then President, pardoned all those convicted and remitted all fines collected pursuant to it. He had always believed the law unconstitutional, but had been unwilling to challenge it in the courts for fear of encouraging the concept of “judicial review” enunciated in Marbury, which he had always abhorred.

But another type of libel law remained, generally unused, on the books of several states. Apparently concerned with provocation of violence or public disorder, these laws criminalized defamatory statements made against individuals or groups. One of those statutes lay dormant until tested in a case with racial overtones.

BEAUHARNAIS v. ILLINOIS, 343 U.S. 250 (1952)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted upon information in the Municipal Court of Chicago of violating 224a of the Illinois Criminal. He was fined \$200. The section provides:

"It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ."

Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and as too vague, under the restrictions implicit in the same Clause, to support conviction for crime. The Illinois courts sustained defendant's conviction.

The information, cast generally in the terms of the statute, charged that Beauharnais "did unlawfully . . . exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes [sic] citizens of Illinois of the Negro race and color to contempt, derision, or obloquy" The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro" Below was a call for "One million self respecting white people in Chicago to unite" with the statement added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

The testimony at the trial was substantially undisputed. From it the jury could find that Beauharnais was president of the White Circle League; that he passed out bundles of the lithographs to volunteers for distribution on downtown Chicago street corners the following day; that the leaflets were in fact distributed in accordance with his plan and instructions. The court refused to charge the jury, as requested by the defendant, that in order to convict they must find "that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

The Illinois Supreme Court tells us that 224a "is a form of criminal libel law." Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction punish[es] libels directed at individuals. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which 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*, 310 U.S. 296, 309-310." Such were the views of a unanimous Court in *Chaplinsky v. New Hampshire*, *supra*, at 571-572.

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether the protection of "liberty" in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels -- as criminal libel has been defined, limited and constitutionally recognized time out of mind -- directed at designated collectivities and flagrantly disseminated. We cannot say that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of

criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.

We would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. "There are limits to the exercise of these liberties [of speech and of the press]. 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." This was the conclusion, again of a unanimous Court, in 1940. *Cantwell v. Connecticut*.

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues.

We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law.

As to the defense of truth, Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made "with good motives and for justifiable ends." Both elements are necessary if the defense is to prevail. The teaching of a century and a half of criminal libel prosecutions in this country would go by the board if we were to hold that Illinois was not within her rights in making this combined requirement.

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.

We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack. But it bears repeating -- although it should not -- that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

This case is here because Illinois inflicted criminal punishment on Beauharnais for causing the distribution of leaflets in the city of Chicago. The conviction rests on the leaflet's contents, not on the time, manner or place of distribution.

That Beauharnais and his group were making a genuine effort to petition their elected representatives is not disputed. After independence was won, Americans stated as the first unequivocal command of their Bill of Rights: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Without distortion, this First Amendment could not possibly be read so as to hold that Congress has power to punish Beauharnais and others for petitioning Congress as they have here sought to petition the Chicago authorities. And we have held in a number of prior cases that the Fourteenth Amendment makes the specific prohibitions of the First Amendment equally applicable to the states.

In view of these prior holdings, how does the Court justify its holding today that states can punish people for exercising the vital freedoms intended to be safeguarded from suppression by the First Amendment? The prior holdings are not referred to; the Court simply acts on the bland assumption that the First Amendment is wholly irrelevant. It is not even accorded the respect of a passing mention.

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."

MR. JUSTICE REED, with whom MR. JUSTICE DOUGLAS joined, dissented in a separate Opinion.

MR. JUSTICE DOUGLAS, dissenting.

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus.

I would also be willing to concede that even without the element of conspiracy there might be times and occasions when the legislative or executive branch might call a halt to inflammatory talk, such as the shouting of "fire" in a school or a theatre.

My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.

Debate and argument even in the courtroom are not always calm and dispassionate. Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of Beauharnais may be.

MR. JUSTICE JACKSON, dissenting.

In this case, neither the court nor jury found or were required to find any injury to any person, or group, or to the public peace, nor to find any probability, let alone any clear and present danger, of injury to any of these. Even though no individuals were named or described as targets of this pamphlet, if it resulted in a riot or caused injury to any individual Negro, such as being refused living quarters in a particular section, house or apartment, or being refused employment, certainly there would be no constitutional obstacle to imposing civil or criminal liability for actual results. But in this case no actual violence and no specific injury was charged or proved.

The leaflet was simply held punishable as criminal libel per se irrespective of its actual or probable consequences. No charge of conspiracy complicates this case. The words themselves do not advocate the commission of any crime. The conviction rests on judicial attribution of a likelihood of evil results. The trial court, however, refused to charge the jury that it must find some "clear and present danger," and the Supreme Court of Illinois sustained conviction because, in its opinion, the words used had a tendency to cause a breach of the peace.

Punishment of printed words, based on their tendency either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the "clear and present danger" test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities.

Comments and Queries

The basis of Justice Frankfurter's opinion for the majority is that the statute must be upheld "unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." Recall that he dissented alone in West Virginia Board of Education v. Barnette, above at p. , on the ground that the only question legitimately before the Court was "whether legislators could in reason have enacted such a law." The majority explicitly rejected this "rational basis" test because "freedom of speech and press ... may not be infringed on such slender grounds." QUERY: what happened? The obvious answer is that four new justices had joined the Court (Burton in 1945; Vinson, as Chief, in 1946; Clark and Minton in 1949). That accounts for the change in outcome, but what accounts for the failure even to mention Barnette? Its' author dissents, but on a factual analysis leading him to conclude only that the "clear and present danger" test had not been satisfied. Justice Black complains that the majority "simply acts on the bland assumption that the First Amendment is wholly irrelevant." But neither the majority nor any of the dissents comes to grips with the question of whether the "rational basis" test is the appropriate standard in a First Amendment case. So, QUERY again: why not?

The majority brushes aside Jackson's "clear and present danger" analysis because "libelous utterances" are "not within the area of constitutionally protected speech." QUERY: why not? Aside from the Chaplinsky dictum, what is the basis for this claim? The majority opinion continues that "[c]ertainly no one would contend that that obscene speech, for example, may be punished only upon a showing of such circumstances." QUERY again: why? Before answering, remember that Near v. Minnesota, above at pp. , had opined that "obscenity" was one of the three "categories" of speech which might be subjected to prior restraint.

Note that, under the Illinois statute, a successful defense against a charge of criminal libel required not only that the defendant prove the statement was "true," but published "with good motives and for justifiable ends." Twenty years before, in Near, the Court had cited just such a requirement as one of the infirmities of Minnesota's "gag law" of the press. **Query:** Why should the requirement be anymore acceptable here than it was there? Is the distinction between "prior restraint" and "subsequent punishment" a sufficient distinction?

Notice Justice Douglas' attempt to distinguish between "conduct directed at a race or group" which "aimed at destroying [it] by exposing it to contempt, derision and obloquy" with his condemnation of speech having the same purpose. **Query:** would such "conduct," which Douglas refers to as "speech plus," be protected under the doctrine of "symbolic speech"? Could the "Skokie" decisions, see above at pp. , survive such a distinction?

Remember that in both American Booksellers Association, Inc. v. Hudnut, above at pp. , and Collin v. Smith, above at pp. , the 7th Circuit Court of Appeals expressed the view that subsequent decisions, Sullivan in particular, had undermined Beauharnais' authority as precedent. After reading the case, **Query:** is the 7th Circuit correct? Before answering , consider that Justice Blackman, joined by then Justice Rhenquist, dissented from the refusal to stay the order of the Court of Appeals in Colin, observing that "Beauharnais has never been overruled or formally limited in any way." Smith v. Colin, 436 U.S. 953 (1978).

GARRISON v. LOUISIANA, 379 U.S. 64 (1964)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant is the District Attorney of Orleans Parish, Louisiana. During a dispute with the eight judges of the Criminal District Court of the Parish, he held a press conference at which he issued a statement disparaging their judicial conduct. As a result, he was tried without a jury before a judge from another parish and convicted of criminal defamation under the Louisiana Criminal Defamation Statute. The principal charges alleged to be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and his accusation that, by refusing to authorize disbursements to cover the expenses of undercover investigations of vice in New Orleans, the judges had hampered his efforts to enforce the vice laws. In impugning their motives, he said:

"The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints This raises interesting questions about the racketeer influences on our eight vacation-minded judges."

The Supreme Court of Louisiana affirmed the conviction. We reverse.

In *New York Times Co. v. Sullivan*, we held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." At the outset, we must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.

We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times* apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "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." *New York Times Co. v. Sullivan*, 376 U.S., at 270.

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the

Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class 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*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

We find no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the New York Times rule. As the Louisiana Supreme Court viewed the statement, it constituted an attack upon the personal integrity of the judges, rather than on official conduct.

We do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation. The accusation concerned the judges' conduct of the business of the Criminal District Court. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Applying the principles of the New York Times case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials. For, contrary to the New York Times rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with "actual malice." And "actual malice" is defined in the decisions below to mean "hatred, ill will or enmity or a wanton desire to injure" The statute is also unconstitutional as interpreted to cover false statements against public officials. The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth.

Reversed.

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

I believe that the First Amendment, made applicable to the States by the Fourteenth, protects every person from having a State or the Federal Government fine, imprison, or assess damages against him when he has been guilty of no conduct other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now and not wait to hold later that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.

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

Beauharnais v. Illinois, a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think little need be added to what Mr. Justice Holmes said nearly a half century ago:

me "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." Abrams v. United States, 250 U.S. 616, 630 (dissenting opinion).

The philosophy of the Sedition Act of 1798 which punished "false, scandalous and malicious" writings is today allowed to be applied by the States. Yet seditious libel was "entirely the creation of the Star Chamber."* It is disquieting to know that one of its instruments of destruction is abroad in the land today.

MR. JUSTICE GOLDBERG, concurring.

I agree with the Court that there is "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials" In *New York Times Co. v. Sullivan*, I expressed my conviction "that the Constitution accords citizens and press an unconditional freedom to criticize official conduct." *New York Times* was a civil libel case; this is a criminal libel prosecution. In my view, "[i]f the rule that libel on government has no place in our Constitution is to have real meaning, then libel [criminal or civil] on the official conduct of the governors likewise can have no place in our Constitution."

*Irving Brandt, "Seditious Libel: Myth and Reality," 39 N. Y. U. L. Rev. 1, 11. "What is called today the common law doctrine of seditious libel is in fact the creation of the Court of Star Chamber, the most iniquitous tribunal in English history. It has been injected into the common law solely by the fiat of Coke and by subsequent decisions and opinions of English judges who perpetuated the vicious procedures by which the Star Chamber stifled criticism of the government and freedom of political opinion. If seditious libel has any genuine common-law affiliation, it is by illegitimate descent from constructive treason and heresy, both of which are totally repugnant to the Constitution of the United States."

Comments and Queries

Notice the somewhat odd statement in the majority opinion: "The reasons which led us to so hold in *New York Times* apply with no less force merely because the remedy is criminal." (emphasis supplied) QUERY: is this just loose language, or is the Court suggesting that criminal remedies might be considered as less severe than civil ones? Compare this with *Commonwealth v. Armao*, 446 Pa. 325 (1972), invalidating a similar statute as applied to the libel of the Associate Editor of the liquor trade tabloid "Observer": "Only a knowing falsity or reckless disregard of the truth are actionable in civil defamation. It would violate all sound and fundamental principles of justice to have a merely negligent statement an occasion for the imposition of criminal penalties, and the First Amendment as interpreted by the Supreme Court of the United States forbids such a result." The editor was a "private" figure, but the subject matter of the libel contained charges of corruption in the state government. QUERY: do you think the ruling would have been different had the subject not been a matter of "public concern"?

More importantly, the Garrison majority does not mention Beauharnais. QUERY: why not? The clear implication is that criminal libel statutes remain constitutional as long as they provide appropriate evidential standards. The three dissents would overrule Beauharnais, Justice Douglas quoting the famous Holmes phrase that "[h]istory seems .. against the notion" that laws criminalizing seditious libel are consistent with the First Amendment. So QUERY further: doesn't the majority have an obligation to state either that, as modified, Beauharnais is re-affirmed or that the question is intentionally left open? Does their failure to do so cast doubt on the 7th Circuit's subsequent statements in

Hudnut and Colin v. Smith that Beauharnais is longer authoritative? In answering , consider that Justice Blackman, joined by then Justice Rhenquist, dissented from the refusal to stay the order of the Court of Appeals in Colin, observing that “Beauharnais has never been overruled or formally limited in any way.” Smith v. Colin, 436 U.S. 953 (1978).

B. Privacy

1. “False light” depictions

In 1890, Samuel Warren and (later Justice) Louis D. Brandeis published a groundbreaking article in the Harvard Law Review. Entitled “The Right to Privacy,” it claimed, for the first time, that individuals should have the right to sue in the civil courts (i.e. there should be a “tort”) for the “invasion” of their private affairs or the unwanted and unjustified dissemination of their images. 4 Harv.L.Rev. 193.

Over the years, the “invasion of privacy” concept branched into four specific torts: “intrusion into the plaintiff’s private affairs, public disclosure of non-newsworthy facts the plaintiff would have preferred to keep secret, publicly placing the plaintiff in a false light, and appropriation of the plaintiff’s name or likeness.” Sullivan and Gunther, First Amendment Law, 2nd ed., 2003, at 86. The inevitable question was whether and, if so, when and to what extent, the First Amendment imposed limitations on the recovery of damages for these civil wrongs.

TIME, INC. v. HILL, 385 U.S. 347 (1967)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether appellant, publisher of Life Magazine, was denied constitutional protections of speech and press by the application by the New York courts of the New York Civil Rights Law to award appellee damages on allegations that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

The article appeared in Life in February 1955. It was entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The text of the article reads as follows:

see "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year

will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.

"The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

The pictures on the ensuing two pages included an enactment of the son being "roughed up" by one of the convicts, entitled "brutish convict," a picture of the daughter biting the hand of a convict to make him drop a gun, entitled "daring daughter," and one of the father throwing his gun through the door after a "brave try" to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts in their suburban, Whitmarsh, Pennsylvania, home for 19 hours on September 11-12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, Joseph Hayes' novel, *The Desperate Hours*, was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family's suburban home. But, unlike Hill's experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled *The Desperate Hours*, and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages on allegations that the Life article was intended to, and did, give the impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant ". . . was false and untrue." Appellant's defense was that the article was "a subject of legitimate news interest," "a subject of general interest and of value and concern to the public" at the

time of publication, and that it was "published in good faith without any malice whatsoever ... " A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee \$50,000 compensatory and \$25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. At the new trial on damages, a jury was waived and the court awarded \$30,000 compensatory damages without punitive damages. The New York Court of Appeals affirmed.

We have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court's construction of the statute. It is the opinion of Judge Keating for the court in *Spahn v. Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543 (1966). The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson v. Rochester Folding Box Co.* Roberson was an action against defendants for adorning their flour bags with plaintiff's picture without her consent. It was grounded upon an alleged invasion of a "right of privacy," defined by the Court of Appeals to be "the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers" The Court of Appeals traced the theory to the celebrated article of Warren and Brandeis. The Court of Appeals, however, denied the existence of such a right at common law but observed that "[t]he legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." The legislature enacted [this statute] in response to that observation.

The New York courts have, however, construed the statute to operate much more broadly. In *Spahn* the Court of Appeals stated that "Over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose" Specifically, it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions

under the statute have tended to limit the statute's application. It is particularly relevant that the Court of Appeals made crystal clear in the Spahn opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. The opinion states: "The factual reporting of newsworthy persons and events is in the public interest and is protected." 18 N. Y. 2d, at 328, 221 N. E. 2d, at 545.7 Constitutional questions which might arise if truth were not a defense are therefore of no concern.

But although the New York statute affords "little protection" to the "privacy" of a newsworthy person, "whether he be such by choice or involuntarily" the statute gives him a right of action when his name, picture, or portrait is the subject of a "fictitious" report or article."

As the instant case went to the jury, appellee, too, was regarded to be a newsworthy person "substantially without a right to privacy" insofar as his hostage experience was involved, but to be entitled to his action insofar as that experience was "fictionalized" and "exploited for the defendants' commercial benefit."

We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the Spahn opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE HARLAN, concurred in part and dissented in part.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE CLARK join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York "Right of Privacy" statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiffs could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the appellee is entitled to a new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial.

Privacy is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection. Particularly where the right of privacy is invaded by words - by the press or in a book or pamphlet - the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the

alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and are entitled to at least the types of protection that this Court extended in *New York Times Co. v. Sullivan*. But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that while the Court gives lip service to this principle, its decision, which it claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York "Right of Privacy" statute because of the "failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." In my opinion, the jury instructions, although they were not a textbook model, satisfied this standard.

Comments and Queries

While not of constitutional dimensions, the initial QUERY seems to be: "\$30,000 in compensatory damages for what"? The "false light" in which Life cast Hill did not defame him in any accepted sense of that term. If any one was defamed, it was the escaped convicts accused of brutality when, in fact, they had treated the family "courteously." The Hills were depicted as behaving courageously in a brutal situation. If, on the other hand, this is simply an "invasion of privacy" case – there was ample evidence that the Hill family had gone to substantial lengths to avoid any publicity regarding these events – why is the "false light" discussion relevant?

The Court adopts the Sullivan "actual malice" standard even though Hill was arguably a private person or, at most, a "vortex" public figure, involuntarily drawn into a matter of public interest. As we have seen, Gertz modified Sullivan by allowing private individuals to recover compensatory damages "on a less demanding standard." So, QUERY: does Gertz accordingly modify Hill? But, QUERY: is James Hill a "private figure"? If so, why? Because the traumatic events of September 11th-12th were not of public interest? Or because of his subsequent efforts to withdraw from public attention?

It is important to note that the Warren and Brandeis article did not suggest the privacy right had a constitutional basis. That claim arose for the first time in the "contraceptive" case, Griswold v. Connecticut, 381 U.S. 479 (1965). "Largely as a result of this article, some States have passed statutes creating such a cause of action, and in

others state courts have done the same thing by exercising their powers as courts of common law. ... Observing that "the right of privacy . . . presses for recognition here," today this Court ... now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.'" Black, J. dissenting at 527.

2. Parodies

HUSTLER MAGAZINE v. FALWELL, 485 U.S. 46 (1988)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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 action 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. On appeal, the Court of Appeals affirmed.

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.

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." *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times* [infra] at 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts [485 U.S. 46, 52] to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

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*, 376 U.S. 254 (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." 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 counterspeech, 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. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

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.

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. As we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978):

"[T]he 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." *Id.*, at 745-746.

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." 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.

*Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986-1987).

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan* has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

Comments and Queries

No one disputes Reverend Falwell was both defamed and cast in a "false light" by the "parody advertisement," and it was equally undisputed that the publisher was motivated by "actual malice." (See the extract from the deposition of Larry Flynt reprinted in Van Alstyne, *The American First Amendment in the Twenty-First Century*, 3rd ed., 2002, p 220.) Yet he could recover no damages for defamation because the allegations were so outrageous that, as the jury found, no one would take them seriously and, therefore, he suffered no loss of reputation or standing in the community. That is the standard for actual damages. QUERY: should he have been able to recover "punitive" damages based not on the "outrageousness" of the libel but the clear malice behind it?

But, as noted above, it is generally required that some actual damage exist before punitive damages can be imposed. QUERY: should that requirement be waived in cases such as this? Before answering, bear in mind the Court's comment that "[f]alse statements of fact are particularly valueless." Why should not someone who makes such statements, with actual malice, be "punished" for making them? If you believe they should, QUERY further: is the disclaimer "not to be taken seriously" enough to remove the malice?

Likewise, Falwell could not recover for invasion of "privacy" because he was, admittedly, a "public figure," who, like the plaintiff in Walker v. Associated Press, above at p. , had achieved that status by the "thrusting of his personality into the 'vortex' of an important public controversy." That conclusion seems unexceptionable, but QUERY: why should it also prevent recovery for "intentional infliction of emotional distress? Is the Court's concern that any such rule would sweep within it valuable political caricatures – like the famous cartoons with which Nash attacked the "Tweed Ring" – sufficiently persuasive? Can you articulate a "principled standard to separate one from the other"?

The Court rejects "outrageousness" because it would allow the jury to impose liability based on their personal "tastes," "views" or "dislike of a particular expression." QUERY: doesn't the "community standards" criterion by which juries are told to determine obscenity pose the same danger? If so, QUERY further: are the "political" implications of this particular "parody" a sufficient distinction?

THE FLORIDA STAR v. B. J. F., 491 U.S. 524 (1989)

JUSTICE MARSHALL delivered the opinion of the Court.

Florida [law] makes it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense. Pursuant to this statute, appellant The Florida Star was found civilly liable for publishing the name of a rape victim which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not.

The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject

we have addressed several times in recent years.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), we found unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records. Appellant takes the position that this case is indistinguishable from *Cox Broadcasting*.

Alternatively, it urges that our decisions in which we have held that the right of the press to publish truth overcame asserted interests other than personal privacy, can be distilled to yield a broader First Amendment principle that the press may never be punished, civilly or criminally, for publishing the truth. Appellee counters that [these cases are] inapposite, because in each case the private information already appeared on a “public record,” and because the privacy interests at stake were far less profound than in the present case. In the alternative, appellee urges that *Cox Broadcasting* be overruled and replaced with a categorical rule that publication of the name of a rape victim never enjoys constitutional protection.

We conclude that imposing damages on appellant for publishing B. J. F.'s name violates the First Amendment, although not for either of the reasons appellant urges. Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which JUSTICE WHITE's opinion for the Court repeatedly noted. Significantly, one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

In our view, this case is appropriately analyzed with reference to a limited First Amendment principle, which we articulated in [*Smith v.*] *Daily Mail [Publishing Co.]*, 443 U.S. 97 (1979): “[I]f 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." 443 U.S., at 103.

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under the facts of this case.

JUSTICE SCALIA, concurred in part and concurred in the judgment.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

At issue in this case is whether there is any information about people, which - thought true - may not be published in the press. By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.

Of course, the right to privacy is not absolute. Even the article widely relied upon in cases

vindicating privacy rights, Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), recognized that this right inevitably conflicts with the public's right to know about matters of general concern - and that sometimes, the latter must trump the former. Resolving this conflict is a difficult matter, and I fault the Court not for attempting to strike an appropriate balance between the two, but rather, fault it for according too little weight to B. J. F.'s side of equation, and too much on the other.

Comments and Queries

If not the privacy interest involved here, QUERY: what do you think the Court would consider to be a "state interest of the highest order" sufficient to justify punishment for the publication of "truthful information .. lawfully obtained"? Matters concerning national security? Remember Justice White's observation in New York Times Co. v. United States that "would have no difficulty in sustaining convictions .. on facts that would not justify .. the imposition of a prior restraint." Does any other "interest" come to mind?

QUERY ALSO: how far would the logic of the dissent extend? To all persons who claim to be the victims of crime? If not, where should the line be drawn between sexual offenses and those that would be embarrassing to the victim? ("I don't want people to know I was robbed"? Or "Beat up"?) Or is the line simply a matter of legislative judgment to which the Court should defer?

And further QUERY: is such a legislative judgment, no matter where the line is drawn, at odds with the "presumption of innocence" to which the accused is entitled, In re Winship, 397 U.S. 358 (1970). At a minimum, the commission of the crime is always an element of the offense which must be proved if the defendant is to be convicted. By affording the "victim" status as such, does the law already acknowledge that a crime was, in fact, committed? Is this especially problematic when one of the elements of the crime, as in rape, is lack of consent? By stamping the accuser as "victim," does the law not presuppose that there was no consent?

Lastly, with specific reference to the case which follows, should the result be different if the publisher knew, or had reason to know, the information had not been "lawfully obtained" in the first place?

4. Publication of illegally obtained material

BARTNICKI et al. v. VOPPER, aka WILLIAMS, et al., ____ U.S. ____ (2001)

Justice Stevens delivered the opinion of the Court.

The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know -- or at least had reason to know -- that the interception was unlawful. Accordingly, these cases present a conflict between interests of the highest order -- on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech.

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at the Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board. Petitioner Kane, then the president of the local union, testified that the negotiations were "contentious" and received "a lot of media attention". In May 1993, petitioner Bartnicki, who was acting as the union's "chief negotiator," used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of the negotiations. An unidentified person intercepted and recorded that call.

In their conversation, Kane and Bartnicki discussed the timing of a proposed strike, difficulties created by public comment on the negotiations, and the need for a dramatic response to the board's intransigence. At one point, Kane said: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news."

In the early fall of 1993, the parties accepted a non-binding arbitration proposal that was generally favorable to the teachers. In connection with news reports about the settlement, respondent Vopper, a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show. After filing suit against Vopper and other representatives of the media, Bartnicki and Kane learned through discovery that Vopper had obtained the tape from Jack Yocum, the head of a

local taxpayers' organization that had opposed the union's demands throughout the negotiations. Yocum testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum later delivered the tape to Vopper.

In the Electronic Communications Privacy Act of 1986, Congress prohibit[ed] the interception of “electronic” as well as oral and wire communications. [The statute] applies to the interception of conversations over both cellular and cordless phones.

We accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents “had reason to know” that it was unlawful. Accordingly, the disclosure of the contents of the intercepted conversation by Yocum to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and state statutes. Under the provisions of the federal statute, as well as its Pennsylvania analog, petitioners are thus entitled to recover damages from each of the respondents. The only question is whether the application of these statutes in such circumstances violates the First Amendment.

First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena -- during a bargaining session, for example -- they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

As a general matter, “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97, 102 (1979). More specifically, this Court has repeatedly held 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 . . . of the highest order.”

The Government identifies two interests served by the statute -- first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition against the interceptor's own use of information that he or she acquired by violating [the statute], but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

The Government's second argument, however, is considerably stronger. Privacy of communication is an important interest, and [these] restrictions are intended to protect that interest, thereby “encouraging the uninhibited exchange of ideas and information among private parties” Moreover, the fear of public disclosure of private conversations might well have a chilling effect on private speech.

Accordingly, it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.

We need not decide whether that interest is strong enough to justify the application of [the statute] to disclosures of trade secrets or domestic gossip or other information of purely private concern. In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: “The right of privacy does not prohibit any publication of

matter which is of public or general interest.” *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern. That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v. California*, but it is no less worthy of constitutional protection.

Justice Breyer, with whom Justice O'Connor joins, concurring.

I join the Court's opinion because I agree with its “narrow” holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely a threat of potential physical harm to others. I write separately to explain why, in my view, the Court's holding does not imply a significantly broader constitutional immunity for the media.

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, dissenting.

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations. In an attempt to prevent some of the most egregious violations of privacy, the United States, the District of Columbia, and 40 States have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications. The Court holds that all of these statutes violate the First Amendment insofar as the illegally intercepted conversation touches upon a matter of

“public concern,” an amorphous concept that the Court does not even attempt to define. But the Court's decision diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.

Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect. It is estimated that over 20 million scanners capable of intercepting cellular transmissions currently are in operation, notwithstanding the fact that Congress prohibited the marketing of such devices eight years ago.

The “dry up the market” theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime, is neither novel nor implausible. It is a time-tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods. We ourselves adopted the exclusionary rule based upon similar reasoning, believing that it would “deter unreasonable searches,” *Oregon v. Elstad*, 470 U. S. 298, 306(1985), by removing an officer's “incentive to disregard [the Fourth Amendment],” *Elkins v. United States*, 364 U. S. 206, 217 (1960).

The same logic applies here and demonstrates that the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications. Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. The law against interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions.

These statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications. Over a

century ago, Samuel Warren and Louis Brandeis recognized that “[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual”. *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). “There is necessarily, and within suitably defined areas, a ... freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 559. One who speaks into a phone “is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” *Katz v. United States*, 389 U. S. 347, 352 (1967).

Surely “the interest in individual privacy,” at its narrowest must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations. The Court subordinates that right, not to the claims of those who themselves wish to speak, but to the claims of those who wish to publish the intercepted conversations of others. Congress’ effort to balance the above claim to privacy against a marginal claim to speak freely is thereby set at naught.

Comments and Queries

II. Fair, Speedy and Public Trial

A. Criminal Trials

The most significant of the powers not delegated to the Federal Government, and thus reserved to the States, was that known to the common law as the “police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people” Barbier v. Connolly, 113 U.S. 27, 32 (1884). Most prominent among these powers is to define unlawful conduct (“crimes”) and to enforce the resulting penal code by establishing a system of criminal courts and providing procedures for their operation. That system is, however, subject to constitutional limitations, including the First Amendment’s guarantee of “free speech” made applicable to the states through the “due process” clause of the Fourteenth.

The two cases that follow arose from labor disputes. In Times-Mirror, two union members had been convicted of assaulting non-union truck drivers, and their sentencing was pending. In Bridges, the elected leader of the west coast longshore union sent a telegram to the United States Secretary of Labor, threatening a strike at all of the west coast ports of entry if a pending motion for a new trial in a labor case was not resolved in the union’s favor.

BRIDGES v. CALIFORNIA, 314 U.S. 252 (1941)
(Together with Times-Mirror Co. v. Superior Court of California)

Mr. Justice BLACK delivered the opinion of the Court.

All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. [P]etitioners [have] challenged the state’s action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press.

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.

Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing editor were cited for contempt for the publication of three editorials. The [most serious] was entitled 'Probation for Gorillas?'. After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting non-union truck drivers, it closes with the observation: 'Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.'

The basis for punishing the publication as contempt was by the trial court said to be its 'inherent tendency' and by the [California] Supreme Court its 'reasonable tendency' to

interfere with the orderly administration of justice in an action then before a court for consideration. In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise. With respect to [the other] two editorials ... [w]e are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible, and that the Constitution compels us to set aside the convictions as unpermissible exercises of the state's power.

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an A.F. of L. union and a C.I.O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as 'outrageous' and said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C.I.O. union, representing some twelve thousand members, did 'not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board.' Apparently Bridges' conviction is not rested at all upon his use of the word 'outrageous.' The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of

the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even 'tended' to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible.

Mr. Justice FRANKFURTER, with whom concurred the CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice BYRNES, dissenting.

To be sure, the majority do not in so many words hold that trial by newspapers has constitutional sanctity. But the atmosphere of their opinion and several of its phrases mean that or they mean nothing.

Here the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the 'clear and present danger' test gives rise. 'It is a question of proximity and degree.' *Schenck v. United States*, 249 U.S. at page 52.

The third [Times-Mirror] editorial was published three days after the trial judge had fixed the time for sentencing. [I]t demanded that he take the latter alternative and send the defendants to the 'jute mill' of the state penitentiary. A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious

mistake'. Clearly, the state court was justified in treating this as a threat to impartial adjudication. California should not be denied the right to free its courts from such coercive, extraneous influences; it can thus assure its citizens of their constitutional right of a fair trial. Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice.

The publication of the [Bridges] telegram was regarded by the state supreme court as 'a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up' and 'a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision'. It would be inadmissible dogmatism for us to say that in the context of the immediate case -- the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made -- this could not have dominated the mind of the judge before whom the matter was pending. Here too the state court's judgment should not be overturned.

Comments and Queries

QUERY: did either the "Gorillas" editorial or the Bridges telegram constitute a "clear and present danger" to the impartial administration of justice? Before answering, consider Toledo Newspaper Co. v. U.S., 247 U.S. 402, 424 (1918), over-ruled in Nye v. United States, 313 U.S. 33, 52 (1941), affirming a contempt conviction on the ground that a series of news stories, editorials and a cartoon had a "reasonable tendency" to influence the rulings of the judge in a long-standing dispute concerning the operation of the city transit system. Justice Holmes dissented on the ground that "a judge of the United States is expected to be a man of ordinary firmness of character and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

As to the Bridges' telegram, the Secretary of Labor clearly had no authority to intervene in a California lawsuit and it would have been improper, and probably illegal, for him to attempt to influence its outcome. QUERY, then, what could have been Bridges' purpose in sending or publishing the telegram other than to influence public opinion and, through it, the Court's decision? See McCloskey, *The Modern Supreme Court* 15 (1972), cited in Tribe, American Constitutional Law, 2nd ed., 1988, p. 856-857, fn.1: "if Bridges' threat to cripple the economy of the entire West Coast did not present

clear and present danger, then the lesson of the case must be that almost nothing said outside the courtroom is punishable as contempt.”

Independent of the specific guarantees of the First Amendment, the Fourteenth provides the basis for at least limited federal supervision of the state criminal process since “if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.” Frank v. Magnum, 237 U.S. 309, 335 (1915). Yet, citing the “relations between the states and the Federal government,” the Supreme Court affirmed a refusal to issue a writ of habeas corpus notwithstanding substantial evidence that those very conditions had existed throughout the murder trial of Leo Frank, a Jewish factory owner from New York, accused of murdering a thirteen year old female employee in a small Georgia town. As it developed, however, both the Trial Judge and the State’s Governor came to believe that the defendant was, very likely, innocent. But the judge died before he could order a new trial, and the Governor felt the situation to be so dangerous that he was unable to do more than direct the defendant’s transfer to a prison farm from which he might be pardoned and then leave the state in safety. While at the farm awaiting pardon, Frank was kidnapped and lynched.

It may well have been as a result of these nationally publicized events (much later dramatized in a well-received television production entitled “The Death of Mary Fagan”), that the federal courts began to be more active in considering 14th Amendment claims. In the first of these, the Supreme Court directed the District Court to hold a habeas hearing to determine the truth of claims that “there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.” Moore v. Dempsey, 261 U.S. 85, 90 (1923).

A writ of habeas corpus (“the Great Writ”) “orders the person who is responsible for the detention – for example, the warden or jailer – to produce the petitioner (that is the body or corpus) quickly, in court, so that a judge may determine the lawfulness of the detention.” David Fellman, “Habeas Corpus” in The Oxford Companion to the Supreme Court, Kermit L. Hall, ed., 1992, at 357.

Given the precedent of Dempsey and other “lynch law” decisions, the federal courts were increasingly drawn into a series of cases (some by direct appeal from the highest court of a State and some by habeas) requiring them to determine the extent to which “outside pressures” had operated to deprive a criminal defendant of their 14th Amendment right to the “due process of law.”

In the decade following World War II, the nature of these “pressures” changed dramatically. Just as “mob domination” dwindled, media coverage of criminal trials became increasingly pervasive. The Robert Considine and Walter Winchell mentioned in the following case were nationally known radio personalities. Winchell’s fifteen minute Sunday night radio news and commentary (“Good evening Mr. and Mrs. North and South America and all the ships at sea .. let’s go to press”) was probably the most listened-to program in the United States.

SHEPPARD v. MAXWELL, 384 U.S. 333 (1966)

MR. 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. We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment.

I.

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 the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a “form” standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and “felt that she was gone.” He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a “form” running out the door and pursued

it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn." Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, "Get hold of yourself. Can you tell me what happened?" Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns.

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 Sheppard 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 publicity then grew in intensity until his indictment on August 17.

II.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor,

including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper and television accounts.

At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered -- while the jurors were at lunch and sequestered by two bailiffs -- the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer" The two brothers of the accused were described as "Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author -- through quotes from Detective Chief James McArthur -- assured readers that the prosecution's exhibits would speak for Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses."

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

“Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury”

6. On November 24, a story appeared under an eight-column headline: “Sam Called A ‘Jekyll-Hyde’ By Marilyn, Cousin To Testify.” It related that Marilyn had recently told friends that Sheppard was a “Dr. Jekyll and Mr. Hyde” character. No such testimony was ever produced at the trial. The story went on to announce: “The prosecution has a ‘bombshell witness’ on tap who will testify to Dr. Sam's display of fiery temper - countering the defense claim that the defendant is a gentle physician with an even disposition.” Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: “Would that have any effect upon your judgment?” Both replied, “No.” This was accepted by the judge as sufficient; he merely asked the jury to “pay no attention whatever to that type of scavenging. . . . Let's confine ourselves to this courtroom, if you please.”

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: “‘Bare-faced Liar,’ Kerr Says of Sam.” Captain Kerr never appeared as a witness at the trial.

IV.

The principle that justice cannot survive behind walls of silence has long been reflected in the “Anglo-American distrust for secret trials.” *In re Oliver*, 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial

administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). And where there was "no threat or menace to the integrity of the trial," *Craig v. Harney*, *supra*, at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

"Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). 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." *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (BLACK, J., dissenting). Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U.S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." Likewise, in *Irvin v. Dowd*, 366 U.S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion"

Only last Term in *Estes v. Texas*, 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

“It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”

V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike *Estes*, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The *Estes* jury saw none of the television broadcasts from the courtroom. On the contrary, the 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.

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.

The press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. 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. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. 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 judgeships.

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." 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.

VI

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.

VII

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.

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.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. 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.

MR. JUSTICE BLACK dissents.

Comments and Queries

The dilemma of this and the cases that follow can be summarized in one sentence: “[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them,” Times-Mirror Co. v. Superior Court of California, 314 U.S. 252, 259 (1941). QUERY: did the Court make the right “choice” here? In answering, is it relevant that after a relatively brief and uneventful retrial, Sheppard was acquitted?

Sheppard’s conviction was initially affirmed by the Ohio appellate courts, and it was a decade before his habeas petition was entertained in the federal courts. See Brown v. Allen, 344 U.S. 443 (1953), authorizing the federal courts to review all of a petitioner’s constitutional claims. Thereafter, the number of petitions filed and granted increased exponentially. Perhaps in response, Stone v. Powell, 428 U.S. 465 (1976), citing the “societal cost” of freeing guilty defendants as well as federalism concerns, modified Brown by holding that “where the State ... has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial.” QUERY: was Allen wisely decided? Was Powell? Note that Sheppard did not turn on any “search and seizure” issues and,

therefore, the limiting of the habeas power in Powell would not have affected its grant here.

Since the Supreme Court believed that measures within the Judge's control – a change of venue, jury sequestration, imposing a “gag order” on the parties, counsel and “other officers of the court,” and maintaining a sense of decorum in the courtroom and its environs – would have been sufficient to provide a fair trial, it did not “consider what sanctions might be available against recalcitrant press.” QUERY: can you imagine situations in which these measures might not be enough? Had he lived, the trial of Lee Harvey Oswald for the murder of President Kennedy? Were he captured and returned here for prosecution, the trial of Osama bin Ladin? If so, QUERY further: what then? One possibility might be to close the trial proceedings. But see Richmond Papers, immediately below. And even if allowed, closure would do nothing to combat the type of inflammatory news stories and broadcasts which contaminated Sheppard. An effective sequestration would insulate the jury once the trial began. But could even the most searching voir dire guarantee that the jurors had not been influenced by prior publicity? Especially in a retrial, where the jurors would have been exposed to the material from which the first jury had been sequestered? Normally, a change of venue, especially if coupled with a delay of the trial, might be expected to remedy the situation. But a state cannot hold a criminal trial outside its borders. What if the state is geographically small or entirely saturated by one media market? In any event, is it fair to put the defendant to the Hobson's choice of “go to trial now and risk the prejudicial publicity” or “even though presumed innocent of a nonbailable offense (which murder is in almost all states), stay in jail until the publicity dissipates”?

All of which would suggest conceivable circumstances under which “sanctions” against the media might have to be considered. If so, QUERY further: how could they be imposed? Even in the unlikely event that a trial judge might constitutionally impose a prior restraint on media within the Court's jurisdiction, what could be done about telecasts or broadcasts originating in another state? The cable news networks? The internet? Before dismissing all these questions as far-fetched, consider again the exemplar questions. So, ultimately QUERY: might the result be that the more heinous and notorious a crime, the less likely that a fair trial can be obtained? In such an event, would the Supreme Court's likely response be to affirm a conviction on the ground that “the system has done the best that it can”? If not, why not?

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) involved the murder of six members of one family in a rural community of approximately 850 people. The trial judge entered an order “restraining the petitioners from publishing or broadcasting ... (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.” Such an order obviously constitutes a “prior restraint.” The Supreme Court found it to be

unconstitutional because “[w]e 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. ... 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.”

Three years later, a severely fractured Court held, five-to-four, that a state court trial judge had properly closed a pre-trial suppression hearing on the admissibility of an incriminating statement made to the police in a murder case, Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The five justice majority (Stewart, who wrote, Burger, C.J., Powell, Rhenquist and Stevens) referred to previous cases which “uniformly recognized the public-trial guarantee as one created for the benefit of the defendant” and held “that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.” They specifically “d[id] not decide” whether the First and Fourteenth Amendments afforded such a right to the “press.” But the Chief Justice concurred separately to stress that “pretrial positions are exactly that” and not part of the “trial” itself. Justice Powell would have held “explicitly that petitioner’s reporter had an interest protected by the First and Fourteenth Amendments in being present ... as an agent of the public at large.” Justice Rhenquist wrote separately to stress his view that neither the First nor the Sixth Amendments provided any such right in either the public or the press. The four justices in the minority (Blackmun, writing on behalf of himself and Brennan, White and Marshall) believed that the Sixth Amendment “may implicate interests beyond those of the accused ... [and that the] ... public trial provision applies to [a suppression] hearing.” They, also, did “not reach the issue of First Amendment access.” The only point of agreement among all nine was that, whatever the “right” or “interest” involved, it is not absolute, and a “weighing” of the competing interests is required in each case. The difference between them was the relative “weight” they assigned to each given the circumstances of the case..

But, overall, most observers thought Gannett left the law more confused than clarified, and it was only a matter of time before the Court would address the larger issue again.

RICHMOND NEWSPAPERS, INC. v. VIRGINIA, 448 U.S. 555 (1980)

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.

I

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, Virginia. 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 on May 30, 1978, when a juror asked to be excused after trial had begun and no alternate was available. A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began.

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 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 ... [which] then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify."

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. Counsel for appellants argued that constitutional considerations mandated that

before ordering closure, the court should first decide that the rights of the defendant could be protected in no other way. Counsel for defendant Stevenson pointed out that this was the fourth time he was standing trial. He also referred to “difficulty with information between the jurors,” and stated that he “didn't want information to leak out,” be published by the media, perhaps inaccurately, and then be seen by the jurors. Defense counsel argued that these things, plus the fact that “this is a small community,” made this a proper case for closure. The prosecutor again declined comment, and the court summed up by saying:

“I'm inclined to agree with [defense counsel] that, if I feel that the rights of the defendant are infringed in any way, [when] he makes the motion to do something and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion.”

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:

“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.”

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 repetition, yet evading review,” *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), it is not moot. Accordingly, we turn to the merits.

II

We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In *Gannett Co. v. DePasquale* the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor

the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that “a hearing on a motion before trial to suppress evidence is not a trial. . . .” 443 U.S., at 394 (BURGER, C. J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials.

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe.

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.

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This “contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .” *Nebraska Press Assn. v. Stuart*, 427 U.S., at 587 (BRENNAN, J., concurring in judgment).

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. And recently in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), both the majority and dissenting opinion agreed that open trials were part of the common-law tradition.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

III

The First Amendment, in conjunction with the Fourteenth, prohibits governments from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials “before as many of the people as chuse to attend” was regarded as one of “the inestimable advantages of a free English constitution of government.” In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Free speech carries with it some freedom to listen. “In a variety of contexts this Court has referred to a First Amendment right to ‘receive information and ideas.’” *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.

From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may “assembl[e] for any lawful purpose,” *Hague v. CIO*, 307 U.S. 496, 519 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised; a trial courtroom also is a public place where the people generally -- and representatives of the media -- have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected.

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

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]*, 408 U.S. [665], at 681 [(1972)].

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* made clear that although the Sixth

Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett*, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.*

*We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." [*Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)] It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joined, concurred in the judgment.

MR. JUSTICE STEWART concurred in the judgment.

MR. JUSTICE BLACKMUN, concurring in the judgment.

The Court's ultimate ruling in *Gannett*, with such clarification as is provided by the opinions in this case today, apparently is now to the effect that there is no Sixth Amendment right on the part of the public -- or the press -- to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it - in the Sixth Amendment.

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. The opinion in partial dissent in *Gannett* explained that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

MR. JUSTICE REHNQUIST, dissenting.

For the reasons stated in my separate concurrence in *Gannett Co. v. DePasquale*, I do not believe that either the First or Sixth Amendment, as made applicable to the States by the Fourteenth, requires that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands.

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's "right" to a fair trial conferred by other Amendments to the Constitution; it is instead whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state-court system did in this case. Being unable to find any such prohibition in the First, Sixth,

Ninth, or any other Amendment to the United States Constitution, or in the Constitution itself, I dissent.

Comments and Queries

With Powell (the only justice to recognize such a right in DePasquale) not participating, the vote here is seven-to-one to interpret the First Amendment as guaranteeing both the public and its “surrogate,” the media, the right to attend a “public trial.” The same seven had explicitly declined to consider that issue in DePasquale. Four of them (Brennan, White and Marshall and Blackmun) believed there was an “open trial” right, but would have recognized its existence in the Sixth Amendment. Only Justice Blackmun persisted in that belief. The others (Brennan and Marshall in a concurrence not reprinted here) seemed to accept as settled law that it does not. QUERY: while the result is logically consistent, wouldn’t clarity have been better served by some explanation of the “transfer” of the right from one amendment to the other?

The Court rests its analysis, at least in part, on a belief that the First Amendment “prohibit[s] government from limiting the stock of information from which the public may draw” and the public’s right to “receive information and ideas.” But neither the prohibition nor the public’s correlative right is absolute. They do not extend, for example, to properly classified information concerning national security, New York Times Co. v. United States supra at pp. , particularly the concurring opinions of Justices Stewart and White; or material covered by “executive privilege,” United States v. Nixon, 418 U.S. 683 (1974); or the identity of agents of the Central Intelligence Agency, Haig v. Agee, 453 U.S. 280 (1981), or the proceedings of a commission inquiring into judicial disability or misconduct, Landmark Communications v. Virginia, 435 U.S. 829 (1978). QUERY: why is the public “right to know” greater here? The only principled distinction would seem to be that the government has a “more compelling” interest in keeping the other information secret. The government’s “interest” here is in assuring a “fair trial” to a person accused of a capital crime, an interest which the defense, the prosecution the trial judge, with a first hand knowledge of the situation, have agreed might be jeopardized by contemporaneous disclosure. Especially since the same information can always be made publicly available, in transcript form, after the criminal proceedings have been concluded, QUERY: why isn’t the confidentiality of this information at least as important as that concerning an inquiry into judicial competence or misconduct? Or, at least, QUERY: why doesn’t the Court admit that it is not so much a question of the public’s right to know as of “balancing” that interest against the other(s) involved? Is it possible they did not do so because the public’s right to receive “real time” information about the trial, and thereby “supervise” the conduct of its participants, is simply not sufficiently persuasive when cast in the balance against the right of the defendant to a fair trial?

Notice, in particular, the Court’s reliance on the Common Law tradition, as expressed by Hale and Blackstone among others, that an “open” trial assured fair proceedings and discouraged perjury, misconduct and partiality. But this was in a time when transcripts were maintained largely in summary form and there was no practicable

means of making them available to the public. In addition, such limited appeals as were allowed were made to judges who served at the pleasure of the Crown. QUERY, therefore: isn't the present day appellate system better able to insure the propriety of the proceedings than the presence of a few individuals having the interest and ability to attend and such limited information as their "surrogates" may choose to furnish. Before answering, recall the sensational nature of the press coverage in Sheppard v. Maxwell, supra, at pp. . QUERY further, then: aren't all the arguments in favor of an "open" trial even more persuasive as reasons why the First Amendment permits the telecast or broadcast of trials in their entirety? If so, QUERY: why hasn't the Court at least considered that possibility? And its extension to the proceedings of appellate courts, including the Supreme Court itself? Lastly, if "live" coverage were permitted, might the courts require that they not be subject to "commercial interruptions" since these would limit the public's "right to know"?

B. Civil litigation

A person can be placed on trial in a criminal case only after indictment by a grand jury or a finding by a judicial officer, usually a magistrate, that a prima facie case exists. But a civil suit can be brought against anyone simply by filing a complaint with a municipal court and paying a relatively nominal filing fee. The rationale for the difference is that a civil suit can penalize the defendant with, at most, "money damages" or some form of injunctive relief. A criminal conviction, on the other hand, frequently results in imprisonment, and a defendant can be jailed pending trial if the offense charged is sufficiently serious (usually murder) as to be deemed "unbailable." There are also other differences, the most familiar being that the verdict in a civil suit is rendered on a "preponderance of the evidence," whereas a criminal conviction requires "proof beyond a reasonable doubt."

Another significant difference is that either party to a civil suit may subject the other to "discovery proceedings," including the production of documents, responses to written questions ("interrogatories") and appearing for oral examination under oath ("depositions"). In theory the information sought must be relevant to the pending lawsuit, but the almost universal rule is that relevance is interpreted "liberally." The practical result is that, by filing a civil complaint, a person can obtain a great deal of sensitive information about the defendant's affairs, finances and business secrets. If the information so obtained could then be released publicly, a person's right to "privacy" could be compromised or destroyed by anyone having enough money to hire a lawyer and pay the filing fee. Conversely, of course, the threat of intrusive discovery might discourage the filing of a meritorious suit.

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SEATTLE TIMES CO. v. RHINEHART, 467U.S. 20 (1984)

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. They described séances 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. 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” 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. 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. The complaint requests \$14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer [and] 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.

In a lengthy ruling, the trial court 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. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership.

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." 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."

Respondents appealed from the trial court's production order, and petitioners appealed from the protective order. The Supreme Court of Washington affirmed both. We affirm.

Most States, including Washington, have adopted discovery provisions modeled on 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." 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.

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." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

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.

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. 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, it is necessary for the trial court to have the authority to issue protective orders. 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." 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, 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.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I agree that the respondents' interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment. I therefore join the Court's opinion.

Comments and Queries

Note that the trial court's order "did not apply to information gained by means other than the discovery process," and this limitation appears crucial to the Supreme Court's holding that because, among other conditions, it "does not restrict the dissemination of the information if gained from other sources," the protective order did not "offend the First Amendment." QUERY: what is meant by "other sources"? Information received by means totally unrelated to the discovery? What if the

information is “leaked” by or purloined from the party or counsel undertaking the discovery? The person violating the protective order could, of course, be punished for contempt. But could the media be penalized for, or even restrained from, publishing the material? Recall the Court’s subsequent decision in Bartnicki v. Vopper, supra, at pp. .., that the media could not be required to pay damages for publicizing information about a matter of “public concern” which it had lawfully obtained, even if it had “reason to know” that the information had been obtained illegally by the party from whom they received it. So, QUERY: will the answer turn on whether or not the information itself, or the underlying lawsuit, is a matter of “public concern”? Is any lawsuit a matter of “public concern”? Or is the fact that the lawsuit concerns matters in which the public or the media have expressed an interest sufficient to make it a matter of “public concern”? Before answering, remember that in Gertz v. Robert Welch, Inc., the Court refused to classify an attorney as a “public figure” merely because he represented a party in a civil suit arising from the alleged “wrongful death” of a member of the public at the hands of a police officer.

See also Landmark Communications v. Virginia, 435 U.S. 829 (1978), reversing the conviction of a newspaper for violating a penal statute intended to guarantee the confidentiality of proceedings before a commission on judicial inquiry. As noted above, the Court held that the state might constitutionally prohibit the initial disclosure of this information, but that the media could not be punished for publishing unless the state could demonstrate a “clear and present danger” to the administration of justice. QUERY: if disclosure did not pose such a “clear and present danger,” why does the First Amendment allow the state to penalize its release in the first place?

III. Compensation of Victims of Crime

By definition, the victim of a crime is also the victim of a civil wrong. It is known to the law as a “tort,” and entitles the victim to recover money damages from the perpetrator sufficient to compensate for what has been lost. The problem, of course, is that most criminals do not have the funds to pay the damages assessed against them. And in most, but not all, cases they are unlikely to come by them.

SIMON & SCHUSTER v. CRIME VICTIMS BOARD, 502 U.S. 105 (1991)

See above at pp. .

Comments and Queries

The Court’s ultimate conclusion is that, while its objective is “compelling,” the statute cannot be sustained because it is “overinclusive,” i.e. “not narrowly tailored to advance that objective.” QUERY: would the result have been different had the statute not extended to any work expressing the author’s thoughts about the crime “however tangentially or incidentally”? Of defined “person convicted of a crime” in such as way to “escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted”? Or, in cases in which the author had not been convicted, limited the period of time within which the escrow could be imposed to that within the “statute of limitations,” i.e. within which prosecution for the crime could be initiated? Should it have been different if any or all of these modifications were made?

QUERY further: what, exactly, is the First Amendment interest at stake here? Does the Amendment protect an author’s right to publish or the inducement for them to do so? If the former, isn’t the listing of well-known works that would have fallen within the ambit of the statute largely irrelevant? If the latter, how far does that interest extend? The Court admits that many of its examples are “hyperbole” in that “some” of these works would have been written in any event, but correctly observes that the statute still “reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated.” QUERY: so what? Cannot the same be said of a potential author, such as O.J. Simpson, who knows that any royalties will be seized to satisfy a pre-existing money judgment? Would anyone seriously contend that proceeds from publication should be exempt from seizure so as to encourage authorship?

IV. Establishment and Free Exercise of Religion

A. Public Places and Monuments

Religious acknowledgments, art and statuary abound in our history and in public places from town squares to the United States Capital. As the Supreme Court has summarized: “Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. Other examples of reference to our religious heritage are found in the statutorily prescribed national motto ‘In God We Trust,’ which Congress and the President mandated for our currency, and in the language ‘One nation under God,’ as part of the Pledge of Allegiance to the American flag. Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent - not seasonal - symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.” Lynch v. Donnelly, 465 U.S. 668, 676-677 (1984).

The Continental Congress which was to approve the Declaration of Independence began by appointing a paid chaplain to open each of its sessions with prayer. So did both houses of the United States Congress shortly after they first met in 1789. The practice continues to this day, and the elected chaplains are deemed “officers” of the House and Senate. State legislatures have done the same, and their appointment of a chaplain was upheld against constitutional challenge in Marsh v. Chambers, 463 U.S. 783 (1983). In its opinion, the Court observed, somewhat wryly, that the proceedings in each of the lower courts that had ruled to the contrary “opened with an announcement that concluded God save the United States and this Honorable Court.”

Shortly after providing for the appointment of paid chaplains, the First Congress approved the first ten amendments to the Constitution and submitted them to the states for ratification. The First Amendment, which forbade abridgment of the “freedom of speech” also provided that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”

STONE v. GRAHAM, 449 U.S. 39 (1980)

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.

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*, 403 U.S. 602, 612-613 (1971).

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 Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one’s parents, killing or murder, adultery, stealing, false

witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

The petition for a writ of certiorari is granted and the judgment below is reversed.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissented. They would have granted certiorari and given the case plenary consideration.

JUSTICE STEWART dissented.

Comments and Queries

Notice, first, that this is one of an extraordinary handful of cases in which the Court grants certiorari and summarily reverses the decision below without affording an opportunity for briefs or arguments on the merits. QUERY: why? Was the violation here really that egregious? Or was the Court simply making a forceful statement sure to attract the attention of lower courts?

More importantly, note that the decision is based on the so-called "Lemon Test," first developed in Lemon v. Kurtzman, 403 U.S. 602 (1971). That case arose from a challenge to a Pennsylvania statute providing reimbursement to church-related elementary and secondary schools for the cost of "teachers' salaries, textbooks, and instructional materials in specified secular subjects." The "test" has been questioned and criticized, see e.g., Tribe, American Constitutional Law, 2nd ed., 1988, at 1277-84, and sometimes ignored, see Van Orden v. Perry, immediately below. But it remains the Court's stated criteria for adjudication in establishment clause cases.

Two cases involving the placement of replicas of the Ten Commandments on public property, both challenged on “establishment” grounds, were decided, with different results, in separate five-to-four opinions filed on the same day. Justice Breyer’s vote was dispositive in each. In VanOrden v. Perry, ___ U.S. ___ (2005), “a 6-foot high monolith inscribed with the Ten Commandments” was among twenty-one historical markers and seventeen monuments surrounding the Texas State Capital. Finding Lemon “not useful” to its analysis, the plurality found that “Texas has treated her capital grounds monuments as representing several strands in the State’s political and legal history. The inclusion of the Commandments monument in this group has a dual significance, partaking of both religion and government, that cannot be said to violate the Establishment Clause.” In McCreary County v. American Civil Liberties Union of Kentucky, however, the Court, following Lemon, stated the obvious: that the “secular purpose [must] be genuine, not a sham, and not merely secondary to a religious objective.” Analyzing the facts of the case, the Court found that “[t]he displays unstinting focus was on religious passages, showing that the Counties posted the Commandment precisely because of their sectarian content. That demonstration of the government’s objective was enhanced by serial religious references and the accompanying resolutions’ claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.”

Compare the analysis in VanOrden with that in the first “crèche” case immediately below.

LYNCH v. DONNELLY, 465 U.S. 668 (1984)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R. I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation - often on public grounds - during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy

bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the creche at issue here.

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as “Christ's Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

We are satisfied that the city has a secular purpose for including the creche, that the city has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government.

Comments and Queries

The Lynch rationale was illustrated in Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989). A creche, atop of which was an angel bearing a banner proclaiming “Gloria in Excelsis Deo” (“Glory to God in the Highest”), was placed alone on the Grand Staircase of the County Courthouse. It was held to violate the establishment clause because of its prominent location and because “nothing in the context of the display detracts from the creche’s religious message. ... No viewer could reasonably think that it occupies this location without the support and approval of government.” However, a Chanukah menorah placed outside the City-County building, “next to a Christmas tree and a sign saluting liberty” was held not to have the “effect of endorsing religious faith,” but that issue was remanded to the Court of Appeals to consider whether it “might violate either the ‘purpose’ or ‘entanglement’ prong of the Lemon analysis.”

It was following Allegheny County that most publicly sponsored displays of the crèche placed it alongside a menorah and plastic statues of Santa Clause, Frosty the Snowman, candy canes and other symbols of the “season” QUERY: at what point, if at all, should the courts conclude that too many judicial resources are being expended in an annual effort to decide if there is enough of Frosty and Rudolph to balance out the

crèche? In the event they reach such a conclusion, what then? Recall Justice Brennan's claim, dissenting in Paris Adult Theatre I v. Slayton, supra, at pp. , that excessive "institutional stress" was one among three reasons to justify a decision to declare all "obscenity" statutes unconstitutional.

B. School Prayer

Not only is religion the freedom first mentioned in the First Amendment, it is mentioned in two distinct respects: “Congress shall make no law respecting an establishment of religion” (the “establishment clause”) “or prohibiting the free exercise thereof” (the “free exercise” clause). It is, of course, possible for a statute to run afoul of one clause and not the other. And in most cases it is the establishment clause that is at issue, and a great many of these involve the recitation of prayers in the public schools.

The first of the “school prayer” cases was relatively simple. The Board of Regents, responsible for overseeing the public education system in the State of New York, composed a prayer, which it directed be recited aloud by teachers and students at the beginning of each school day. In its entirety, the prayer was: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” The Supreme Court disposed of the resulting litigation almost summarily: “The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.” Engel v. Vitale, 370 U.S. 421, 425 (1962).

Following Engel, many school districts sought other ways to “solemnize” the beginning of classes. Most of these settled on the reading of student-selected, and usually student-read, passages from the Bible.

ABINGTON SCHOOL DIST. v. SCHEMPP, 374 U.S. 203 (1963)

MR. JUSTICE CLARK delivered the opinion of the Court.

On each school day at the Abington Senior High School between 8:15 and 8:30 a. m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy

Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent - a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

[T]he exercises and the law requiring them are in violation of the Establishment Clause.

MR. JUSTICE DOUGLAS, concurred.

MR. JUSTICE BRENNAN, concurred.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN joined, concurred.

MR. JUSTICE STEWART, dissented. .

Comments and Queries

Hovering in the background of Abbington and similar cases was the question of which version of the Bible would be used? And how would it be selected? Would the reading be from the Old Testament (which is, of course, sacred to both the Judaic and Christian traditions)? Or the Christian New Testament? Whichever testament, from which Bible would it be read? The King James or Revised Standard (Protestant) or Douay (Catholic) versions? Today, of course, a broader question would be whether to include the Koran (Islam) or the sacred books of lesser practiced religions? Most importantly, who would make that determination? If a student, who would select the student?

QUERY: is the precedent value of Engel and Abbington broader than it might at first appear? Consider this extract from Justice Douglas' concurring opinion in Engel: "What New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court and then added "God save the United States and this Honorable Court." [And] what each House of Congress does at the opening of each day's business. In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution." At pp. 439-441. His unarticulated conclusion, of course, is that all are equally unconstitutional. Is he right? Before answering, consider Marsh v. Chambers, 463 U.S. 783 (1983), upholding the appointment of a paid chaplain by the Nebraska state legislature. Remember also that all branches of the military service commission clergy of all faiths as officers to minister to the spiritual needs of their members. Katcoff v. Marsh, 755 F.2d 223 (2nd Cir., 1985). See, also, Shriffrin and Choper, The First Amendment, 2nd ed., 1996, at 642. While not of constitutional dimensions, it is surely worth considering how the abolition of this practice would affect enlistment and retention rates and, perhaps more importantly, the morale of troops in combat.

The recitation of the Lord's paryer would seem to fall automatically under Engel. The remaining element of the morning ritual was the Salute to the Flag. Remember, from West Virginia Board of Education v. Barnette, supra, at pp. , that the student could not be required to recite the pledge. As to its content, see Elk Grove Independent School District v. Newdow, below, at pp.

In Wallace v. Jaffree, 472 U.S. 38 (1985), the Court upheld an uncontested statute providing for “a minute of silence ... for meditation” at the beginning of each school day, while invalidating a subsequent amendment which added “or voluntary prayer” after “meditation.” The result of this somewhat contorted decision was to provide a politically acceptable substitute for “morning prayer,” and attention soon shifted to prayers said on important, but “voluntary,” school occasions.

LEE v. WEISMAN, 505 U.S. 577 (1992)

JUSTICE KENNEDY delivered the opinion of the Court.

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June, 1989. She was about 14 years old. For many years, it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation, and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

"AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion.

"AMEN"

The parties stipulate that attendance at graduation ceremonies is voluntary. The graduating students enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families. The students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. Even on the assumption that there was a respectful moment of silence both before and after the prayers, the rabbi's two presentations must not have extended much beyond a minute each, if that. We do not know whether he remained on stage during the whole ceremony, or whether the students received individual diplomas on stage, or if he helped to congratulate them.

Deborah and her family attended the graduation, where the prayers were recited. In July, 1989, Daniel Weisman filed a complaint seeking a permanent injunction barring

petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations. We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

The controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus, we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. 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." *Lynch* [v. *Donnelly*, 465 U.S. 668], 678 [(1984)]. The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undeniable. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and, from a constitutional perspective, it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not

disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions" and advised him that his prayers should be nonsectarian. Through these means, the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government, *Engel v. Vitale*, 370 U.S. 421, 425 (1962), and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes are obliged to attend.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State, and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of

schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian, rather than pertaining to one sect, does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst, increases their sense of isolation and affront.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as amicus, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall

not allow the case to turn on this point. Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention is that the prayers are an essential part of these ceremonies because, for many persons, an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was, for Daniel and Deborah Weisman, religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency, and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). The considerations we have raised in objection to the invocation and benediction are, in many respects, similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave specific

recognition to this distinction, and placed particular reliance on it in upholding the prayers at issue there. Today's case is different. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere, the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from Marsh, and suffices to make the religious exercise a First Amendment violation.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, dissenting.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President:

of "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness the people of the United States a Government instituted by themselves for these essential purposes." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 2, (1989).

Such supplications have been a characteristic feature of inaugural addresses ever since. Most recently, President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President.

The other two branches of the Federal Government also have a long-established practice of prayer at public events. As we detailed in Marsh, congressional sessions have opened with a chaplain's prayer ever since the First Congress. And this Court's own sessions

have opened with the invocation “God save the United States and this Honorable Court” since the days of Chief Justice Marshall.

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July, 1868 when “15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers.” As the Court obliquely acknowledges in describing the “customary features” of high school graduations, and as respondents do not contest, the invocation and benediction have long been recognized to be “as traditional as any other parts of the [school] graduation program and are widely established.” H. McKown, *Commencement Activities* 56 (1931).

II

The Court presumably would separate graduation invocations and benedictions from other instances of public “preservation and transmission of religious beliefs” on the ground that they involve “psychological coercion.” The Court identifies two “dominant facts” that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause.

The Court declares that students’ “attendance and participation in the [invocation and benediction] are, in a fair and real sense, obligatory.” According to the Court, students at graduation who want “to avoid the fact or appearance of participation,” in the invocation and benediction are psychologically obligated by “public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence” during those prayers.

The Court's notion that a student who simply sits in “respectful silence” during the invocation and benediction (when all others are standing) has somehow joined -- or would somehow be perceived as having joined -- in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely “our social conventions,” have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain the

free will to sit, there is absolutely no basis for the Court's decision. It is fanciful enough to say that “a reasonable dissenter,” standing head erect in a class of bowed heads, “could believe that the group exercise signified her own participation or approval of it.” It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is “subtly coerced” . . . to stand! Even that does not remotely establish a “participation” (or an “appearance of participation”) in a religious exercise. The Court acknowledges that, “in our culture, standing . . . can signify adherence to a view or simple respect for the views of others.” But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a “reasonable dissenter . . . could believe that the group exercise signified her own participation or approval”? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate - so that, even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally.

The other “dominant fac[t]” identified by the Court is that “[s]tate officials direct the performance of a formal religious exercise” at school graduation ceremonies. “Direct[ing] the performance of a formal religious exercise” has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. A Court professing to be engaged in a “delicate and fact-sensitive” line-drawing, would better describe what it means as “prescribing the content of an invocation and benediction.” But even that would be false. All the record shows is that principals of the Providence public schools, acting within their delegated authority, have invited clergy to deliver invocations and benedictions at graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee “directed and controlled the content of [Rabbi Gutterman’s] prayer,” that school

officials “monitor prayer,” and attempted to “compose official prayers,” and that the “government involvement with religious activity in this case is pervasive,” is difficult to fathom. The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced “peer-pressure” coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise,” I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty - a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone, rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that “[s]peech is not coercive; the listener may do as he likes.” *American Jewish Congress v. Chicago*, 827 F.2d, at 132 (Easterbrook, J., dissenting).

The Court relies on our “school prayer” cases, *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington v. Schempp*, 374 U.S. 203 (1963). But whatever the merit of those cases, they do not support, much less compel, the Court's psychojourney. In the first place, *Engel* and *Schempp* do not constitute an exception to the rule, distilled from historical practice, that public ceremonies may include prayer; rather, they simply do not fall within the scope of the rule for the obvious reason that school instruction is not a public ceremony. Second, we have made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (i.e., coercion under

threat of penalty) provides the ultimate backdrop. In *Schempp*, for example, we emphasized that the prayers were “prescribed as part of the curricular activities of students who are required by law to attend school.”

IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, see *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), which has received well-earned criticism from many Members of this Court. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster, and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

I must add one final observation: the Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration -- no, an affection -- for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our

public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism in order to spare the nonbeliever what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

Comments and Queries

QUERY: is this decision “much ado about nothing”? Regardless of its constitutional wisdom, is it, as a practical matter, enforceable? Suppose, for example, the same principal invited the same rabbi to deliver the following year’s commencement address? The school authorities could not preclude a member of the clergy from serving as commencement speaker any more than a state could preclude their election to public office, McDaniel v. Paty, 435 U.S. 619 (1978). And surely a public official who cannot “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, 319 U.S. 624, (1943), could not censor what the speaker might say. What, then, would prevent the same speaker from reciting the same words simply under a different heading in the program? So QUERY further: is the lesson of this case that First Amendment is violated merely by the use of the terms “Invocation” and “Benediction”?

More importantly, QUERY: should the “establishment clause” be interpreted to all prayer at publicly sponsored events? Before answering, recall that at his inauguration, George Washington added the words “So help me God” to the presidential oath prescribed in the Constitution, and every president since has followed that tradition. Public ceremonies great and small are opened and closed with prayers, a reflection, perhaps, of the fact that “[w]e are a religious people whose institutions presuppose a Supreme Being,” Zorach v. Clauson, 343 U.S. 306, 313 (1952.). And consider, also, this language used in a slightly different context: “It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire existence and indeed predates it. Yet an unbroken practice ... is not something to be lightly cast aside.” Walz v. Tax Commission of the City of New York, 397 U.S. 664, (1970).

Or QUERY: should Lee be read narrowly as applying to the “one school event most important to attend” and, therefore, one most susceptible to “psychological coercion” of young people to acquiesce in a religious exercise? If so, would that be sufficient to deflect the “slipper slope” arguments made against it?

Lastly, consider that if the graduation ceremony is the “one school event most important to attend,” what is a “home” high school football game in a small Texas town?

SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE, 530 U.S. 290 (2000)

JUSTICE STEVENS delivered the opinion of the Court.

The Santa Fe Independent School District (District) is responsible for the education of more than 4,000 students in a small community in the southern part of the State. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

[A school] policy, 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. [A]ccording to the parties’ stipulation, “the district’s high school students voted to determine whether a student would deliver prayer at varsity football games.” The students chose to allow a student to say a prayer at football games.” A week later, in a separate election, they selected a student “to deliver the prayer at varsity football games.” [A subsequent revision of the policy omitted the word “prayer”] and refers to “messages” and “statements” as well as “invocations.”

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student’s message. Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe’s student election system ensures that only those messages deemed “appropriate” under the District’s policy may be delivered. That is, the

majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is “‘one of neutrality rather than endorsement’” or by characterizing the individual student as the “circuit-breaker” in the process. Contrary to the District’s repeated assertions that it has adopted a “hands-off” approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the “degree of school involvement” makes it clear that the pregame prayers bear “the imprint of the State and thus put school-age children who objected in an untenable position.”

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. 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.” The elections thus “shall” be conducted “by the high school student council” and “[u]pon advice and direction of the high school principal.” The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the “statement or invocation” be “consistent with the goals and purposes of this policy,” which are “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.”

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 citizenship” and “establish the appropriate environment for competition” further narrow

the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an “invocation” --a term that primarily describes an appeal for divine assistance. 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. The results of the elections described in the parties’ stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. 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.”

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious

activity, one of the relevant questions is “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.” *Wallace* [v. *Jaffree*, 472 U.S. 38, 73 (1985)]. Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants “that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U. S., at 688 (1984) (O'Connor, J., concurring). The delivery of such a message -- over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -- is not properly characterized as “private” speech.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.” The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* “differs dramatically” from attendance at high school football games, which it contends “are of no more than passing interest to many students” and are “decidedly extracurricular,” thus dissipating any coercion. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, “[l]aw reaches past formalism.” To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.” We stressed in *Lee* the obvious observation that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.” High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution demands that the school may not force this difficult choice upon these students.

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. [N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

Finally, the District argues repeatedly that the *Does* have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious.

[W]e assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971). Under the *Lemon* standard, a court must invalidate a statute if it lacks “a secular legislative purpose.”

The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message -- that of Santa Fe's traditional religious “invocation.” The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly -- that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

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.

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.”

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno*, 481 U. S. 739, 745 (1987), the fact that a policy might “operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.”

The Court applies *Lemon* and holds that 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 Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the “majoritarian election” permitted by the policy as being an election on “prayer” and “religion.” To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

Second, with respect to the policy's purpose, the Court holds that “the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer,

was a constitutional violation.” But the policy itself has plausible secular purposes: “[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” [T]he Court dismisses the secular purpose of solemnization by claiming that it “invites and encourages religious messages.” But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse “And this be our motto: ‘In God is our trust.’” Under the Court’s logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case.

Comments and Queries

There are two obvious, and significant, similarities between Lee and Sante Fe. In both, the speech in question was referred to as an “invocation,” and delivered at a large school-sponsored event which the students had a personal incentive, and would likely be under strong peer pressure, to attend. There is also a very significant difference. In Lee, the speaker was selected by the principal, a discretionary choice “attributable to the state,” but nonetheless his alone. The two-tiered election by which the students chose the speaker in Sante Fe, “conducted ‘by the high school student council ... [u]pon advice and direction of the high school principal,’” was a far more complicated process. And one in which it was, at least, highly likely that religious issues would predominate: e.g. “What kind of a person would vote against prayer”? “Vote for me; I’ll deliver the type prayer we’re used to at the same church we attend every Sunday.” QUERY: in addition to other problems, wouldn’t such an electoral process be the very kind of “excessive entanglement” forbidden by Lemon?

Assume that the principal, perhaps on the advice of the school district’s counsel, announced that the student’s remarks could not be “religious,” and certainly not “sectarian,” in nature. QUERY: would the principal be permitted to “censor,” in advance, what was said as she could the student newspaper, Hazelwood School District v. Kuhlmerier, 484 U.S. 260 (1988), or penalize the student if the remarks were deemed “inappropriate” to the occasion, Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)? In either event, would the principal’s scrutiny of the remarks to ascertain their “religious” or “sectarian” content constitute further “entanglement”?

But even so QUERY: was it really a good idea for the Court to decide this case without “wait[ing] for the inevitable to confirm and magnify the constitutional injury.”

Over more than a century, the Court had established a series of self regulating principles, which came to be known as the “Ashwander rules” because they were collected and summarized by Justice Brandeis in his concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1938). Although often ignored, they have never been repudiated. The second is that “[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.” At 346. So why do it here? Because the majority did not want to subject high school students to another year of elections likely to be contested on religious grounds? Or simply because the alternatives suggested in the Chief Justice’s opinion were too fanciful to justify delaying the inevitable? What advantage do you see in deciding the case at this point? In waiting?

C. The Pledge of Allegiance

A great many school districts require that each class day begin with the voluntary recitation of the Pledge of Allegiance to the Flag of the United States. The atheist father of a child enrolled in such a school brought suit “claim[ing] that his daughter is injured when she is compelled to ‘watch and listen as her state employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’” A divided panel of the 9th Circuit Court of Appeals enjoined the recitation on the ground that “[t]he text of the official Pledge, codified in federal law, impermissibly takes a position with respect to a purely religious question of the existence and identify of God.” It also held that “the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. The coercive effect ... is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.” Newdow v. U.S. Congress, ___ F.2d ___ (2002).

ELK GROVE UNIFIED SCHOOL DISTRICT v. NEWDOW, ___ U.S. ___ (2004)

Justice Stevens delivered the opinion of the Court.

The Pledge of Allegiance was initially conceived more than a century ago. Congress revisited the Pledge [in 1954] when it amended the text to add the words “under God.” The resulting text is the Pledge as we know it today: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”

Under California law, “every public elementary school” must begin each day with “appropriate patriotic exercises.” The Elk Grove Unified School District has implemented the state law by requiring that “[e]ach elementary school class recite the pledge of allegiance to the flag once each day.” Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation. See West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943).

In March 2000, Newdow filed suit against [among others] the Elk Grove Unified School District. At the time of filing, Newdow's daughter was enrolled in kindergarten in the

School District and participated in the daily recitation of the Pledge. The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses of the United States Constitution, as well as an injunction against the School District's policy requiring daily recitation of the Pledge.

In every federal case, the party bringing the suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U. S. 490, 498 (1975).

[T]he extent of the standing problem raised by the domestic relations issues in this case was not apparent until [the mother of Newdow's daughter, Sandra] Banning filed her motion for leave to intervene or dismiss the complaint. At that time, the child's custody was governed by a[n] order of the California Superior Court. That order provided that Banning had "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" her daughter. We conclude that Newdow lacks prudential standing to bring this suit in federal court.

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

Chief Justice Rehnquist, with whom Justice O'Connor joins, and with whom Justice Thomas joins as to Part I [relating to the standing issue], concurring in the judgment.

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the School District policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the First Amendment.

The phrase “under God” in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.

The motto “In God We Trust” first appeared on the country's coins during the Civil War. Secretary of the Treasury Salmon P. Chase, acting under the authority of an Act of Congress passed in 1864, prescribed that the motto should appear on the two cent coin. The motto was placed on more and more denominations, and since 1938 all United States coins bear the motto. Paper currency followed suit at a slower pace; Federal Reserve notes were so inscribed during the decade of the 1960's. Meanwhile, in 1956, Congress declared that the motto of the United States would be “In God We Trust.”

Our Court Marshal's opening proclamation concludes with the words ““God save the United States and this honorable Court.”” The language goes back at least as far as 1827.

All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase “under God” in the Pledge: “From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” Giving additional support to this idea is our national anthem “The Star-Spangled Banner,” adopted as such by Congress in 1931. The last verse ends with these words:

“Then conquer we must, when our cause is just,
“And this be our motto: “In God is our trust.”
“And the star-spangled banner in triumph shall wave
“O'er the land of the free and the home of the brave.”

Notwithstanding the voluntary nature of the School District policy, the Court of Appeals, by a divided vote, held that the policy violates the Establishment Clause of the First Amendment because it “impermissibly coerces a religious act.” To reach this result, the court relied primarily on our decision in *Lee v. Weisman*, 505 U. S. 577 (1992). That case

arose out of a graduation ceremony for a public high school in Providence, Rhode Island. The ceremony was begun with an invocation, and ended with a benediction, given by a local rabbi. The Court held that even though attendance at the ceremony was voluntary, students who objected to the prayers would nonetheless feel coerced to attend and to stand during each prayer. But the Court throughout its opinion referred to the prayer as “an explicit religious exercise” and “a formal religious exercise.”

I do not believe that the phrase “under God” in the Pledge converts its recital into a “religious exercise” of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase “under God” is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in [the House Report]. Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Justice O'Connor concurred in the judgment in a separate opinion.

Justice Thomas concurred in the judgment in a separate opinion.

Comments and Queries

Within days of the 9th Circuit decision, the United States Senate condemned it by a vote of 99-0. The House of Representatives followed shortly with only a handful of negative votes. It was obvious that had the Supreme Court affirmed, the Congress would have approved a constitutional amendment, which would very likely have been ratified, in short order, by the states. QUERY: what would the passage of such an amendment have done to the Court's prestige? And QUERY further: should that, in any way, affect the Court's decision? Before answering, consider that the Court, having the power neither “of the purse nor the sword,” must depend on public support for the credibility and, ultimately, the enforcement of its decisions. Recall, in this regard, the “dilemma” from which Chief Justice escaped in Marbury v. Madison, *supra*, at pp.

Also QUERY: why shouldn't the plaintiff's clear lack of “standing” to sue be a sufficient reason to dismiss the complaint. The relevant state court had granted the child's mother “sole legal custody ... to make decisions relating to [her] ... education and

welfare.” Remember the Ashwander “rules” referred to connection with Sante Fe School District v. Doe, above. The fourth of these is “[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” 297 U.S. 288, 347 (1936). Is there some irony in the fact that Chief Justice Rhenquist and Justice Thomas, who opposed the “rush to judgment” in Sante Fe, would unnecessarily reach the constitutional question here?

D. Financing Student Activities

Most colleges and universities impose a “student activities fee” as one of the annual charges imposed on attendance at the institution. The fees are deposited in a common “fund,” from which a committee, usually of students but sometimes of students and faculty together, makes allocations to fund the activities of various student groups.

ROSENBERGER v. UNIVERSITY OF VIRGINIA, 515 U.S. 819 (1995)

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 fulltime 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. CIOs 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 CIOs “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 CIOs 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 that "are related to the educational purpose of the University." The SAF is based on the University's "recogni[tion] that the availability of a wide range of opportunities" for its students "tends to enhance the University environment." 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 SAF receives its money from a mandatory fee of \$14 per semester assessed to each full-time student. 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.

Some, but not all, CIOs may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." One of these is "student news, information, opinion, entertainment, or academic communications media groups." The Guidelines also specify, however, that the costs of certain activities of CIOs that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities which 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. The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which . . . espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. 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.” The editors committed the paper to a two-fold mission: “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis’ ideas about evil and free will, and reviews of religious music. In the next two issues, *Wide Awake* featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of *Wide Awake*, and the end of each article or review, is marked by a cross. The advertisements carried in *Wide Awake* also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of *Wide Awake* to University students, free of charge.

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. As defined by the Guidelines, a “religious organization” is “an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.” 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, i.e., that the newspaper “promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” [A] letter signed by the Dean of Students, the committee sustained the denial of funding.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm

of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, we declared that “[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391 (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum,” nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. The most recent and most apposite case is our decision in *Lamb's Chapel*, *supra*. There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a “Christian perspective.” There was no indication in the record in *Lamb's Chapel* that the request to use the school facilities was “denied for any reason other than the fact that the presentation would have been from a religious perspective.” Our conclusion was unanimous: “[I]t discriminates on the basis of viewpoint to permit school property to be

used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.”

The University does acknowledge (as it must in light of our precedents) that “ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts,” but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in Lamb’s Chapel, 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.

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. It remains to be considered whether the violation following from the University’s action is excused by the necessity of complying with the Constitution’s prohibition against state establishment of religion. We turn to that question.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University’s SAF

Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room involve[s] governmental expenditure, if only in the form of electricity and heating or cooling costs. It follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question -- speech otherwise protected by the Constitution -- contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and

writing that merely happens to express views that a given religion might approve.” That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. Official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. 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.

JUSTICE O'CONNOR, concurring.

Although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. There currently exists a split in the lower courts as to whether such a challenge would be successful. While the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student

Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, "Love in Christ": it is "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The masthead of every issue bears St. Paul's exhortation, that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11."

Each issue of Wide Awake contained in the record makes good on the editor's promise and echoes the Apostle's call to accept salvation.

The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. The University exercises the power of the State to compel a student to pay it and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment. The Court has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity. Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter.

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint," or its "religious perspective," and in distinguishing funding of Wide Awake from the funding of a church,

the Court maintains that “[Wide Awake] is not a religious institution, at least in the usual sense.” The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Is any government activity that provides any incidental benefit to religion likewise unconstitutional? Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important. However the Court may in the past have phrased its line-drawing test, the question whether such benefits are provided on an evenhanded basis has been relevant, for the question addresses one aspect of the issue whether a law is truly neutral with respect to religion, that is, whether the law either “advance[s] [or] inhibit[s] religion.” Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.

The common factual thread running through [our cases] is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum or to suppress a particular religious viewpoint. In each case, to be sure, the religious speaker's use of the room passed muster as an incident of a plan to facilitate speech generally for a secular purpose, entailing neither secular entanglement with religion nor risk that the religious speech would be taken to be the speech of the government or that the government's endorsement of a religious message would be inferred. But each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist or the Hare Krishna like any other speaker in a public forum. It was the preservation of free speech on the model of the

street corner that supplied the justification going beyond the requirement of evenhandedness.

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government on equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid. The argument from economic equivalence thus breaks down on recognizing that the direct state aid it would support is not mitigated by the street corner analogy in the service of free speech. Absent that, the rule against direct aid stands as a bar to printing services as well as printers.

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

The Court acknowledges what may be said or taught when it decides, in the absence of unlimited amounts of money or other resources, how to honor its educational responsibilities. Nor does the Court generally question that in allocating public funds a state university enjoys spacious discretion. Accordingly, the Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is

not eligible for funding, is “an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality,” It is clear that this is the basis on which Wide Awake Productions was denied funding. The discussion of Wide Awake’s content, shows beyond any question that it “primarily promotes or manifests a particular belief(s) in or about a deity . . . ,” in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only “in” but “about” a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists. The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that “primarily promotes or manifests” any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Guidelines are thus substantially different from the access restriction considered in *Lamb’s Chapel*, the case upon which the Court heavily relies in finding a viewpoint distinction here. *Lamb’s Chapel* addressed a school board’s regulation prohibiting the after-hours use of school premises “by any group for religious purposes,” even though the forum otherwise was open for a variety of social, civic, and recreational purposes. “Religious” was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject.

With this understanding, it was unremarkable that in *Lamb’s Chapel* we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing

religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

Comments and Queries

The case's crucial distinction is between "content discrimination," which is permissible in a "limited public forum" and discrimination among "viewpoints" on content "otherwise within the forum's limitations," which is not. Given that, QUERY: who is right? Specifically, is a ban on funding "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'," a restriction on "content" or "viewpoint"? Pretty clearly, Wide Awake "manifests a particular belie[f]," or, put another way, expresses a viewpoint on that question. So QUERY: isn't it relevant, really necessary, to determine if a publication expressing the opposite viewpoint would likewise have been denied reimbursement? Why doesn't the Court discuss that question or, if inadequate information is available, remand for further hearings?

The question raised in Justice O'Connor's concurring opinion was answered in Board of Regents of the University of Wisconsin v. Southworth, 529 U.S. 217 (2000): "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." (A part of the University's policy, which allowed a student body referendum as to whether or not a specific activity could be funded, was remanded for further hearings to determine whether it impermissibly silenced minority viewpoints.)

THE RIGHT IN SPECIFIC SITUATIONS

I. "Commercial Speech"

A. General Principles

There are two traditional theories as to why “commercial speech” is entitled to less First Amendment protection than “noncommercial speech.” The first is that since it does “no more than propose a commercial transaction,” Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 385 (1973), the government, in the exercise of its “police power,” needs to protect the public against fraud or, worse, products which do actual harm. It is on this rationale, for example, that the Food and Drug Administration regulates pharmaceutical advertising. The other is that there are “gradations” of speech, some having more value than others. On this theory the Court held, in Chaplinsky v. New Hampshire, 315 U.S. 568, (1942) that the “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words ... 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 societal interest in order and morality.” This concept has been famously expressed by Professor William W. VanAlstyne as a series of concentric circles, with “political advocacy” at its core and, in extending outward order, “socio-economic, commercial, sexual-purient and criminal solicitation.” The American First Amendment in the Twenty-First Century, 3rd ed., 2002, at 23.

The first of the “commercial speech” cases was Valentine v. Chrestensen, 316 U.S. 52 (1942). The owner of a former Navy submarine anchored it to a pier in the East River, hoping to exhibit it for profit. A New York City ordinance forbade distribution in the streets of commercial, but not political, advertising. Chrestensen, therefore printed a “two-sided” brochure, one side advertising the submarine and the other protesting against the City Dock Department’s refusal to allow him permission to tie up at a city pier. The Supreme Court reversed a lower court decision in his favor because “affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve from the law’s command.”

Less than a decade later, the Court upheld a municipal ban on door-to-door commercial solicitation, Breard v. Alexander, 341 U.S. 622 (1951), even though a ban on door-to-door distribution of religious tracts or other “information,” had been invalidated on First Amendment grounds in Martin v. Struthers, 319 U.S. 141 (1943).

For some time it appeared that “commercial speech” enjoyed no, or at least very little, constitutional protection. The Court denied that assumption in Bigelow v. Virginia, 421 U.S. 809 (1975), but, given the subject matter of that case, did little to clarify the nature of that protection.

VIRGINIA PHARMACY BOARD v. VIRGINIA CONSUMER COUNCIL, 425 U.S.
748 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Since the challenged restraint is one that peculiarly concerns the licensed pharmacist in Virginia, we begin with a description of that profession as it exists under Virginia law. The “practice of pharmacy” is statutorily declared to be “a professional practice affecting the public health, safety and welfare,” and to be “subject to regulation and control in the public interest.” The regulatory body is the appellant Virginia State Board of Pharmacy. The Board is also the licensing authority. Once licensed, a pharmacist is subject to a civil monetary penalty, or to revocation or suspension of his license, if the Board finds that he “is guilty of “unprofessional conduct,” [which] is specifically defined [as, among other things,] advertising of the price for any prescription drug.

Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State.

The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. Their claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond “the cost of 40 Achromycin tablets ranges from \$2.59 to \$6.00, a difference of 140% [sic],” and that in the Newport News-Hampton area the cost of tetracycline ranges from \$1.20 to \$9.00, a difference of 650%.

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to “receive information and ideas,” and that freedom of speech “necessarily protects the right to receive.” If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is “commercial speech.” There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen*, *supra*, the Court upheld a New York statute that prohibited the distribution of any “handbill, circular . . . or other advertising matter whatsoever in or upon any street.” The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed “no such restraint on government as respect purely commercial advertising.” Further support for a “commercial speech” exception to the First Amendment may perhaps be found in *Breard v. Alexandria*, 341 U.S. 622 (1951), where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions.

Since the decision in *Breard*, however, the Court has never denied protection on the ground that the speech in issue was “commercial speech.” Last Term, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the notion of unprotected “commercial speech” all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the procuring of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the

availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. Chrestensen's continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. Indeed, we observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

V

If there is a kind of commercial speech that lacks all First Amendment protection, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. Our question is whether speech which does "no more than propose a commercial transaction," is so removed from any "exposition of ideas," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and

from “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,”” *Roth v. United States*, 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Moreover, there is another consideration that suggests that no line between publicly “interesting” or “important” commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism. Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. At the same time, we cannot discount the Board's justifications entirely.

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and

excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the “professional” pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

VI

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients. Reserving other questions,* we conclude that the answer to this one is in the negative.

*We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the

consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

CHIEF JUSTICE BURGER concurred.

MR. JUSTICE STEWART, concurring.

Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not “wholly outside the protection of the First Amendment.” But since it is a cardinal principle of the First Amendment that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” the Court's decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today's decision does not preclude such governmental regulation.

MR. JUSTICE REHNQUIST, dissenting.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise.

The issue is not, as the Court phrases it, whether “[o]ur pharmacist” may communicate the fact that he “will sell you the X prescription drug at the Y price.” No pharmacist is asserting any such claim to so communicate. The issue is rather whether appellee consumers may override the legislative determination that pharmacists should not advertise even though the pharmacists themselves do not object. In deciding that they may do so, the Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions.

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that “society also may have a strong interest in the free flow of commercial information.” One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the importance in a “predominantly free enterprise economy” of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is “primarily an instrument to enlighten public decisionmaking in a democracy.” I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a “merchant ‘who goes from door to door selling pots’.” *Breard v. City of Alexandria*, 341 U.S. 622, 650 (1951) (dissenting).

Comments and Queries

Notice, first, that consumers, not a pharmacist, brought this suit. The Court acknowledges their “standing” to sue based on a “right to receive information.” QUERY: is that a sufficient basis? Assuming it is, should it be limited to standing issues or is it an

independent, substantive right? In Kleindienst v. Mandel, a three-judge district court held that it was, and ordered the Attorney General to grant a temporary visa to a Belgian Marxist who had been invited to speak at academic conferences in the United States. Notwithstanding the language quoted the opinion, the Supreme Court reversed, holding that Congress had lawfully delegated its “plenary power to exclude aliens or prescribe the conditions for their entry” to the Executive Branch. When the Attorney General decides “for a legitimate and bona fide reason” to exclude someone, the courts will accept that decision and “not ... weight it against the First Amendment interests of those who would personally communicate with the alien.” So QUERY further: if there is such a right in the recipient, how can it be totally vitiated by an executive decision?

But consider, also, instances in which information unlawfully received might, nonetheless, be distributed to the public without prior restraint, see New York Times Co. v. United States, supra, at pp. , or even to subsequent penalty if the dissemination is one step removed from the original acquisition, see Bartnicki v. Vopper, supra, at pp. . See also Pico v. Board of Education, 457 U.S. 853, (1982) for the proposition that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press and political freedom.”

Not every advertising of a product is “simply this: ‘I will see you the X prescription drug at the Y price’.” So, QUERY: how can it be determined when an advertisement constitutes “commercial speech.” See Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), in which a mass mailing of “informational pamphlets” concerning the availability of contraceptives could not be “characterized merely as proposals to engage in commercial transactions. The Court nevertheless held the it was “commercial speech” because of “[t]he combination” of three factors: (1) they were “conceded to be advertisements,” (2) they referred to a “specific product,” and that (3) the sender has “an economic motivation for mailing” them. QUERY further: what difference does it make? Is there some constitutional “limbo” between “advertising” and “commercial speech” in which diminished, or no, First Amendment protection is available?

Compare these observations: Justice Blackmun, for the majority: “Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.” And Justice Rhenquist’s response: “One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack.” QUERY: is Blackmun’s concern a legitimate part of constitutional analysis? Or is Rhenquist right in, at least, implying that such considerations should be left to the elected branches of government?

Virginia Pharmacy, both in the majority opinion and the dissent, raised two questions, one not fully resolved and the other explicitly “reserved”: What, if any limits, may be imposed on the truthful advertising of the price of a lawful product? Can the states restrict advertising by other professions, such as lawyers and physicians?

B. Truthful Advertising of Goods and Prices

CENTRAL HUDSON GAS & ELECTRIC CO. v. PUBLIC SERVICE COMMISSION, 447 U.S. 557 (1980)

MR. JUSTICE POWELL delivered the opinion of the Court.

The case presents the question whether a regulation of the Public Service Commission of the state of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission ordered electric utilities in New York State to cease all advertising that “promot[es] the use of electricity.” The order was based on the Commission’s finding that “the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter.”

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses “into two broad categories: promotional -- advertising intended to stimulate the purchase of utility services -- and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.” The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commissioner's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in “off-peak” consumption, the ban limits the “beneficial side effects” of such growth in terms of more efficient use of existing powerplants. And since oil dealers are not under the Commissioner’s jurisdiction and

thus remain free to advertise, it was recognized that the ban can achieve only “piecemeal conservationism.” Still, the Commission adopted the restriction because it was deemed likely to “result in some dampening of unnecessary growth” in energy consumption.

The Commission’s order explicitly permitted “informational” advertising designed to encourage shifts of consumption” from peak demand times to periods of low electricity demand. Information advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review “specific proposals by the companies for specifically described [advertising] programs that meet these criteria.”

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. The state agency also thought that promotional advertising would give “misleading signals” to the public by appearing to encourage energy consumption at a time when conservation is needed.

II

The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board [v. Virginia Citizens Consumer Council]* 425 U.S. [748] at 761-762 [(1976)]. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the “highly paternalistic” view that government has complete power to suppress or regulate commercial speech. “[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .” *Id.*, at 770. Even when advertising communicates only an incomplete

version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.

If the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both *Bates [v. Arizona]*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession.

The second criterion recognizes that the First Amendment mandates that speech restrictions be “narrowly drawn.” The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth.

The reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly services at all, or how

much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising. Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity - during peak or off-peak periods - means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting

protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority - and indeed the duty - to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to “dampen” demand for or use of the product. Even though “commercial” speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. Our cases indicate that this guarantee applies even to commercial speech. In *Virginia Pharmacy Board v. Virginia Consumer Council*, we held that Virginia could not pursue its goal of encouraging the public to patronize the “professional pharmacist” by “keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.” We noted that our decision left the State free to pursue its goal of maintaining high standards among its pharmacists by “requir[ing] whatever professional standards it wishes of its pharmacists.”

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression. If a governmental unit believes that use or overuse of air

conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. Just as the Commonwealth of Virginia may promote professionalism of pharmacists directly, so too New York may not promote energy conservation “by keeping the public in ignorance.”

MR. JUSTICE REHNQUIST, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations ‘from promoting the use of electricity through the use of advertising, subsidy payments . . . or employee incentives.’”

Given what seems to me full recognition of the holding of Virginia Pharmacy Board that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.

Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a “no more extensive than necessary” analysis that will unduly impair a state legislature’s ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

I doubt there would be any question as to the constitutionality of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, to condition its sale on specified terms, or to restrict its production. In terms of

constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open. Thus, even if I were to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

Comments and Queries

Notice the "critical inquiry in this case" whether the Commission's order was "no more extensive than necessary to further the State's interest in energy conservation." Exactly what that meant in the commercial speech context as the subject of dispute until Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989), which held "[i]f the word 'necessary' is interpreted strictly ... [it] .. would translate into the 'least restrictive means test We have refrained from imposing a least-restrictive-means requirement – even where core political speech is at issue. ... In requiring that to be 'narrowly tailored' to serve an important or substantial state interest, we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the the government' legitimate interests,' Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). ... What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends,' 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, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed."

For s discussion of the required “fit” between the state’s interest and the means employed, see City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), invalidating a city ordinance banning from the city streets “newsracks” or “vending machines” containing “commercial handbills” but not newspapers. The Court held that while the city had a valid interest in the “safety and aesthetics” of the streets,” there was not a “reasonable fit” between its goals and its means. Since the ordinance banned only 62 newsracks, while allowing somewhere between 1550 and 200 to remain, and the 62 were selected based solely on their “commercial content,” the ordinance was neither “content neutral nor ‘narrowly tailored’.”

44 LIQUORMART, INC. v. RHODE ISLAND, 517 U.S. 484 (1996)

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, VII, and VIII, an opinion with respect to Parts III and V, in which JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, an opinion with respect to Part VI, in which JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE GINSBURG join, and an opinion with respect to Part IV, in which JUSTICE KENNEDY and JUSTICE GINSBURG join.

Last Term we held that a federal law abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages is unconstitutional. Rubin v. Coors Brewing Co., 514 U.S. 476, 476 (1995). We now hold that Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is also invalid. Our holding rests on the conclusion that such an advertising ban is an abridgment of speech protected by the First Amendment and that it is not shielded from constitutional scrutiny by the Twenty-first Amendment.

In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from “advertising in any manner whatsoever” the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street. The second statute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements - even those

referring to sales in other States - that “make reference to the price of any alcoholic beverages.”

Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. are licensed retailers of alcoholic beverages. Petitioner 44 Liquormart operates a store in Rhode Island and petitioner Peoples operates several stores in Massachusetts that are patronized by Rhode Island residents. Peoples uses alcohol price advertising extensively in Massachusetts, where such advertising is permitted, but Rhode Island newspapers and other media outlets have refused to accept such ads.

Complaints from competitors about an advertisement placed by 44 Liquormart in a Rhode Island newspaper in 1991 generated enforcement proceedings that in turn led to the initiation of this litigation. The advertisement did not state the price of any alcoholic beverages. Indeed, it noted that “State law prohibits advertising liquor prices.” The ad did, however, state the low prices at which peanuts, potato chips, and Schweppes mixers were being offered, identify various brands of packaged liquor, and include the word “WOW” in large letters next to pictures of vodka and rum bottles. Based on the conclusion that the implied reference to bargain prices for liquor violated the statutory ban on price advertising, the Rhode Island Liquor Control Administrator assessed a \$400 fine.

After paying the fine, 44 Liquormart, joined by Peoples, filed this action in the Federal District Court seeking a declaratory judgment that the two statutes violate the First Amendment. The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits “all advertising of alcoholic beverages excepting references to price outside the licensed premises,” and that petitioners’ proposed ads do not concern an illegal activity and presumably would not be false or misleading.

III

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on “commercial speech” for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his

early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services. In the early years, the common law, and later, statutes, served the consumers' interest in the receipt of accurate information in the commercial market by prohibiting fraudulent and misleading advertising. It was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services.

Our early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection. At the same time, our early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech. Specifically, we explained that the State may require commercial messages to “appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive,” *Virginia Pharmacy Board*, 425 U.S., at 772, and that it may restrict some forms of aggressive sales practices that have the potential to exert “undue influence” over consumers.

IV

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. Sound reasons justify reviewing the latter type of commercial speech regulation more carefully. Most obviously, complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond “irrationally” to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.

V

In this case, there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with “special care,” *Central Hudson*, mindful that speech prohibitions of this type rarely survive constitutional review.

The State argues that the price advertising prohibition should nevertheless be upheld because it directly advances the State’s substantial interest in promoting temperance, and because it is no more extensive than necessary. Although there is some confusion as to what Rhode Island means by temperance, we assume that the State asserts an interest in reducing alcohol consumption.

In evaluating the ban’s effectiveness in advancing the State’s interest, we note that a commercial speech regulation “may not be sustained if it provides only ineffective or remote support for the government's purpose.” For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so “to a material degree.” The need for the State to make such a showing is particularly great given the drastic nature of its chosen means - the wholesale suppression of truthful, nonmisleading information. Accordingly, we must determine whether the State has shown that the price advertising ban will significantly reduce alcohol consumption.

Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide

consumption. Indeed, the District Court's considered and uncontradicted finding on this point is directly to the contrary. Moreover, the evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities. In addition, as the District Court noted, the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban. Thus, the State's own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous.

The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal. It necessarily follows that the price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech.

VI

The State responds by arguing that it merely exercised appropriate "legislative judgment" in determining that a price advertising ban would best promote temperance. Relying on the *Central Hudson* analysis set forth in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), Rhode Island first argues that, because expert opinions as to the effectiveness of the price advertising ban "go both ways," the Court of Appeals correctly concluded that the ban constituted a "reasonable choice" by the legislature. The State next contends that precedent requires us to give particular deference to that legislative choice because the State could, if it chose, ban the sale of alcoholic

beverages outright. Finally, the State argues that deference is appropriate because alcoholic beverages are so-called “vice” products. We consider each of these contentions in turn.

Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

We also cannot accept the State's second contention, which is premised entirely on the “greater-includes-the-lesser” reasoning endorsed toward the end of the majority's opinion in *Posadas*. There, the majority stated that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.” It went on to state that “because the government could have enacted a wholesale prohibition of [casino gambling] it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.” The majority concluded that it would “surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.” On the basis of these statements, the State reasons that its undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale.

Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is “greater” than its power to ban truthful, nonmisleading commercial speech. Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less

vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily “greater” than the power to suppress speech about it.

As a matter of First Amendment doctrine, the *Posadas* syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends. That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. That teaching clearly applies to state attempts to regulate commercial speech, as our cases striking down bans on truthful, nonmisleading speech by licensed professionals attest.

Finally, we find unpersuasive the State’s contention that the price advertising ban should be upheld because it targets commercial speech that pertains to a “vice” activity. The scope of any “vice” exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to “vice activity”. Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the “vice” label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice. For these reasons, a “vice” label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

VIII

Because Rhode Island has failed to carry its heavy burden of justifying its complete ban on price advertising, we conclude that [it] abridge[s] speech in violation of the First

Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I share JUSTICE THOMAS's discomfort with the Central Hudson test, which seems to me to have nothing more than policy intuition to support it. I also share JUSTICE STEVENS' aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them. On the other hand, it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.

Since I do not believe we have before us the wherewithal to declare Central Hudson wrong -- or at least the wherewithal to say what ought to replace it -- I must resolve this case in accord with our existing jurisprudence, which all except JUSTICE THOMAS agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

JUSTICE THOMAS, concurring in Parts I, II, VI, and VII, and concurring in the judgment.

I do not see a philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech. Nor do I believe that the only explanations that the Court has ever advanced for treating "commercial" speech differently from other speech can justify restricting "commercial" speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE BREYER join, concurring in the judgment.

Both parties agree that the first two prongs of the Central Hudson test are met. Even if we assume *arguendo* that Rhode Island's regulation also satisfies the requirement that it directly advance the governmental interest, Rhode Island's regulation fails the final prong; that is, its ban is more extensive than necessary to serve the State's interest.

Rhode Island offers one, and only one, justification for its ban on price advertising. Rhode Island says that the ban is intended to keep alcohol prices high as a way to keep consumption low. By preventing sellers from informing customers of prices, the regulation prevents competition from driving prices down and requires consumers to spend more time to find the best price for alcohol. The higher cost of obtaining alcohol, Rhode Island argues, will lead to reduced consumption. The fit between Rhode Island's method and this particular goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal - methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers.

Rhode Island's prohibition on alcohol-price advertising, as a means to keep alcohol prices high and consumption low, cannot survive First Amendment scrutiny. While I agree with the Court's finding that the regulation is invalid, I would decide that issue on narrower grounds. I therefore concur in the judgment.

Comments and Queries

The holding in this case is that the prohibition "against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is ... invalid." QUERY: why not generalize that holding to any lawful product and simply stop there? Instead, the Court holds that such "accurate" information may be regulated if "the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a 'material degree'." If there is a legitimate governmental interest in limiting the sale or consumption of a product, the government can regulate, or even prohibit, the sale of that product. Why, then, get involved in such an extended First Amendment analysis?

Notice Justice Thomas' statement that he cannot "see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." QUERY: is he correct? If he is, how does that affect the concept that different

“categories” of speech are of different constitutional “value”? More specifically, how does it affect the viability of Chaplinsky v. New Hampshire, supra, at pp. ?

Lastly, QUERY: is the Posadas decision really worth the consideration given to it here? It dealt with a truly bizarre statute, which permitted casino gambling and its advertising only in those parts of Puerto Rico that were known to be frequented by tourists. It forbade that advertising only in those parts of the island in which the indigenous population resided. The theory was that the availability of casino gambling to visitors would increase tourism, whereas advertising it to the “native” population would encourage the “vice” of gambling. It was upheld as a “reasonable” exercise of legislative power. QUERY: even granting the unique status of a “United State territory,” shouldn’t this statute have been struck down as, simply, unreasonable? Or at least, given the extensive criticism here, shouldn’t Posadas have been explicitly over-ruled?

C. Solicitation for Professional Services

ZAUDERER v. OFFICE OF DISCIPLINARY COUNSEL, 471 U.S. 626 (1985)

JUSTICE WHITE delivered the opinion of the Court.

Since the decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the Court held for the first time that the First Amendment precludes certain forms of regulation of purely commercial speech, we have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. This case presents additional unresolved questions: whether a State may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

Appellant is an attorney practicing in Columbus, Ohio. In the spring of 1982, [he] placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information."

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant charging him with a number of disciplinary violations.

The charges against appellant were heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ... [which] in turn, adopted the Board's findings that appellant's advertisements had violated the Disciplinary Rules.

Contending that Ohio's Disciplinary Rules violate the First Amendment insofar as they authorize the State to discipline him for the content of his Dalkon Shield advertisement, appellant filed this appeal.

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case - advertising pure and simple - falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," *Ohralik v. Ohio State Bar Assn.*, [436 U.S. 447] at 455-456, and appellant's advertisements undeniably propose a commercial transaction.

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Central Hudson Gas & Electric*, *supra*, at 566. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible. To resolve this appeal, we must apply the teachings of these cases to three separate forms of regulation Ohio has imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.

III

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*.

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement - and print advertising generally - poses much less risk of over-reaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation - the fear that lawyers will "stir up litigation" - justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness.

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: “we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.” *Bates v. State Bar of Arizona*, 433 U.S., at 376.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate to eliminate “unfair or deceptive acts or practices in . . . commerce” reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators

the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

IV

The application of [the Disciplinary Rules] restriction on illustrations in advertising by lawyers to appellant's advertisement fails for much the same reasons as does the application of the self-recommendation and solicitation rules. The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech.

The text of [the Rule] strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case ... the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

V

In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. But Ohio has not attempted to "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 State Bd. of Ed. v. Barnette,] 319 U.S. [624, 642 (1943)]. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal [W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs" - terms that, in ordinary usage, might well be virtually interchangeable. The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joined, concurred in part, concurred in the judgment in part, and dissented in part.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part, concurring in the judgment in part, and dissenting in part.

In my view, a State could reasonably determine that the use of unsolicited legal advice “as bait with which to obtain agreement to represent [a client] for a fee,” *Ohralik*, 436 U.S., at 458, poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's *Dalkon Shield* advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether “it is too late to take legal action against the . . . manufacturer” without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights (permitting attorneys to speak and write publicly on legal topics as long as they do not emphasize their own experience or reputation). Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys.

Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

Recall the language used in Virginia Pharmacy, reserving decision on this question: “Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” QUERY: does this opinion adequately address these concerns?

The freedom of lawyers to advertise is, however, not without limits. In Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), the Court upheld a Bar Association rule against the sending of mailed solicitations to victims, or their relatives, within thirty days of an accident or disaster. The rationale was, in part, to protect “the privacy and tranquility of personal injury victims and their loved one against intrusive, unsolicited contact.” QUERY: why does this privacy interest disappear on the thirty-first day?

The rationale of Zauderer was extended to certified public accountants in Edenfield v. Fane, 507 U.S. 761 (1993), which struck down a Florida statute prohibiting them from engaging in “direct, in-person, uninvited solicitation.”

II. Picketing

A. Labor Disputes

The first instance in which First Amendment protection was extended beyond “speech” and “press” -- to what we now know as “symbolic speech” or “expressive conduct” -- involved labor disputes. Employees, unhappy with the conditions of employment or the refusal of their employer to enter into collective bargaining with a union, would walk back and forth, on the public street in front of the employer’s place of business, usually carrying signs protesting that the employer was “unfair.” Frequently these signs would also ask the public not to patronize the employer’s business and fellow employees not to continue working under these “unfair” conditions.

In the early years of the twentieth century, many states had statutes which outlawed “picketing” on the ground that it disrupted economic activity and frequently resulted in violence.

THORNHILL v. ALABAMA, 310 U.S. 88 (1940)

Mr. Justice MURPHY delivered the opinion of the Court.

Byron Thornhill was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923:

“Loitering or picketing forbidden. - Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business.”

The proofs consist of the testimony of two witnesses for the prosecution. It appears that petitioner on the morning of his arrest was seen “in company with six or eight other men” “on the picket line” at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, affiliated with The American Federation of Labor, which had as members all but four of the approximately one

hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man." For engaging in some or all of these activities, petitioner was arrested, charged, and convicted.

The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers

not to patronize the employer. The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.

It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute. “(The) streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Hague v. C.I.O.*, 307 U.S. 496, 515, 516. The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.

Mr. Justice McREYNOLDS is of opinion that the judgment below should be affirmed.

Comments and Queries

The activity involved here came to be known as “informational picketing,” i.e. that intended to inform the public of the employees’ grievances and persuade them not to do business with the offending employer. Thornhill was extended in American Federation of Labor v. Swing, 312 U.S. 321 (1941) to include “peaceful picketing” by members of a union who were not themselves employees of the employer in question.

Since that time, the application of Thornhill has been severely restricted, both to prevent a practice generally referred to as a “secondary boycott” and, more generally, to enforce public policy as expressed in valid state laws. As to the secondary boycott, see Electrical Workers v. Labor Board, 341 U.S. 694 (1951): “By peaceful picketing, the agent of a labor organization induced union employees of a carpentry subcontractor on a construction project to engage in a strike in the course of their employment. An object of such inducement was to force the general contractor to terminate its contract with the electrical subcontractor, who was employing nonunion workmen.” The Court sustained an order of the National Labor Relations Board declaring the picketing to be “an unfair labor practice.”

Numerous decisions have refused First Amendment protection to picketing conducted to achieve results contrary to the public policy of a state. In Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), a union seeking to organize peddlers had picketed a wholesaler in an effort to induce it not to sell to nonunion peddlers. The Court unanimously affirmed a Texas injunction against the picketing on the ground that it was in violation of the state’s antitrust laws. Plumbers Union v. Graham, 345 U.S. 192 (1953) sustained an injunction against picketing which advertised that nonunion workers were employed on a construction project. The Court found that its purpose was “in conflict with the [state “Right to Work”] statute, since the immediate results of the picketing demonstrated its potential effectiveness as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men.” Finally came International Brotherhood of Teamsters, Local 695 v. Voight, 354 U.S. 284 (1957). Explicitly “realizing” that Thornhill “had to yield ‘to the impact of facts unforeseen,’ or at least not sufficiently appreciated,” the Court upheld a ban on picketing intended “to coerce an employer to put pressure on his employees to join the union” in violation of “the declared policy of the State.” Voight was decided five-to-three, with one justice not participating. Chief Justice Warren and Justices Black and Douglas dissented on the ground that it was inconsistent with both Thornhill and Swing.

QUERY: are these “limiting” decisions correct? In each case, the picketing was peaceful and designed to provide the public with factual information and matters of opinion. Remember Thornhill’s statement that “[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.”

But, QUERY further: as a practical matter, the effect of this “expression” will be to interfere with the operation of valid federal and state laws providing for the “right to work” (i.e., without being forced to join a union as a condition of employment), against secondary boycotts (i.e. inducing the public to refrain from trading with businesses not directly involved in a labor dispute) and other “restraints of trade.” Does the government

“interest” in enforcing its laws simply outweigh the speech right involved in the picketing?

In NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), the Court specifically refused to extend similar limitations to civil rights protests. The NAACP had organized an effective boycott of white merchants “to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice.” Holding that “while States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful activity such as that found in the boycott in this case,” the Court struck down an award of money damages awarded in the state courts. It did, however, remand the case for a determination of any damages specifically caused by violent acts attendant to the picketing.

Marginal cases seem to be decided against picketing and/or the withholding of services. In International Longshoreman’s Association v. Allied International, Inc., 456 U.S. 212 (1982), the Court unanimously held that the union’s refusal to unload cargo shipped from the Soviet Union as a protest against the Soviet invasion of Afghanistan was an illegal secondary boycott under federal law. Since it was intended to “coerce” rather than “communicate,” it deserved little “consideration under the First Amendment.” Similarly, a work stoppage by a group of attorneys frequently appointed as counsel for indigent criminal defendants could not be justified under Claiborne Hardware since its “undenied objective” was to secure an increase in fees and was, therefore, “to gain an economic advantage for those who agreed to participate.” FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).

The labor movement is a significant force in the social, economic and political life of the nation. Many of its supporters in state legislatures, anxious to protect picketing as a crucial component of the right to strike, began to exempt “labor picketing” from bans on other forms of picketing which were considered to be contrary to the public interest.

POLICE DEPARTMENT OF CHICAGO v. MOSLEY, 408 U.S. 92 (1972)

MR. JUSTICE MARSHALL delivered the opinion of the Court

At issue in this case is the constitutionality of the following Chicago ordinance:

“A person commits disorderly conduct when he knowingly:

“(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half

hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute"

The suit was brought by Earl Mosley, a federal postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School in Chicago. During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago.

On March 26, 1968, [the Ordinance] was passed, to become effective on April 5. Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. On April 4, the day before the ordinance became effective, Mosley ended his picketing next to the school. Thereafter, he brought this action, seeking declaratory and injunctive relief.

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating

in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable “time, place and manner” regulations of picketing may be necessary to further significant governmental interests. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, see, e. g., *Thornhill v. Alabama*, discriminations among pickets must be tailored to serve a substantial governmental interest.

In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. This is never permitted. In spite of this, Chicago urges that the ordinance is not improper content censorship, but rather a device for preventing disruption of the school. Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits.

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. “[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines School District*, 393 U.S., at 508. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more

disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

Chicago's ordinance imposes a selective restriction on expressive conduct far "greater than is essential to the furtherance of [a substantial governmental] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST concur in the result.

MR. CHIEF JUSTICE BURGER concurred in a separate Opinion.

Comments and Queries

QUERY: were it not for the exclusion of "labor disputes," would the state's interest in "preventing disruption of the school" have been sufficient to justify a total ban on picketing during the specified hours? And QUERY further: is it, perhaps, to avoid addressing that question that the Court decides this "free speech" case, rather unusually, under the "equal protection" clause of the Fourteenth Amendment?

Compare this case with *Madsen v. Woman's Heath Center, Inc.*, below, in which the Court is required to analyze and balance the state's interest in maintaining a tranquil hospital environment against the First Amendment rights of the "abortion protestors." QUERY: would not a similar "balancing" have been a more straightforward means of approaching this case? Or is the Court simply adhering to the third of the *Ashwander* principles which instructs that "it will not formulate a rule of constitutional law broader than needed"? (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)).

B. Private Residences

The sanctity of the home is one of the cardinal principles of Anglo-American law. It has given rise to the oft-repeated axiom that a home may be so primitive and open to the elements through gaps in its slats and timbers that “the wind may enter, the rain may enter, but the King of England may not enter.” That same sentiment was the central concern behind the “search and seizure” provision of the Fourth Amendment. For similar reasons, the Supreme Court has held that the states may criminalize the possession of “obscene” materials anywhere except in the privacy of the home, Stanley v. Georgia, *supra*, at pp. .

FRISBY v. SCHULTZ, 487 U.S. 474 (1988)

JUSTICE O'CONNOR delivered the opinion of the Court.

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing “before or about” any residence. This case presents a facial First Amendment challenge to that ordinance.

Brookfield is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board enact[ed] an ordinance to restrict the picketing[:] “It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.”

The ordinance itself recites the primary purpose of this ban: “the protection and preservation of the home” through assurance “that members of the community enjoy in

their homes and dwellings a feeling of well-being, tranquility, and privacy.” The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with “the free use of public sidewalks and public ways of travel.”

Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield and sought declaratory as well as preliminary and permanent injunctive relief on the grounds that the ordinance violated the First Amendment.

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of “uninhibited, robust, and wide-open” debate on public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), we have traditionally subjected restrictions on public issue picketing to careful scrutiny.

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the “place” of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated “differ depending on the character of the property at issue.” Specifically, we have identified three types of fora: “the traditional public forum, the public forum created by government designation, and the nonpublic forum.”

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. “[T]ime out of mind” public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. Appellants, however, urge us to disregard these “cliches.” They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield’s streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication. We reject this suggestion. Our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a “cliche,” but recognition that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.” No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. The residential character of those

streets may well inform the application of the relevant test, but it does not lead to a different test; the anti-picketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora.

The appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. We accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is “narrowly tailored to serve a significant government Interest” and whether it “leave[s] open ample alternative channels of communication.”

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words “residence” and “dwelling” suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. So narrowed, the ordinance permits the more general dissemination of a message. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain:

“Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment.”

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy.

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, e. g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)

(offensive radio broadcasts); *Rowan* [v. Post Office Department, 397 U.S. 728 (1970)] (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, (1949) (sound trucks).

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because “the substantive evil - visual blight - [was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself.”

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. In such cases “the flow of information [is not] into . . . household[s], but to the public.” Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.

The First Amendment permits the government to prohibit offensive speech as intrusive when the “captive” audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a “captive.” The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the “evil” of targeted residential picketing, “the very presence of an unwelcome visitor at the home,” is “created by the medium of expression itself.” Accordingly, the Brookfield ordinance’s complete ban of that particular medium of expression is narrowly tailored.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail.

JUSTICE WHITE concurred in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joined, dissented.

JUSTICE STEVENS, dissenting.

“GET WELL CHARLIE - OUR TEAM NEEDS YOU.”

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the period of time necessary to convey its friendly message to its intended audience.

The Court’s analysis of the question whether Brookfield’s ban on picketing is constitutional begins with an acknowledgment that the ordinance “operates at the core of the First Amendment,” and that the streets of Brookfield are a “traditional public forum.” It concludes, however, that the total ban on residential picketing is “narrowly tailored” to protect “only unwilling recipients of the communications.” The plain language of the ordinance, however, applies to communications to willing and indifferent recipients as well as to the unwilling.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to do more than convey a message of opposition to the character of the doctor's practice; it was intended to cause him and his family substantial psychological distress. I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little

justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably “overbroad” in that it prohibits some communication that is protected by the First Amendment. In this case the overbreadth is unquestionably “real.” Whether or not it is “substantial” in relation to the “plainly legitimate sweep” of the ordinance is a more difficult question. My hunch is that the town will probably not enforce its ban against friendly, innocuous, or even brief unfriendly picketing, and that the Court may be right in concluding that its legitimate sweep makes its overbreadth insubstantial. But there are two countervailing considerations that are persuasive to me. The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; while we sit by and await further developments, potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. Accordingly, I respectfully dissent.

Comments and Queries

In Carey v. Brown, 447 U.S. 455 (1980), the Court struck down an Illinois statute providing that “[i]t is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.” Given the exceptions, “the State’s asserted interest in promoting the privacy of the home is not sufficient to save the statute.”

QUERY: without the “labor dispute” exception, should the ordinance have been upheld on the analysis set forth here? The picketers had, in fact, marched before the home of the Mayor of Chicago to protest his refusal to support the busing of students to achieve racial integration of the schools. QUERY: assuming it could be shown that the Mayor used his home for meetings of advisors on matters of public interest, should that have brought the picketing within the last of the cited exceptions? If so, QUERY further: would this have been enough to avoid passing on validity of the ordinance?

Notice that the Court reaffirms its cases holding the streets to be “traditional public fora,” but nonetheless upholds the ordinance because “[t]he resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted

speech.” Then recall Justice Douglas’ concurring opinion in Lehman v. City of Shaker Heights, supra, at pp. . Supplying the crucial fifth vote to overturn a transit system regulation banning political advertising, he opined that while a candidate “has a right to express his views to those who wish to listen, he had no right to force his message upon an audience incapable of declining to receive it. ... this captive audience.” QUERY: is there any substantial similarity between the two cases?

C. Abortion Clinics

The decision in Roe v. Wade, 420 U.S. 113 (1973), as modified in Planned Parenthood v. Casey, 505 U.S. 833 (1992), holding that the “liberty” interested protected by the due process clause of the Fifth and Fourteenth Amendments includes the right of a woman to terminate her pregnancy prior to the “viability” of the fetus, set off one of the greatest controversies in the history of the United States. Great moral, philosophical and legal arguments have been brought to bear on both sides. Those disagreements come into practical conflict “on the streets” outside the clinics in which the abortion procedure is performed.

MADSEN v. WOMEN HEALTH CENTER, INC., 512 U.S. 1277 (1994)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners challenge the constitutionality of an injunction entered by a Florida state court which prohibits anti-abortion protestors from demonstrating in certain places and in various ways outside of a health clinic that performs abortions. We hold that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment, but that several other provisions of the injunction do not.

I

Respondents operate abortion clinics throughout central Florida. Petitioners and other groups and individuals are engaged in activities near the site of one such clinic in Melbourne, Florida. They picketed and demonstrated where the public street gives access to the clinic. In September, 1992, a Florida state court permanently enjoined petitioners from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic. Six months later, respondents sought to broaden the injunction, complaining that access to the clinic was still impeded by petitioners' activities and that such activities had also discouraged some potential patients from entering the clinic, and had deleterious physical effects on others. The trial court thereupon issued a broader injunction, which is challenged here.

The court found that, despite the initial injunction, protesters continued to impede access to the clinic by congregating on the paved portion of the street - Dixie Way - leading up to the clinic, and by marching in front of the clinic's driveways. It found that, as vehicles

heading toward the clinic slowed to allow the protesters to move out of the way, “sidewalk counselors” would approach and attempt to give the vehicle’s occupants anti-abortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.

The protests, the court found, took their toll on the clinic’s patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients “manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures.” The noise produced by the protestors could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date, the doctor testified, increased their health risks by reason of the delay.

Doctors and clinic workers, in turn, were not immune even in their homes. Petitioners picketed in front of clinic employees’ residences; shouted at passersby; rang the doorbells of neighbors and provided literature identifying the particular clinic employee as a “baby killer.” Occasionally, the protestors would confront minor children of clinic employees who were home alone.

This and similar testimony led the state court to conclude that its original injunction had proved insufficient “to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services.” The state court therefore amended its prior order, enjoining a broader array of activities. The Florida Supreme Court upheld the constitutionality of the trial court’s amended injunction.

III

If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism* and similar cases. Given that the forum around the clinic is a traditional public forum, see *Frisby v. Schultz*, 487 U.S., at 480, we would determine whether the time, place, and manner regulations were “narrowly tailored to serve a significant governmental interest.”

There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. We believe that these differences require a somewhat more stringent application of general First Amendment principles in this context. When evaluating a content-neutral injunction, our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.

A

We begin with the 36-foot buffer zone. The state court prohibited petitioners from “congregating, picketing, patrolling, demonstrating or entering” any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic. This speech-free buffer zone requires that petitioners move to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the free access of patients and staff. The buffer zone also applies to private property to the north and west of the clinic property. We examine each portion of the buffer zone separately.

We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. Here the picketing is directed primarily at patients and staff of the clinic. The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way. The state court seems to have had few other options to protect access given the narrow confines around the clinic. As the Florida Supreme Court noted, Dixie Way is only 21 feet wide in the area of the clinic. The state court was convinced that allowing the petitioners to remain on the clinic’s sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access. And allowing the petitioners to stand in the middle of Dixie Way would obviously block vehicular traffic.

The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review. Moreover, one of petitioners' witnesses during the evidentiary hearing before the state court conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots. We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order. On balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.

The inclusion of private property on the back and side of the clinic in the 36-foot buffer zone raises different concerns. The accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way. Patients and staff wishing to reach the clinic do not have to cross the private property, and nothing in the record indicates that petitioners' activities on the private property have obstructed access to the clinic. Nor was evidence presented that protestors located on the private property blocked vehicular traffic on Dixie Way. We hold that, on the record before us, the 36-foot buffer zone, as applied to the private property to the north and west of the clinic, burdens more speech than necessary to protect access to the clinic.

B

In response to high noise levels outside the clinic, the state court restrained the petitioners from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the [c]linic" during the hours of 7:30 a.m. through noon on Mondays through Saturdays. We must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary. We have upheld similar noise restrictions in the past, and as we noted in upholding a local noise ordinance around public schools, "the nature of a place, 'the pattern of its normal

activities, dictate the kinds of regulations . . . that are reasonable.’’ Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Noise control is particularly important around hospitals and medical facilities during surgery and recovery periods, and in evaluating another injunction involving a medical facility, we stated:

“Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.” NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-784, n. 12 (1979).

We hold that the limited noise restrictions imposed by the state court order burden no more speech than necessary to ensure the health and wellbeing of the patients at the clinic. The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. “If overamplified loudspeakers assault the citizenry, government may turn then down.” That is what the state court did here, and we hold that its action was proper.

C

The same, however, cannot be said for the “images observable” provision of the state court's order. Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all “images observable.” This broad prohibition on all “images observable” burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families. Similarly, if the blanket ban on “images observable” was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by “images observable” inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

D

The state court ordered that petitioners refrain from physically approaching any person seeking services of the clinic “unless such person indicates a desire to communicate” in an area within 300 feet of the clinic. The state court was attempting to prevent clinic patients and staff from being “stalked” or “shadowed” by the petitioners as they approached the clinic.

But it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters’ speech is independently proscribable (i.e., “fighting words” or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand. “As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Boos v. Barry*, 485 U.S., at 322. The “consent” requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

E

The final substantive regulation challenged by petitioners relates to a prohibition against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. The prohibition also covers impeding access to streets that provide the sole access to streets on which those residences are located. The same analysis applies to the use of sound amplification equipment here as that discussed above: the government may simply demand that petitioners turn down the volume if the protests overwhelm the neighborhood.

As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as “the last citadel of the tired, the weary, and the sick.” *Frisby*, 487 U.S., at 484. We stated that “[t]he State’s interest in protecting the wellbeing, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”

But the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. The ordinance at issue there

made it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual.” The prohibition was limited to “focused picketing taking place solely in front of a particular residence.” By contrast, the 300-foot zone would ban “[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.” The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

V

In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court's injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the “images observable” provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction.

JUSTICE SOUTER concurred in a separate Opinion.

JUSTICE STEVENS concurred in part and dissented in part in a separate Opinion.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

The judgment in today’s case has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. That appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that, in any other context, it would have been regarded as a candidate for summary reversal.

But the context here is abortion. A long time ago, in dissent from another abortion-related case, JUSTICE O’CONNOR, joined by then-JUSTICE REHNQUIST, wrote:

“This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but - except when it comes to abortion - the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986).

Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.

Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions, I dissent.

According to the Court, the state court imposed the later injunction's “restrictions on petitioner[s'] . . . anti-abortion message because they repeatedly violated the court's original order.” Surprisingly, the Court accepts this reason as valid, without asking whether the court's findings of fact support it - whether, that is, the acts of which the petitioners stood convicted were violations of the original injunction.

The Court simply takes this on faith - even though violation of the original injunction is an essential part of the reasoning whereby it approves portions of the amended injunction, even though petitioners denied any violation of the original injunction, and even though close examination of the factual basis for essential conclusions is the usual practice in First Amendment cases. Let us proceed, then, to the inquiry the Court neglected. In the Amended Permanent Injunction the trial court found that

“despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility. . . . [in] the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some

marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of the sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. . . . Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.”

“As traffic slowed on Dixie Way and began to turn into the clinic’s driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles’ occupants to give them anti-abortion literature and to urge them not to use the clinic’s services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.”

“The . . . staff physician testified that, on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way. . . . This physician also testified that he witnessed the demonstrators running along side in front of patients’ vehicles, pushing pamphlets in such windows to persons who had not indicated any interest in such literature. . . .”

On the basis of these findings, Judge McGregor concluded that “the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of traffic.”

These are the only findings and conclusions of the court that could conceivably be considered to relate to a violation of the original injunction. They all concern behavior by the protestors causing traffic on the street in front of the abortion clinic to slow down, and causing vehicles crossing the pedestrian right-of-way, between the street and the clinic’s parking lot, to slow down or even, occasionally, to stop momentarily while pedestrians got out of the way. As far as appears from the court’s findings, all of these results were produced, not by anyone intentionally seeking to block oncoming traffic, but as the incidental effect of persons engaged in the activities of walking a picket line and

leafletting on public property in front of the clinic. There is no factual finding that petitioners engaged in any intentional or purposeful obstruction.

If the original injunction is read as it must be, there is nothing in the trial court's findings to suggest that it was violated. The Court today speaks of "the failure of the first injunction to protect access." But the first injunction did not broadly "protect access." It forbade particular acts that impeded access, to-wit, intentionally "blocking, impeding or obstructing." The trial court's findings identify none of these acts, but only a mild interference with access that is the incidental byproduct of leafletting and picketing. There was no sitting down, no linking of arms, no packing en masse in the driveway; the most that can be alleged is that, on one occasion, protestors "took their time to get out of the way." If that is enough to support this one-man proscription of free speech, the First Amendment is in grave peril.

Assuming a "significant state interest" of the sort cognizable for injunction purposes (i.e., one protected by a law that has been or is threatened to be violated) in both (1) keeping pedestrians off the paved portion of Dixie Way, and (2) enabling cars to cross the public sidewalk at the clinic's driveways without having to slow down or come to even a "momentary" stop, there are surely a number of ways to protect those interests short of banishing the entire protest demonstration from the 36-foot zone. For starters, the Court could have (for the first time) ordered the demonstrators to stay out of the street (the original injunction did not remotely require that). It could have limited the number of demonstrators permitted on the clinic side of Dixie Way. And it could have forbidden the pickets to walk on the drive-ways. The Court's only response to these options is that "[t]he state court was convinced that [they would not work] in view of the failure of the first injunction to protect access." But must we accept that conclusion as valid - when the original injunction contained no command (or at the very least no clear command) that had been disobeyed, and contained nothing even related to staying out of the street? If the "burden no more speech than necessary" requirement can be avoided by merely opining that (for some reason) no lesser restriction than this one will be obeyed, it is not much of a requirement at all.

What we have decided seems to be, and will be reported by the media as, an abortion case. But it will go down in the lawbooks, it will be cited, as a free-speech injunction case - and the damage its novel principles produce will be considerable. The proposition that injunctions against speech are subject to a standard indistinguishable from (unless

perhaps more lenient in its application than) the “intermediate scrutiny” standard we have used for “time, place, and manner” legislative restrictions; the notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact - these latest by-products of our abortion jurisprudence ought to give all friends of liberty great concern.

For these reasons, I dissent from that portion of the judgment upholding parts of the injunction.

Comments and Queries

Notice, first, the Court’s distinction between “a generally applicable ordinance,” enacted by a legislative body, and an “injunction” issued by a court. A person found guilty of violating an ordinance later found to be unconstitutional cannot be punished since it was void “ab initio,” i.e. from the beginning. An injunction, on the other hand, is valid until stayed or overturned, and a person can be punished for its violation even if it is later found to have been invalid. This accounts for the Court’s determination that “our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” QUERY: is this really a substantial difference, given that one of the criteria necessary to sustain a “time, place and manner” restriction is that it must be “narrowly tailored to serve a significant government interest”?

QUERY: is the Court’s decision that “[o]n balance ... the 36 foot buffer zone .. burdens no more speech than necessary” justified? Is the Court’s decision to overturn the “inclusion on the back and side of the clinic in the 36-foot buffer zone” because “nothing in the record indicates that petitioners’ activities on the private property have obstructed access to the clinic,” an invitation for them to do just that, thereby beginning the process of another lawsuit, another decision and another appeal? Far more importantly, QUERY: is this line-by-line analysis of a state court injunction an appropriate function of the Supreme Court? Or is it, like the screening of pornographic movies to determine which are “obscene,” Paris Adult Theatre I v. Slayton, supra, at pp. , and determining how many candy canes are needed to balance the manger scene in a publicly sponsored “holiday” display, Lynch v. Donnelly, supra, at pp. , simply a waste of the Court’s time and limited resources. So QUERY further: should the Court refuse to grant certiorari on that ground? What would be the practical consequences of such refusals?

The Hobbs Act, 18 United States Code 1951, was passed in an effort to combat organized crime. Its principal provision is that “[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section” is guilty of an offense and subject to fine and imprisonment.

SCHEIDLER v. NATIONAL ORGANIZATION FOR WOMEN, ___ U.S. ___ (2003)

Chief Justice Rehnquist delivered the opinion of the Court.

We once again address questions arising from litigation between petitioners, a coalition of antiabortion groups called the Pro-Life Action Network, Joseph Scheidler and other individuals and organizations that oppose legal abortion, and respondents, the National Organization for Women, Inc, a national nonprofit organization that supports the legal availability of abortion, and two health care centers that perform abortions. Our earlier decision provides a substantial description of the factual and procedural history of this litigation, see *National Organization for Women, Inc. v. Scheidler*, 510 U. S. 249 (1994), and so we recount only those details necessary to address the questions here presented.

We first address the question whether petitioners’ actions constituted extortion in violation of the Hobbs Act. That Act defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U. S. C. §1951(b)(2). Petitioners allege that the jury’s verdict and the Court of Appeals’ decision upholding the verdict represent a vast and unwarranted expansion of extortion under the Hobbs Act. They say that the decisions below “rea[d] the requirement of ‘obtaining’ completely out of the statute” and conflict with the proper understanding of property for purposes of the Hobbs Act.

We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as

another's right to exercise exclusive control over the use of a party's business assets. Whatever the outer boundaries may be, the effort to characterize petitioners' actions here as an "obtaining of property from" respondents is well beyond them. Such a result would be an unwarranted expansion of the meaning of that phrase.

There is no dispute in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. Likewise, petitioners' counsel readily acknowledged at oral argument that aspects of his clients' conduct were criminal. But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. *United States v. Nardello*, 393 U. S. 286, 290 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act.

Justice Ginsburg, with whom Justice Breyer joined, concurred in an opinion.

Justice Stevens, dissenting.

The term "extortion" as defined in the Hobbs Act refers to "the obtaining of property from another." 18 U. S. C. §1951(b)(2). The Court's murky opinion seems to hold that this phrase covers nothing more than the acquisition of tangible property. No other federal court has ever construed this statute so narrowly.

For decades federal judges have uniformly given the term “property” an expansive construction that encompasses the intangible right to exercise exclusive control over the lawful use of business assets. The right to serve customers or to solicit new business is thus a protected property right. The use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible right is an appropriation of control embraced by the term “obtaining.” That is the commonsense reading of the statute that other federal judges have consistently and wisely embraced in numerous cases that the Court does not discuss or even cite. Recognizing this settled definition of property, as I believe one must, the conclusion that petitioners obtained this property from respondents is amply supported by the evidence in the record.

Comments and Queries

QUERY: assuming the dissent is correct in believing that the “right to serve customers or to solicit new business is ... a property right,” does it follow that coercing the “owner of a business to surrender control of such an intangible right” is equivalent to “obtaining” that right? In the context of this case, the abortion protestors have surely not “obtained” the “right” to “serve the customers” of the clinic or to “solicit new business” for it. Has the “intangible right,” then, simply disappeared? If it has, is the Hobbs’ Act conviction sustainable?

THE RIGHT IN PUBLIC VENUE

I. Public Schools

Recall the classic statement of the problem in Tinker v. Des Moines School District, 393 U.S. 503, (1969): “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. ... 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 school authorities.”

This “comprehensive authority” is based on either, or both, of two theories: Since almost all students are “minors” (i.e. under the age of eighteen), the school authorities are, at least to some extent, acting in loco parentis (in the place of their parents) during the school day. Moreover, since the obvious, and important, function of schools is education, those responsible for their operation must be able to make rules to prevent “disruptions” and “distractions” from the learning environment.

A. Libraries

As the Supreme Court was later to observe, in another context, “libraries pursue the worthy mission of facilitating learning and cultural enrichment. [The American Library Association’s] Library Bill of Rights states that libraries should provide ‘[b]ooks and other ... resources ... for the interest, information and enlightenment of all people of the community the library serves’.” United States v. American Library Association, Inc., ___, ___, ___ (2003).

BOARD OF EDUCATION v. PICO, 457 U.S. 853 (1982)

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.

I

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and [several individuals who were members of the Board when suit was filed.] The Board is a state agency charged with responsibility for the operation and administration of the public schools within the District, including the High School and 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, [three of the] petitioners 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 [they] described as “objectionable,” and 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.”

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 in the United States District Court. 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.

II

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. For example, *Meyer v. Nebraska*, 262 U.S. 390 (1923), struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson v. Arkansas*, 393 U.S. 97 (1968), declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school. But the current action does not require us to re-enter this difficult terrain, which Meyer and Epperson traversed without apparent misgiving. For as this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. 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.

The substantive question before us is still further constrained by the procedural posture of this case. Petitioners were granted summary judgment by the District Court. The Court of Appeals reversed that judgment, and remanded the action for a trial on the merits of respondents' claims. We can reverse the judgment of the Court of Appeals, and grant Petitioners' request for reinstatement of the summary judgment in their favor, only if we determine that "there is no genuine issue as to any material fact," and that petitioners are "entitled to a judgment as a matter of law."

A

(1)

The Court has long recognized that local school boards have broad discretion in the management of school affairs. 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.

The nature of students' First Amendment rights in the context of this case requires further examination. *West Virginia Board of Education v. Barnette* 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 v. Des Moines School District*, 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. In short, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students."

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. *Epperson v. Arkansas*, 393 U.S., at 104. 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. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them: "The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. As we recognized in *Tinker*, students too are beneficiaries of this principle: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'" Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker*.

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.

(2)

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.

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.”

As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to remove books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *West Virginia Board of Education v. Barnette*, 319 U.S., at 642.

B

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?

The evidence plainly does not foreclose the possibility that petitioners’ decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books [but] 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. On that issue, it simply cannot be said that there is no genuine issue as to any material fact.

* The nine books in the High School library were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. The book in the Junior High School library was *A Reader for Writers*, edited by Jerome Archer. Still another listed book, *The Fixer*, by Bernard Malamud, was found to be included in the curriculum of a 12th-grade literature course.

****Laughing Boy.**

*****Black Boy.**

JUSTICE BLACKMUN concurred in part and concurred in the judgment in a separate Opinion.

JUSTICE WHITE concurred in the judgment.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal-court review. Were this to become the law, this Court would come perilously close to becoming a “super censor” of school board library decisions. Stripped to its essentials, the issue comes down to two important propositions: first, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and second, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. In an attempt to place this case within the protection of the First Amendment, the plurality suggests a new “right” that, when shorn of the plurality's rhetoric, allows this Court to impose its own views about what books must be made available to students.

We can all agree that as a matter of educational policy students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired

from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.

The plurality also limits the new right by finding it applicable only to the removal of books once acquired. Yet if the First Amendment commands that certain books cannot be removed, does it not equally require that the same books be acquired? Why does the coincidence of timing become the basis of a constitutional holding? According to the plurality, the evil to be avoided is the “official suppression of ideas.” It does not follow that the decision to remove a book is less “official suppression” than the decision not to acquire a book desired by someone. Similarly, a decision to eliminate certain material from the curriculum, history for example, would carry an equal - probably greater - prospect of “official suppression.” Would the decision be subject to our review?

Through use of bits and pieces of prior opinions unrelated to the issue of this case, the plurality demeans our function of constitutional adjudication. Today the plurality suggests that the Constitution distinguishes between school libraries and school classrooms, between removing unwanted books and acquiring books. Even more extreme, the plurality concludes that the Constitution requires school boards to justify to its teenage pupils the decision to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

JUSTICE POWELL, dissenting.

I view today’s decision with genuine dismay. Whatever the final outcome of this suit and suits like it, the resolution of educational policy decisions through litigation, and the exposure of school board members to liability for such decisions, can be expected to corrode the school board’s authority and effectiveness. As is evident from the generality of the plurality’s “standard” for judicial review, the decision as to the educational worth of a book is a highly subjective one. Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district.

JUSTICE REHNQUIST with whom THE CHIEF JUSTICE and JUSTICE POWELL joined, dissented in a separate Opinion.

JUSTICE O'CONNOR dissented in a separate Opinion.

Comments and Queries

Notice the plurality's narrow holding: "that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books," and its failure to respond to the dissent's question "if the First Amendment commands that certain books cannot be removed, does it not equally require that the same books be acquired?" QUERY: Given that, and the fact that the case is merely remanded for a hearing into the motives behind the School Board's action, does this decision stand for any principle broader than that the plurality wanted to make a statement against metaphorical "book burning"?

QUERY also: as a practical matter, is the conclusion on remand a foregone conclusion? Is it likely the former (or present) school board members will testify that they voted as they did so as "to deny respondents access to ideas with which petitioners disagreed," rather than because of the "pervasive" vulgarity and "educational suitability" of the books in question?

Notice that only three justices join in section IIA(1) of the opinion, which relies, in part, on the "right to receive ideas." QUERY: what implications would follow from recognizing this as a separate, substantive "right"? Would it expand upon the right of others to express "ideas"? If so, what "ideas"? If not, why isn't the "right to receive" redundant except insofar as it may confer standing on otherwise ineligible plaintiffs, see, e.g., Virginia Pharmacy Board v. Virginia Council, supra, at pp. .

B. Student Publications

One of the unique features of the public schools is that they frequently fulfill roles other than those associated with traditional education. They are the “publisher” of the student newspaper and the “producer” of student theater. In almost all cases they also operate an extensive transportation system and manage large athletic programs. All of these functions not only carry technical and educational responsibilities but increase the school’s exposure to legal liability as well. If, for example, the student newspaper were to commit libel or unlawfully invade someone’s privacy, the aggrieved person would have a right of action against the school as well as against the offending student(s). Indeed, the primary lawsuit would almost certainly be against the school because it would be seen as having the “deeper pockets,” i.e. the greater ability to pay whatever money damages might be assessed.

It is this concern, among others, that frequently leads the school authorities to review a copy of the newspaper prior to its publication.

HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER, 484 U.S. 260 (1988)

JUSTICE WHITE delivered the opinion of the Court.

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 Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper.

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 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 reversed.

Students in the public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker [v. Des Moines Independent Community School District]*, 393 U.S. 503 [at 506] [(1969)]. They cannot be punished merely for expressing their personal views on the school premises - whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,” - unless

school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.”

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,” and must be “applied in light of the special characteristics of the school environment.” A school need not tolerate student speech that is inconsistent with its “basic educational mission,” even though the government could not censor similar speech outside the school.

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy and the Hazelwood East Curriculum Guide. Board Policy provided that “[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.” The Hazelwood East Curriculum Guide described the Journalism II course as a “laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I.” The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, “the legal, moral, and ethical restrictions imposed upon journalists within the school community,” and “responsibility and acceptance of criticism for articles of opinion.” Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play “disassociate itself,” not only from speech that would “substantially interfere with [its] work . . . or impinge upon the rights of other students,” but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices - 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,” 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*, 347 U.S. 483, 493 (1954).

We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

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[d],” as to require judicial intervention to protect students’ constitutional rights

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. 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.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

This case arose when the Hazelwood East administration breached its own promise, dashing its student's expectations. The school principal, without prior consultation or explanation, excised six articles - comprising two full pages - of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption.

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.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices . . ." The same cannot be said of official censorship designed to shield the audience or

dissociate the sponsor from the expression. Censorship so motivated might well serve some other school purpose. But it in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences." Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with 'the shared values of a civilized social order'") through school-sponsored student activities.

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. The former would constitute unabashed and unconstitutional viewpoint discrimination, as well as an impermissible infringement of the students' "right to receive information and ideas." Just as a school board may not purge its state-funded library of all books that "offen[d] [its] social, political and moral tastes," school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication.

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential topic sensitivity" is a vaporous nonstandard - like "'public welfare, peace, safety, health, decency, good order, morals or convenience,'" *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969), or "'general welfare of citizens,'" *Staub v. Baxley*, 355 U.S. 313, 322 (1958) - that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object. In part because of those dangers, this Court has consistently condemned any

scheme allowing a state official boundless discretion in licensing speech from a particular forum.

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk “that the views of the individual speaker [might be] erroneously attributed to the school.” Of course, the risk of erroneous attribution inheres in any student expression, including “personal expression” that, like the armbands in *Tinker*, “happens to occur on the school premises.” Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But “[e]ven 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.’ Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the “Statement of Policy” that *Spectrum* published each school year announcing that “[a]ll . . . editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East,” or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time-tested proposition that public school students “do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’.” That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of “teach[ing] children to respect the diversity of ideas that is fundamental to the American system,” *Board of Education v. Pico*, 457 U.S., at 880 (BLACKMUN, J.concurring in part and concurring in the judgment) and “that our Constitution is a living reality, not parchment preserved under glass,” *Shanley v. Northeast Independent School District*, 462 F.2d 960, 972 (1972), the Court today “teach[es] youth to discount important principles of our government as mere platitudes.” *West Virginia Board of Education v. Barnette*, 319 U.S., at 637. The young men and

women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

Comments and Queries

QUERY: can Justice Brennan's dissent be taken seriously? He begins by criticizing the principal for eliminating the two pages "'simply because he considered [them] unsuitable' for student consumption. Yet as the author of the opinion in Board of Education v. Pico, immediately above, he noted that if the decision to remove the books from the library "was based solely upon the 'educational unsuitability' of the books in question, then their removability would be 'perfectly reasonable'." He also finds insufficient "the school's interest in shielding an impressionable high school audience from material whose substance is 'unsuitable for immature audiences'." Further, he faults the principal's action as impermissible "suppression of disfavored viewpoints ...," though without challenging the majority's observation that "[a] school must also retain 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 ...'." But see his concurrence in Bethel School District v. Fraser, below, because the student's "remarks exceeded permissible limits."

Lastly, would the "dissociative means" suggested in the dissent really be sufficient to shield the school district from liability from libel or unlawful invasion of privacy? Whatever "disclaiming" words the school might choose to print at the bottom of the page, the newspaper was produced in a class taken for credit and supervised by a teacher appointed by the school district. Surely, at a minimum, the teacher has the responsibility of reviewing the work for purposes of assigning a grade. Even, therefore, if we leave aside the role of the principal in reviewing the text, can the school "disassociate" itself from the published product?

C. Student Conduct

The courts have consistently upheld regulations to prevent “disruption” of and “distractions” from the “learning environment” necessary in a school. These include numerous restrictions on student’s conduct, and even expression, which would be unconstitutional if applied to society at large. Numerous circuit court decisions have upheld school “dress codes,” see e.g., noticeably, New Rider v. Board of Education, 480 F.2d 693 (10th Cir., 1973), cert.den. 414 U.S. 1097 (1973), as to three Pawnee Indian junior high school students who were denied the right to wear their hair “braided” as an expression of their heritage and tradition. Student’s school lockers may be searched without the necessity of a warrant or, even of probable cause: “Under ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” New Jersey v. T.L.O., 469 U.S. 325, 341-42.

It seems clear, therefore, that, students do “shed” some of their constitutional rights at the schoolhouse gates. Whether, and to what extent, this includes the right to freedom of speech and expression seems to depend on the nature of the expression and the amount of distraction or disruption it threatens.

TINKER v. DES MOINES SCHOOL DISTRICT, 393 U.S. 503 (1969)

See above at pp. .

BETHEL SCHOOL DISTRICT v. FRASER, 478 U.S. 675 (1986)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

On April 26, 1983, 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. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. 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.

The District Court held that the school’s sanctions violated respondent’s right to freedom of speech under the First Amendment. The Court of Appeal affirmed. We reverse.

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). In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the “inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.”

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. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California*, 403 U.S. 15 (1971). 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.

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.

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.

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. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *New Jersey v. T. L. O.*, 469 U.S., at 340. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.

JUSTICE BLACKMUN concurs in the result.

JUSTICE BRENNAN, concurring in the judgment.

Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

“I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most . . . of all, his belief in you, the students of Bethel, is firm.

“Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds.

“Jeff is a man who will go to the very end - even the climax, for each and every one of you.

“So vote for Jeff for A. S. B. vice-president - he'll never come between you and the best our high school can be.”

The Court, referring to these remarks as “obscene,” “vulgar,” “lewd,” and “offensively lewd,” concludes that school officials properly punished respondent for uttering the speech. 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.

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.

JUSTICE STEVENS, dissenting.

“Frankly, my dear, I don't give a damn.”

When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.

This respondent was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers. This fact is relevant for two reasons. It confirms the conclusion that the discipline imposed on him - a 3-day suspension and ineligibility to speak at the school's graduation exercises - was sufficiently serious to justify invocation of the School District's grievance procedures. More importantly, it indicates that he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word - or a sexual metaphor - than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.

It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we - at this distance - confidently assert that he must have known that the school administration would punish him for delivering it?

For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.

Comments and Queries

QUERY: however wise might be the result in this case, is some of the rhetoric used in reaching it dangerously simplistic? For example, the hearing examiner found Fraser's speech to be "obscene." Is there any basis whatever for such a conclusion in light of the Supreme Court's definition of "obscenity" in Miller v. California, 413 U.S. 15 (1973)? Notice the Court does not support that conclusion, but refers to the speech as "offensively lewd and indecent." Far more importantly, Chief Justice Burger, after discussing the purposes of the school system, seems to go beyond that subject in concluding: "Even the most heated political discourse in a democratic society requires consideration of the personal sensibilities of the other participants and audiences." QUERY: if taken literally, wouldn't this statement validate the various "speech codes" since enacted by public universities, all of which have been struck down by on First Amendment grounds.

The most significant criticism of the decision seems to come from Justice Stevens, whose concern is that Fraser was "entitled to fair notice of the scope of the prohibition and the consequences of its violation." A statute will be held "void for vagueness" if it does not require "a person to conform to an imprecise but comprehensible standard, but rather ... that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning'." Coates v. Cincinnati, 402 U.S. 611 (1971). QUERY: does the school's disciplinary rule satisfy this standard? QUERY further: even if it does not, is the Court correct in concluding that greater "latitude" must be afforded to school regulations?

This regulation applies not to conduct, as such, but to expression. Recall, in that regard, the "debate" between Justices Brennan and Rhenquist, conducted in two "obscenity" cases. Brennan claimed, in Smith v. California, 361 U.S. 147, (1959), that "[t]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the looser. In Hamling v. United States, 418 U.S. 87, (1974), Rhenquist replied that [w]henver the law draws a line there will be cases very near each on the opposite sides.

The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.” QUERY: which view is preferable? And further QUERY: whichever is preferable as a matter of general law, do the “special characteristics of the school environment,” make the distinction inapplicable here?

Notice that Justice Marshall, while “agree[ing] with the principles” set forth in Justice Brennan’s concurring opinion, nonetheless dissents because the school district “failed to demonstrate that [the] remarks were indeed disruptive.” QUERY: should that make any difference? Remember Justice Holmes’ famous remark in Schenck, that “[w]e perceive no ground for saying that success alone warrants making the act a crime.” More precisely, remember the Court’s expression, in Brandenburg v. Ohio, 395 U.S. 444, (1969), of “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.” (emphasis supplied) QUERY: if the test is “likelihood” when applied to a general penal statute, why should there be a higher standard in the application of a rule intended to prevent disruption in the public schools?

II. Political Campaigns

A. Restrictions on Expression

1. Right of Reply

If the discussion of public affairs is at the “core” of the First Amendment, see Van Alstyne, The American First Amendment in the Twenty-First Century, 3rd, ed., 2002, at 23, the election of public officials and the resolution of public questions by popular vote must be at the center of that core. Indeed, “the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office,” Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). As to the similar importance of referenda and ballot initiatives, see Meyer v. Grant, 486 U.S. 414 (1988).

MILLS v. ALABAMA, 384 U.S. 214 (1966)

MR. JUSTICE BLACK delivered the opinion of the Court.

On November 6, 1962, Birmingham, Alabama, held an election for the people to decide whether they preferred to keep their existing city commission form of government or replace it with a mayor-council government. On election day the Birmingham Post-Herald, a daily newspaper, carried an editorial written by its editor, James E. Mills, which strongly urged the people to adopt the mayor-council form of government. Mills was later arrested on a complaint charging that by publishing the editorial on election day he had violated the Alabama Corrupt Practices Act, which makes it a crime “to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on the day on which the election affecting such candidates or propositions is being held.”

The First Amendment, which applies to the States through the Fourteenth, prohibits laws “abridging the freedom of speech, or of the press.” The question here is whether it abridges freedom of the press for a State to punish a newspaper editor for doing no more than publishing an editorial on election day urging people to vote a particular way in the election. We should point out at once that this question in no way involves the extent of a State’s power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. The sole reason for the charge that Mills violated the law is that

he wrote and published an editorial on election day urging Birmingham voters to cast their votes in favor of changing their form of government.

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars to play an important role in the discussion of public affairs. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.

Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only "reasonable restrictions" or at least "within the field of reasonableness." The court reached this conclusion because it thought the law imposed only a minor limitation on the press - restricting it only on election days - and because the court thought the law served a good purpose. It said:

"It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."

This argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate "from confusive last-minute charges and countercharges." We hold that no test of reasonableness can save a state law

from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joined, concurred in a separate Opinion.

Comments and Queries

Notice the Court's statement that this decision does not affect the "State's power to regulate conduct in and around the polls in order to maintain peace, good order and decorum there." Burson v. Freeman, 504 U.S. 191 (1992), upheld a prohibition against "campaigning" within one hundred feet of a polling place. The Court held this to be a "rare case" in which a statute could survive strict scrutiny. The compelling government interest was in preventing the intimidation of voters and electoral fraud, and the means were found "narrowly tailored" to achieve that end.

The argument in support of the statute was that it prevented "last minute" charges which "because of lack of time" could not be answered. QUERY: is this a classic case of the fallacy of "infinite regression"? If election day is "sanitized" for this reason, then the day before election day becomes the "last minute" for charges, and if that day is then "sanitized" for the same reason, the day before it becomes the "last minute." Compare this to the current practice in several European countries, which bans campaigning on the day before the election to afford an "opportunity for reflection." QUERY: could a ban based on such a rationale survive a First Amendment challenge?

Early in the history of broadcasting, the Federal Communications Commission (FCC) imposed "the fairness doctrine" on the industry. The doctrine generally required that licensed stations provide "equal time" for opposing sides of public issues. More specifically, it required that equal time for "reply" be afforded to an individual who was the subject of a "personal attack" or an adverse "political editorial." While largely non-controversial at first, changes in the industry made the doctrine increasingly difficult to administer, and the FCC repealed all but the "personal attack" and "political editorial" requirements in 1987. See Teeter & LeDuc, Law of Mass Communications, 7th ed., 1992, 383-387. Three years later, those provisions were repealed as well.

While the doctrine was in effect, there were sporadic attempts to extend the concept to the print media. One such was Florida's "Right of Reply" law.

MIAMI HERALD PUBLISHING CO. v. TORNILLO, 418 U.S. 241 (1974)

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

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, 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, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of \$5,000. The action was premised on 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 [the statute] was unconstitutional. The Florida Supreme Court 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."

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. 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.

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. 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 controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

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.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only “right of reply” statutes and implies no view upon the constitutionality of “retraction” statutes affording

plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.

MR. JUSTICE WHITE, concurring.

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer “the power of reason as applied through public discussion” and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Comments and Queries

The arguments made against the Florida statute were the same as those made against the “fairness doctrine.” The broadcast media’s argument was, in fact, stronger because there were substantial costs involved in compliance. Among other things, the stations had to provide time for coverage of both sides of controversial public issues at its own expense if it could not obtain commercial sponsorship for the programming. Notwithstanding these arguments, the Supreme Court unanimously upheld the doctrine against a First Amendment challenge in Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969). It based its decision on the “scarcity” of available broadcast frequencies and the FCC’s statutory authority to allocate licenses as the public “interest, convenience or necessity” requires. Given that authority, the Court reasoned, the FCC also had the power to impose requirements on those to whom the licenses were granted. QUERY: is that a sufficient distinction between the cases?

2. Anonymous Publications

While we know as a historical matter, and many of the politically involved of their day undoubtedly knew as well, the Federalist Papers were written as letters to the Editor(s) by Alexander Hamilton, James Madison and John Jay. But the letters were not signed in the name of their authors, but by “Brutus,” “Publicus,” and other Roman statesmen of legend. Why the authors chose this subterfuge has never been entirely clear. They were surely in no danger from expressing their opinions and, in any event, their

support for the proposed Constitution was well known. But the fact remains that some of the most famous political letters in American were signed anonymously.

McINTYRE v. OHIO ELECTIONS COMMISSION, 514 U.S. 334 (1995)

JUSTICE STEVENS delivered the opinion of the Court.

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy. There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

While Mrs. McIntyre distributed her handbills, an official of the school district, who supported the tax proposal, advised her that the unsigned leaflets did not conform to the Ohio election laws. Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills.

The proposed school levy was defeated at the next two elections, but it finally passed on its third try in November 1988. Five months later, the same school official filed a complaint with the Ohio Elections Commission charging that Mrs. McIntyre's distribution of unsigned leaflets violated the Ohio Code. The Commission agreed and imposed a fine of \$100.

Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only \$100, petitioner, as the executor of her estate, has pursued her claim in this Court. Our grant of certiorari reflects our agreement with his appraisal of the importance of the question presented.

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” *Talley v. California*, 362 U.S. 60, 64 (1960). Great works of literature have frequently been produced by authors writing under assumed names. Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

When a law burdens core political speech, we apply “exacting scrutiny,” and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. The State argues that even under the strictest standard of review, the disclosure requirement is justified by two important and legitimate state interests. Ohio judges its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. These two interests necessarily overlap to some extent, but it is useful to discuss them separately.

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude. We have already held that the State may not compel a newspaper that prints editorials critical of a particular candidate to provide space for a reply by the candidate. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader’s ability to evaluate the document’s message. Thus, Ohio’s informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on [this statute] to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [this] extremely broad prohibition.

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. S. Mill, *On Liberty*, in *On Liberty and Considerations on Representative Government*. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression -- at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

JUSTICE GINSBURG, concurring.

The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that

the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity.

JUSTICE THOMAS, concurring in the judgment.

I agree with the majority's conclusion that Ohio's election law is inconsistent with the First Amendment. I would apply, however, a different methodology to this case.

While, like JUSTICE SCALIA, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when interpreting the Speech and Press Clauses. After reviewing the weight of the historical evidence, it seems that the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion. Because the majority has adopted an analysis that is largely unconnected to the Constitution's text and history, I concur only in the judgment.

JUSTICE SCALIA, with whom The Chief Justice joins, dissenting.

At a time when both political branches of Government and both political parties reflect a popular desire to leave more decisionmaking authority to the States, today's decision moves in the opposite direction, adding to the legacy of inflexible central mandates imposed by this Court's constitutional jurisprudence. Preferring the views of the English utilitarian philosopher John Stuart Mill to the considered judgment of the American people's elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.

I do not know where the Court derives its perception that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of

dissent.” I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid “threats, harassment, or reprisals” the First Amendment will require an exemption from the Ohio law. But to strike down the Ohio law in its general application - and similar laws of 48 other States and the Federal Government - on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.

Comments and Queries

In discussing “Ohio’s informational interest” in requiring identification, the Court observes that ‘in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader’s ability to evaluate the document’s message.’ Compare this statement with the following from City of Ladue v. Gilleo, ___ U.S. ___, ___ (1994), which struck down a municipal ordinance forbidding the placement of signage, including political messages, on private property: “As an early and eminent student of rhetoric [Aristotle] observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile.” QUERY: are these two statements consistent? If not, QUERY further: which do you find more persuasive? Why?

Notice Justice Ginsburg’s statement, concurring, that “we do not ... hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity.” Congress, of course, has done precisely that in requiring that paid advertising which “expressly advocate[s] the election or defeat of a clearly identified candidate” [for federal office] shall “clearly state” the identity of the person(s) or committee that has paid for and authorized it. 2 United States Code (U.S.C.) section 441d(a)(2).

3. Judicial Elections

An ancient question asks: Quod iudices iudet? (Who shall judge the judges?) The right to “judge the judges” implies, of course, the right to remove them for unsatisfactory

performance, and the person(s) possessing that right has, undoubtedly, a strong influence over the judge's decisions in office. When the famed English judge Sir Edward Coke had the temerity to tell King James I that "the King is under no man, but under God and the Law," the King bided his time until political fortunes changed and then removed Coke from the bench. (For a well-written account of that famous quarrel, see Bowen, The Lion and the Throne, 370-390.) It was with this in mind that the Framers provided in Article III, section 1 that federal judges "shall hold their Offices during good Behaviour" (i.e., for life unless removed by conviction of "Treason, Bribery, or other high Crimes and Misdemeanors."

The appointment and removal of judges by elected executives would, obviously, produce similar problems. On the other hand, judges chosen by periodic elections are subject to popular opinion and that, too, might influence their judgment. Efforts to compromise these difficulties have resulted in various "merit selection" and "retention" systems, in which the judge is appointed by an executive authority (usually the Governor), and then faces the electorate in, at most, one politically contested election and thereafter is subject to a "retention" ("yes" or "no") vote every so many years. The unresolved problem, however, is that any contested election involves a discussion of the "issues" which might come before the successful candidate.

REPUBLICAN PARTY OF MINNESOTA v. WHITE, ___ U.S. ___ (2002)

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. 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." This prohibition, promulgated by the Minnesota Supreme Court 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. Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation.

[A candidate for judicial office] filed this lawsuit in Federal District Court, seeking a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept [the candidate] from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. [T]he District Court found in favor of respondents ... [and] ... the United States Court of Appeals affirmed.

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is “at the core of our First Amendment freedoms” -- speech about the qualifications of candidates for public office. 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.” *Brown v. Hartlage*, 456 U. S. 45, 54 (1982).

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 the impartiality of the state judiciary.

A

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. This is the traditional sense in which the term is used.

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.

B

It is perhaps possible to use the term “impartiality” in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.” *Laird v. Tatum*, 409 U. S. 824, 835 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” *Ibid*.

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Justice O'CONNOR, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

Despite these significant problems, thirty-nine States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both.

[S]ome States adopted a modified system of judicial selection that became known as the Missouri Plan. Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. If a judge is recalled, the vacancy is filled through a new nomination and appointment. This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges. Thirty-one other States, however, still use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who thereafter run for reelection periodically. Of these, slightly more than half use nonpartisan elections, and the rest use partisan elections.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

Justice KENNEDY, concurring.

I agree with the Court that Minnesota's prohibition on judicial candidates' announcing their legal views is an unconstitutional abridgment of the freedom of speech. There is authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases, see, e.g., *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105 (1991), and the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test. So I join its opinion.

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow

tailoring or compelling government interests. The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BRYER join, dissenting.

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judge[s] represen[t] the Law." *Chisom v. Roemer*, 501 U. S. 380, 411 (1991) (Scalia, J., dissenting). Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will," Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota has designated all judicial elections nonpartisan. And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges."

The speech restriction must fail, in the Court's view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say. I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results.

When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views, she will also "ris[k] being assailed as a dissembler," willing to say one thing to win an election and to do the opposite once in office.

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo* –

a judicial candidate's promises on issues in return for the electorate's votes at the polls -- inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges.

This Court has recognized in the past, a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U. S., at 400. We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States who wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

Comments and Queries

The heart of the majority opinion is its distinction between impartiality between "parties" and impartiality between "issues." QUERY: do you find the distinction persuasive?

QUERY also: does the "announce clause" put incumbents at an advantage (or disadvantage, depending on the individual voter's perspective), because they have a record of decision-making on the bench, which can be studied and publicized, as opposed to a "stealth candidate" with no record at all? If so, is that wise public policy? Whether it is or not, should that be considered in passing on its constitutionality?

Consider Justice O'Connor's view that an "appointment and retention vote" system "obviously reduces threats to judicial impartiality." She nonetheless concurs with the majority because Minnesota "has voluntarily taken on the risks to judicial bias described above." QUERY: can a state constitutionally "take risks" with judicial impartiality? If not, QUERY further: is her opinion the basis for an argument that the election of judges violates the "due process" clause of the 5th and 14th Amendments?

Having read the majority and dissenting opinions, which do you find more persuasive? Perhaps more importantly, after considering all the issues involved, what do you believe is the “best” method for selecting state court judges?

B. “Campaign Finance” Limitations

1. Candidates for Public Office

There is an axiom that “money is the mother’s mild of politics.” Certainly, its liberal use to win elections goes back to the very origins of our electoral process. When George Washington was a candidate for the Virginia House of Burgesses in 1757, “military duties kept him from electioneering at the polls; but he provided his friends with the following customary means for winning votes: 28 gallons of rum, 50 gallons of rum punch, 3 gallons of wine, 46 gallons of beer, and 2 gallons of cider royal. The voters, 391 in number, averaged a quart and a half per man. ... He was elected.” Roseboom, A History of Presidential Elections, 1959, 4.

The Federal Election Campaign Act of 1971 was passed, among other reasons, to eliminate perceived excesses in campaign financing and the opportunities thereby provided for corruption and improper influences in government. A comprehensive challenge to the Act filed, among others, by former Sen. Eugene McCarthy (D-Minn.), then an independent candidate for President, and Sen. James Buckley (C-N.Y.), who was running for re-election, raised a number of issues (e.g. the composition of the Federal Election Commission and public funding of presidential campaigns) which are not reprinted here. Of significance to the First Amendment are the provisions relating to the raising, reporting and expenditure of campaign contributions.

BUCKLEY v. VALEO, 424 U.S. 1 (1976)

PER CURIAM.

I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than \$25,000 in a single year or more than \$1,000 to any single candidate for an election campaign and from spending more than \$1,000 a year “relative to a clearly identified candidate.” Other provisions restrict a candidate’s use of personal and family resources in his campaign and limit the overall amount that can be spent by a candidate in campaigning for federal office.

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.

A. General Principles

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*, 354 U.S. 476, 484 (1957). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "[t]he right to associate with the political party of one's choice." *Kusper v. Pontikes*, 414 U.S. 51, 56, 57 (1973).

A restriction on the amount of money a person or group can spend on political communication during a campaign 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest

handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The \$1,000 ceiling on spending "relative to a clearly identified candidate" would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. 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.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented

candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall 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.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's \$1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.

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.

B. Contribution Limitations

1. The \$1,000 Limitation on Contributions by Individuals and Groups to Candidates and Authorized Campaign Committees

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.

(a)

In view of the fundamental nature of the right to associate, governmental “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” Yet, it is clear that “[n]either the right to associate nor the right to participate in political activities is absolute.” Even a “‘significant interference’ with protected rights of political association” may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

It is unnecessary to look beyond the Act’s primary purpose - to limit the actuality and appearance of corruption resulting from large individual financial contributions - in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure 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.

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with “proven and suspected quid pro quo arrangements.” But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption

inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

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.

(b)

A related overbreadth 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 statewide 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. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000."

(c)

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. In considering this contention, it is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.

There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents. Challengers can and often do defeat incumbents in federal elections. Major-party challengers in federal elections are usually men and women who are well known and influential in their community or State. Often such challengers are themselves incumbents in important

local, state, or federal offices. Statistics in the record indicate that major-party challengers as well as incumbents are capable of raising large sums for campaigning. Indeed, a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals. And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's \$1,000 ceiling has the practical effect of benefiting challengers as a class.

The charge of discrimination against minor-party and independent candidates is more troubling, but the record provides no basis for concluding that the Act invidiously disadvantages such candidates. As noted above, the Act on its face treats all candidates equally with regard to contribution limitations. And the restriction would appear to benefit minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions. Although there is some force to appellants' response that minor-party candidates are primarily concerned with their ability to amass the resources necessary to reach the electorate rather than with their funding position relative to their major-party opponents, the record is virtually devoid of support for the claim that the \$1,000 contribution limitation will have a serious effect on the initiation and scope of minor-party and independent candidacies. Moreover, any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election.

2. The \$5,000 Limitation on Contributions by Political Committees

Certain committees, designated as "political committees," [are permitted] 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.

4. The \$25,000 Limitation on Total Contributions During any Calendar Year

In addition to the \$1,000 limitation on the nonexempt contributions that an individual may make to a particular candidate for any single election, the Act contains an overall \$25,000 limitation on total contributions by an individual during any calendar year. This quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

C. Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an expenditure of \$1,000 "relative to a clearly identified candidate during a calendar year." Other expenditure ceilings limit spending by candidates, their campaigns, and political parties in connection with election campaigns. It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

1. The \$1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

The plain effect of [the Act] is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than \$1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for

a person or association to place a single one-quarter page advertisement “relative to a clearly identified candidate” in a major metropolitan newspaper.

We agree that in order to preserve the provision against invalidation on vagueness grounds, [the Act] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.

We turn then to the basic First Amendment question - whether [the Act], even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression. [This] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures. Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, [this] 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. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the

First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *New York Times Co. v. Sullivan*, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

The Court's decisions in *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. The prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a \$1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate for public office. More recently in *Tornillo*, the Court held that Florida could not constitutionally require a newspaper to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. The legislative restraint involved in *Tornillo* thus also pales in comparison to the[se] limitations.

For the reasons stated, we conclude that [the] independent expenditure limitation is unconstitutional under the First Amendment.

2. Limitation on Expenditures by Candidates from Personal or Family Resources

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.” These ceilings vary from \$50,000 for Presidential or Vice Presidential candidates to \$35,000 for senatorial candidates, and \$25,000 for most candidates for the House of Representatives.

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. As the Court of Appeals concluded:

“Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family.” Indeed, the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act’s contribution limitations are directed.

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for [the] expenditure ceiling. That interest is clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate’s personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that restriction on a candidate’s personal expenditures is unconstitutional.

3. Limitations on Campaign Expenditures

Presidential candidates may spend \$10,000,000 in seeking nomination for office and an additional \$20,000,000 in the general election campaign. The ceiling on senatorial campaigns is pegged to the size of the voting-age population of the State with minimum dollar amounts applicable to campaigns in States with small populations. In senatorial primary elections, the limit is the greater of eight cents multiplied by the voting-age population or \$100,000, and in the general election the limit is increased to 12 cents multiplied by the voting-age population or \$150,000. The Act imposes blanket \$70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives with the exception that the senatorial ceiling applies to campaigns in States entitled to only one Representative. These ceilings are to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months.

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by campaign expenditure ceilings. There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions.

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political 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.

In sum, the provisions of the Act that impose a \$1,000 limitation on contributions to a single candidate, a \$5,000 limitation on contributions by a political committee to a single candidate, and a \$25,000 limitation on total contributions by an individual during any calendar year, are constitutionally valid. These limitations, along with the disclosure

provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, its limitation on a candidate's expenditures from his own personal funds, and its ceilings on overall campaign expenditures. These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. CHIEF JUSTICE BURGER, concurred in part and dissented in part in an opinion.

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I agree with the Court's conclusion and much of its opinion with respect to sustaining the disclosure provisions. I am also in agreement with the Court's judgment upholding the limitations on contributions. I dissent, however, from the Court's view that the expenditure limitations violate the First Amendment.

The judgment of Congress was that reasonably effective campaigns could be conducted within the limits established by the Act and that the communicative efforts of these campaigns would not seriously suffer. In this posture of the case, there is no sound basis for invalidating the expenditure limitations, so long as the purposes they serve are legitimate and sufficiently substantial, which in my view they are.

In the first place, expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption. The Court upholds the overall limit of \$25,000 on an individual's political contributions in a single election year on the ground that it helps reinforce the limits on gifts to a single candidate. By the same token, the expenditure

limit imposed on candidates plays its own role in lessening the chance that the contribution ceiling will be violated. Without limits on total expenditures, campaign costs will inevitably and endlessly escalate. Pressure to raise funds will constantly build and with it the temptation to resort in "emergencies" to those sources of large sums, who, history shows, are sufficiently confident of not being caught to risk flouting contribution limits. Congress would save the candidate from this predicament by establishing a reasonable ceiling on all candidates. This is a major consideration in favor of the limitation. It should be added that many successful candidates will also be saved from large, overhanging campaign debts which must be paid off with money raised while holding public office and at a time when they are already preparing or thinking about the next campaign. The danger to the public interest in such situations is self-evident.

I have little doubt in addition that limiting the total that can be spent will ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function. There is nothing objectionable - indeed it seems to me a weighty interest in favor of the provision - in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money. I regret that the Court has returned them all to the treadmill.

It is also important to restore and maintain public confidence in federal elections. It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility - and the stomach - for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.

I also disagree with the Court's judgment that [the provision] which limits the amount of money that a candidate or his family may spend on his campaign, violates the Constitution. Although it is true that this provision does not promote any interest in preventing the corruption of candidates, the provision does, nevertheless, serve salutary purposes related to the integrity of federal campaigns. By limiting the importance of personal wealth, [it] helps to assure that only individuals with a modicum of support from others will be viable candidates. This in turn would tend to discourage any notion that the outcome of elections is primarily a function of money. Similarly, [it] tends to equalize

access to the political arena, encouraging the less wealthy, unable to bankroll their own campaigns, to run for political office.

As with the campaign expenditure limits, Congress was entitled to determine that personal wealth ought to play a less important role in political campaigns than it has in the past. Nothing in the First Amendment stands in the way of that determination.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I join in all of the Court's opinion except [that] Part which deals [the] section which limits the amount a candidate may spend from his personal funds, or family funds under his control, in connection with his campaigns during any calendar year.

One of the points on which all Members of the Court agree is that money is essential for effective communication in a political campaign. It would appear to follow that the candidate with a substantial personal fortune at his disposal is off to a significant "headstart." Of course, the less wealthy candidate can potentially overcome the disparity in resources through contributions from others. But ability to generate contributions may itself depend upon a showing of a financial base for the campaign or some demonstration of pre-existing support, which in turn is facilitated by expenditures of substantial personal sums. Thus the wealthy candidate's immediate access to a substantial personal fortune may give him an initial advantage that his less wealthy opponent can never overcome. And even if the advantage can be overcome, the perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermine public confidence in the integrity of the electoral process.

The concern that candidacy for public office not become, or appear to become, the exclusive province of the wealthy assumes heightened significance when one considers the impact of [the] provision [which] prohibits contributions from individuals and groups to candidates in excess of \$1,000, and contributions from political committees in excess of \$5,000. While the limitations on contributions are neutral in the sense that all candidates are foreclosed from accepting large contributions, there can be no question that large contributions generally mean more to the candidate without a substantial personal fortune to spend on his campaign. Large contributions are the less wealthy

candidate's only hope of countering the wealthy candidate's immediate access to substantial sums of money. With that option removed, the less wealthy candidate is without the means to match the large initial expenditures of money of which the wealthy candidate is capable. In short, the limitations on contributions put a premium on a candidate's personal wealth.

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here. I therefore do not join Part I-B of the Court's opinion or those portions of Part I-A that are consistent with Part I-B. As to those, I dissent.

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in Part I of the Court's opinion.

Comments and Queries

The essence of the Court's different treatment of the two is that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money". But "[b]y contrast, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."

QUERY: why? After all, except for personal funds, candidates can only spend the funds they can raise.

The majority seems to respond to the question by saying that "while contributions may result in political expression ... the transformation of contributions into political debate involves speech by someone other than the contributor." But QUERY: how, if at all, does the fact that someone other than the contributor makes the "speech" change the equation between contributions and expenditures?

The Court finds that the government has a compelling interest in restricting contributions “to limit the actuality and appearance of corruption.” It justifies the restriction on individual contributors, at least in part, because they are “free to become a member of any political association and to assist personally in the association’s efforts in behalf of candidates.” If this “assistance” is in the form of contributions, QUERY: isn’t the result the same? Forbidden to do it directly because of a concern of undue influence over a successful candidate, the contributor does it indirectly. Is it realistic to believe that the candidate will not become aware of, and grateful for, the “total” contribution? See Justice Marshall, dissenting in Federal Election Committee v. National Conservative Action Committee, immediately below. But, given the escalating costs of campaigning, QUERY also: does the annual \$25,000 “cap” on contributions mitigate the concern?

The Court also seems to admit, without classifying them as compelling, that there is also an interest in eliminating “invidious discrimination between incumbents and challengers” and “discrimination against minor-party and independent candidates.” It rejects both, although the latter is “more troubling,” because there is insufficient evidence in the record to establish that either was the case. QUERY: is “leveling the playing field” a “compelling government interest?” Why or why not? If yes, QUERY further: why not remand the case for hearing as to whether such discrimination does, in fact, exist? If, as more likely, the Court’s answer would be no because “[t]he First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.” QUERY again: why not? Before answering, consider the argument that, while differences in financial resources will make some speech more effective than others, differences in speaking ability and persuasive skills will have the same effect. If the government cannot equalize the quality of speech, why should it attempt to do so with respect to its dissemination?

If “leveling the playing field” were a compelling government interest, QUERY: would the Court have necessarily ruled differently with respect to “expenditures by candidates from personal or family resources”?

Lastly, QUERY: as a purely practical matter, have Justice White’s concerns been realized? Are self-funded candidates able to, in effect, “buy” a seat in Congress? Are others forced onto the “treadmill” of constant fund-raising for the next campaign?

The “Political Committees” referred to in part B(2) of the opinion are now known as “Political Action Committees” (PACs). See Federal Election Committee v. National Conservative Action Committee, immediately below.

Political Action Committees began as groups of like minded private individuals who pooled, generally small, amounts of money to contribute to candidates who shared their public policy preferences. (The organizations involved in the case below represented

“conservative” views; others, such as the Council for a Livable World, fulfilled the same function from the “liberal” perspective.) As the technique proved effective, the number and size of such committees grew rapidly. Today, almost every trade or industry association, all lobbying firms, many large law firms and individual members of Congress (usually those holding, or hoping to hold, leadership positions) have formed their own PACs.

FEDERAL ELECTION COMMISSION (FEC) v. NATIONAL CONSERVATIVE
POLITICAL ACTION COMMITTEE, 470 U.S. 480 (1985)

JUSTICE REHNQUIST delivered the opinion of the Court.

The Presidential Election Campaign Fund Act offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If a Presidential candidate elects public financing, [the Act] makes it a criminal offense for independent “political committees,” such as appellees National Conservative Political Action Committee (NCPAC) and Fund For A Conservative Majority (FCM), to expend more than \$1,000 to further that candidate’s election.

NCPAC is a nonprofit corporation registered with the FEC as a political committee. Its primary purpose is to attempt to influence directly or indirectly the election or defeat of candidates for federal, state, and local offices by making contributions and by making its own expenditures. It is governed by a three-member board of directors which is elected annually by the existing board. The board’s chairman and the other two members make all decisions concerning which candidates to support or oppose, the strategy and methods to employ, and the amounts of money to spend. Its contributors have no role in these decisions. It raises money by general and specific direct mail solicitations. It does not maintain separate accounts for the receipts from its general and specific solicitations, nor is it required by law to do so. FCM is in all material respects identical to NCPAC.

Both NCPAC and FCM are self-described ideological organizations with a conservative political philosophy. They solicited funds in support of President Reagan’s 1980 campaign, and they spent money on such means as radio and television advertisements to encourage voters to elect him President. On the record before us, these expenditures were “independent” in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents. Indeed, there are

indications that the efforts of these organizations were at times viewed with disfavor by the official campaign as counterproductive to its chosen strategy. NCPAC and FCM expressed their intention to conduct similar activities in support of President Reagan's reelection in 1984, and we may assume that they did so.

In these cases we consider provisions of the Fund Act that make it a criminal offense for political committees such as NCPAC and FCM to make independent expenditures in support of a candidate who has elected to accept public financing.

The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements. And of course the criminal sanction in question is applied to the expenditure of money to propagate political views, rather than to the propagation of those views unaccompanied by the expenditure of money. But for purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than \$1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system.

We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents."

Having concluded that the PACs' expenditures are entitled to full First Amendment protection, we now look to see if there is a sufficiently strong governmental interest served by [the] restriction on them and whether the section is narrowly tailored to the evil that may legitimately be regulated.

We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances. In *Buckley* we struck down the limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find [this]

limitation on independent expenditures by political committees to be constitutionally infirm.

Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate. The amounts given to the PACs are over-whelmingly small contributions, well under the \$1,000 limit on contributions upheld in *Buckley*; and the contributions are by definition not coordinated with the campaign of the candidate. The Court concluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.

We think the same conclusion must follow here. It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Even were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, [the Act] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate.

When the First Amendment is involved, our standard of review is “rigorous,” *Buckley v. Valeo*, 424 U.S. at 29, and the effort to link either corruption or the appearance of corruption to independent expenditures by PACs, whether large or small, simply does not pass this standard of review. Even assuming that Congress could fairly conclude that large-scale PACs have a sufficient tendency to corrupt, the overbreadth in these cases is so great that the section may not be upheld.

JUSTICE BRENNAN and JUSTICE STEVENS joined in the foregoing part of the Court's Opinion.

JUSTICE WHITE dissenting.

The Internal Revenue Code limits to \$1,000 the annual independent expenditures a PAC can make to further the election of a candidate receiving public funds. Because these expenditures “produce speech at the core of the First Amendment,” the majority concludes that they can only be regulated in order to avoid real or apparent corruption. Perceiving no such danger, since the money does not go directly to political candidates or their committees, it strikes down [this provision of the Code].

My disagreements with this analysis, which continues this Court's dismemberment of congressional efforts to regulate campaign financing, are many. First, I continue to believe that *Buckley v. Valeo* was wrongly decided. Congressional regulation of the amassing and spending of money in political campaigns without doubt involves First Amendment concerns, but restrictions such as the one at issue here are supported by governmental interests - including, but not limited to, the need to avoid real or apparent corruption - sufficiently compelling to withstand scrutiny. Second, even were *Buckley* correct, I consider today's holding a mistaken application of that precedent. The provision challenged here more closely resembles the contribution limitations that were upheld in *Buckley*, and later cases, than the limitations on uncoordinated individual expenditures that were struck down. Finally, as part of an integrated and complex system of public funding for Presidential campaigns, [this provision] is supported by governmental interests that were absent in *Buckley*, which was premised on a system of private campaign financing.

By striking down one portion of an integrated and comprehensive statute, the Court has transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork. Without [this provision], Presidential candidates enjoy extensive public financing while those who would otherwise have worked for or contributed to a campaign had there been no such funding will pursue the same ends through “independent” expenditures. The result is that the old system remains essentially intact, but that much more money is being spent. In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds. I respectfully dissent.

JUSTICE MARSHALL, dissenting.

Although I joined the portion of the *Buckley* per curiam that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance.

Undoubtedly, when an individual interested in obtaining the proverbial ambassadorship had the option of either contributing directly to a candidate’s campaign or doing so indirectly through independent expenditures, he gave money directly. It does not take great imagination, however, to see that, when the possibility for direct financial assistance is severely limited, as it is in light of *Buckley*’s decision to uphold the contribution limitation, such an individual will find other ways to financially benefit the candidate’s campaign. It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate. Surely an eager supporter will be able to discern a candidate’s needs and desires; similarly, a willing candidate will notice the supporter’s efforts. To the extent that individuals are able to make independent expenditures as part of a quid pro quo, they succeed in undermining completely the first rationale for the distinction made in *Buckley*.

I have come to believe that the limitations on independent expenditures challenged in [*Buckley*] and here are justified by the congressional interests in promoting “the reality and appearance of equal access to the political arena,” and in eliminating political corruption and the appearance of such corruption.

Comments and Queries

Notice that the Court makes clear here what was now so clearly stated in Buckley “that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” Again, QUERY: why? Is there no government interest in preventing the wealthy from “buying” their way into public office? Or might there be such an interest, but no a “compelling” one?

The Court acknowledges the “hypothetical possibility” that “candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter” It discounts this possibility for two reasons: that PACs presumably contribute to those who already share their views on public policy and the “absence of prearrangement and coordination” between the PAC and the candidate. QUERY: are these distinctions persuasive?

The Court holds the statute “overbroad” because it “is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions” QUERY, therefore: would an amendment applying the statute only to PACs with “multimillion dollar war chests” or limiting, rather than prohibiting, PAC contributions satisfy this concern?

See Justice Marshall’s change of position between Buckley and this case because he “now believe[s] that the distinction between [between contributions and independent expenditures] has no constitutional significance.” QUERY: is he right?

Neither the Federal Election Campaign Act of 1971 or its 1974, 1976 and 1979 amendments succeeded in curtailing the problems with campaign financing. In fact, the costs of campaigning for almost every public office, but especially federal office, increased exponentially in the quarter century that followed. The principal response to this development, and the ongoing problems associated with it, was the multi-year struggle to enact the “McCain-Feingold” bill (named for its initial sponsors, Sen. John McCain (R-Ariz.) and Sen. Russell Feingold (D-Wisc.)). Congressional reluctance to pass the bill, officially known as the “Bipartisan Campaign Reform Act,” was finally overcome by a barrage of newstories and editorials reciting the evils of the existing system.

The principal senatorial opponent of the bill, Sen. Mitch McConnell (R-Ky.) had always maintained that it was a unconstitutional restriction on the freedom of speech. Having lost the battle in the legislature, he took that argument to the courts.

McCONNELL v. FEDERAL ELECTION COMMISSION, ____ U.S. ____ (2003)

JUSTICE STEVENS and JUSTICE O'CONNOR delivered the opinion of the Court with respect to Titles I and II.

The Bipartisan Campaign Reform Act of 2002 (BCRA) is the most recent federal enactment designed “to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions.” Three important developments in the years after our decision in *Buckley* persuaded Congress that further legislation was necessary to regulate the role that corporations, unions, and wealthy contributors play in the electoral process. As a preface to our discussion of the specific provisions of BCRA, we comment briefly on the increased importance of “soft money,” the proliferation of “issue ads,” and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections.

Soft Money

Under [the Federal Election Campaign Act] FECA, “contributions” must be made with funds that are subject to the Act's disclosure requirements and source and amount limitations. Such funds are known as “federal” or “hard” money. FECA defines the term “contribution,” however, to include only the gift or advance of anything of value “made by any person for the purpose of influencing any election for *Federal* office.” Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA’s requirements and prohibitions. As a result, prior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute “nonfederal money” -- also known as “soft money” -- to political parties for activities intended to influence state or local elections.

As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. The national parties transferred large amounts of their soft money to the state parties, which were allowed to use a larger percentage of soft money to finance mixed-purpose activities under FEC rules. In the year 2000, for example, the national parties diverted \$280 million -- more than half of their soft money -- to state parties.

Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA. For example, in 1996 the top five corporate soft-money donors gave, in total, more than \$9 million in nonfederal funds to the two national party committees. Moreover, the largest corporate donors often made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.

Not only were such soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money.

The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections.

Issue Advertising

In *Buckley* we construed FECA's disclosure and reporting requirements, as well as its expenditure limitations, "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." As a result of that strict reading of the statute, the use or omission of "magic words" such as "Elect John Smith" or "Vote Against Jane Doe" marked a bright statutory line separating "express advocacy"

from “issue advocacy.” Express advocacy was subject to FECA's limitations and could be financed only using hard money. The political parties, in other words, could not use soft money to sponsor ads that used any magic words, and corporations and unions could not fund such ads out of their general treasuries. So-called issue ads, on the other hand, not only could be financed with soft money, but could be aired without disclosing the identity of, or any other information about, their sponsors.

While the distinction between “issue” and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to “vote against Jane Doe” and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to “call Jane Doe and tell her what you think.” Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words. Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election. Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were attractive to organizations and candidates precisely because they were beyond FECA’s reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money.

Because FECA’s disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. “Citizens for Better Medicare,” for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And “Republicans for Clean Air,” which ran ads in the 2000 Republican Presidential primary,

was actually an organization consisting of just two individuals -- brothers who together spent \$25 million on ads supporting their favored candidate.

While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former Senator confirmed that candidates and officials knew who their friends were and “sometimes suggest[ed] that corporations or individuals make donations to interest groups that run ‘issue ads.’” As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA’s limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on “issue” advocacy.

Senate Committee Investigation

In 1998 the Senate Committee on Governmental Affairs issued a six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections. The report gave particular attention to the effect of soft money on the American political system, including elected officials’ practice of granting special access in return for political contributions.

The committee’s principal findings relating to Democratic Party fundraising were set forth in the majority’s report, while the minority report primarily described Republican practices. The two reports reached consensus, however, on certain central propositions. They agreed that the “soft money loophole” had led to a “meltdown” of the campaign finance system that had been intended “to keep corporate, union and large individual contributions from influencing the electoral process.” The report was critical of both parties’ methods of raising soft money, as well as their use of those funds. It concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions.

Title I is Congress’ effort to plug the soft-money loophole. The cornerstone of Title I is new FECA §323(a), which prohibits national party committees and their agents from

soliciting, receiving, directing, or spending any soft money. New FECA §323(b) prevents the wholesale shift of soft-money influence from national to state party committees by prohibiting state and local party committees from using such funds for activities that affect federal elections. New FECA §323(d) reinforces these soft-money restrictions by prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities. New FECA §323(e) restricts federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections. Finally, new FECA §323(f) prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.

In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to “preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.”

Plaintiffs contend that we must apply strict scrutiny to because many provisions restrict not only contributions but also the spending and solicitation of funds raised outside of FECA’s contribution limits. But for purposes of determining the level of scrutiny, it is irrelevant that Congress chose to regulate contributions on the demand rather than the supply side. The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.

With these principles in mind, we apply the less rigorous scrutiny applicable to contribution limits to evaluate the constitutionality of new FECA §323. Because the five

challenged provisions of §323 implicate different First Amendment concerns, we discuss them separately.

Restrictions on National Party Committees

The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do.

Restrictions on State and Local Party Committees

In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Restrictions on Parties' Solicitations for, and Donations to, Tax-Exempt Organizations

Section 323(d) prohibits national, state, and local party committees, and their agents or subsidiaries, from "solicit[ing] any funds for, or mak[ing] or direct[ing] any donations" to, any organization established under §501(c) of the Internal Revenue Code that makes expenditures in connection with an election for federal office, and any political organizations "other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office." Absent the solicitation provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates. All of the

corruption and appearance of corruption attendant on the operation of those fundraising apparatuses would follow.

New FECA §323(e) regulates the raising and soliciting of soft money by federal candidates and officeholders. It prohibits federal candidates and officeholders from “solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing]” any soft money in connection with federal elections. It also limits the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in connection with state and local elections.

Section 323(e)’s restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA’s contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities.

Restrictions on State Candidates and Officeholders

The final provision of Title I is new FECA §323(f) generally prohibits candidates for state or local office, or state or local officeholders, from spending soft money to fund “public communications,” *i.e.*, a communication that “refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.” We will not upset Congress’ eminently reasonable prediction that, with other avenues no longer available, state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising.

§201's Definition of "Electioneering Communication"

The first section of Title II, §201 requires political committees to file detailed periodic financial reports with the FEC. The amendment coins a new term, "electioneering communication." [It] is defined to encompass any "broadcast, cable, or satellite communication" that

"(I) refers to a clearly identified candidate for Federal office;

"(II) is made within--

"(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

"(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

"(III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate."

In addition to setting forth this definition, [the statute] specif[ies] significant disclosure requirements for persons who fund electioneering communications. BCRA's use of this new term is not, however, limited to the disclosure context: A later section of the Act restricts corporations' and labor unions' funding of electioneering communications. Plaintiffs challenge the constitutionality of the new term as it applies in both the disclosure and the expenditure contexts.

The major premise of plaintiffs' challenge to BCRA's use of the term "electioneering communication" is that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech. Thus, plaintiffs maintain, Congress cannot constitutionally require disclosure of, or regulate expenditures for, "electioneering communications" without making an exception for those "communications" that do not meet *Buckley*'s definition of express advocacy.

That position misapprehends our prior decisions. [A] plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command.

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

§201's Disclosure Requirements

Under those provisions, whenever any person makes disbursements totaling more than \$10,000 during any calendar year for the direct costs of producing and airing electioneering communications, he must file a statement with the FEC identifying the pertinent elections and all persons sharing the costs of the disbursements. If the disbursements are made from a corporation's or labor union's segregated account, or by a single individual who has collected contributions from others, the statement must identify all persons who contributed \$1,000 or more to the account or the individual during the calendar year. The statement must be filed within 24 hours of each "disclosure date" -- a term defined to include the first date and all subsequent dates on which a person's aggregate undisclosed expenses for electioneering communications exceed \$10,000 for that calendar year.

We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements -- providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions -- apply in full to BCRA. Accordingly, *Buckley* amply supports application of disclosure requirements to the entire range of "electioneering communications."

We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day. In the main we uphold BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications.

CHIEF JUSTICE REHNQUIST dissented in an opinion..

JUSTICE SCALIA, dissenting with respect to Title I, and concurring in the judgment in part and dissenting in part with respect to Title II.

This is a sad day for the freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, *Ashcroft v. Free Speech Coalition*, 535 U. S. 234 (2002), tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525 (2001), dissemination of illegally intercepted communications, *Bartnicki v. Vopper*, 532 U. S. 514 (2001), and sexually explicit cable programming, *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000), would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. For that is what the most offensive provisions of this legislation are all about. We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort. It forbids pre-election criticism of incumbents by

corporations, even not-for-profit corporations, by use of their general funds; and forbids national-party use of “soft” money to fund “issue ads” that incumbents find so offensive.

Beyond that, however, the present legislation *targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents. Is it accidental, do you think, that incumbents raise about three times as much “hard money” -- the sort of funding generally *not* restricted by this legislation -- as do their challengers?

I wish to address three fallacious propositions that might be thought to justify some or all of the provisions of this legislation--only the last of which is explicitly embraced by the principal opinion for the Court, but all of which underlie, I think, its approach to these cases.

(a) Money is Not Speech

It should be obvious that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a newspaper can pay its editorial staff or the amount a charity can pay its leafletters. It is equally clear that a limit on the amount a candidate can *raise* from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.

(b) Pooling Money is Not Speech

Such a proposition fits uncomfortably with the concluding words of our Declaration of Independence: “And for the support of this Declaration, . . . we mutually pledge to each other our Lives, *our Fortunes* and our sacred Honor.” (Emphasis added.) The freedom to associate with others for the dissemination of ideas -- not just by singing or speaking in unison, but by pooling financial resources for expressive purposes -- is part of the freedom of speech.

(c) Speech by Corporations Can Be Abridged

In the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views. People who associate -- who pool their financial resources -- for purposes of economic enterprise overwhelmingly do so in the corporate form; and with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas -- such as the American Civil Liberties Union and the National Rifle Association. Imagine, then, a government that wished to suppress nuclear power -- or oil and gas exploration, or automobile manufacturing, or gun ownership, or civil liberties -- and that had the power to prohibit corporate advertising against its proposals. To be sure, the individuals involved in, or benefited by, those industries, or interested in those causes, could (given enough time) form political action committees or other associations to make their case. But the organizational form in which those enterprises already *exist*, and in which they can most quickly and most effectively get their message across, is the corporate form. The First Amendment does not in my view permit the restriction of that political speech. And the same holds true for corporate electoral speech: A candidate should not be insulated from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.

But what about the danger to the political system posed by “amassed wealth”? The most direct threat from that source comes in the form of undisclosed favors and payoffs to elected officials -- which have already been criminalized, and will be rendered no more discoverable by the legislation at issue here. The use of corporate wealth (like individual wealth) to speak to the electorate is unlikely to “distort” elections -- *especially* if disclosure requirements *tell* the people where the speech is coming from. The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as *too much* speech.

JUSTICE THOMAS concurred in the judgment in part and dissented in part in an opinion.

JUSTICE KENNEDY concurred in the judgment in part and dissented in part in an opinion.

Comments and Queries

The opinion of the Court and, to an even greater extent, the dissents are much longer than reprinted here. But the crucial difference between them is fairly straightforward. The majority believes monetary contributions are deserving of limited First Amendment protection, which can be outweighed by a “narrowly tailored” measure designed to achieve a “compelling government interest.” The dissenters believe that such contributions are an essential part of “core political speech,” not subject to being “balanced” away. QUERY: with which view do you agree? QUERY further: assuming the majority view is correct, are the various provisions of “new” section 323 appropriate and “narrowly tailored” means to avoid “circumvention” of the Act’s purpose?

Notice the definition of “electioneering communication,” which the Act makes subject both to regulation and disclosure requirements. QUERY: is there a significant difference between “express advocacy” and the “issue advertising” discussed in the majority opinion? Assuming there is not, QUERY further: is the definition adequate to reach all conceivable forms of “issue advertising”?

2. Ballot Initiatives and Referenda

The constitutions of 24 states and many local and city governments provide for “referenda” or “public initiatives.” The concepts are similar. Usually, either the governing body or petitions signed by a given number of registered voters (most often, a percentage of those who voted in the last election for the chief executive officer of the jurisdiction) can put a “proposition” on the ballot at an ensuing election. Most referenda are “binding”; if the majority vote is in the affirmative, the proposition becomes law or, in some cases, a part of the state constitution.

CITIZENS AGAINST RENT CONTROL v. BERKELEY, 454 U.S. 290 (1981)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether a limitation of \$250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.

The voters of Berkeley, California, adopted the Election Reform Act of 1974 [the ordinance] by initiative. The campaign ordinance so enacted placed limits on expenditures and contributions in campaigns involving both candidates and ballot measures.

Citizens Against Rent Control is an unincorporated association formed to oppose a ballot measure at issue in the April 19, 1977, election. The ballot measure would have imposed rent control on many of Berkeley's rental units. 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 the ordinance, [the] Berkeley Fair Campaign Practice Commission 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 [the ordinance]. The ballot measure relating to rent control was defeated. The Superior Court subsequently granted Citizens Against Rent Control's motion for summary judgment, declaring that [the ordinance] was invalid on its face because it violated the First Amendment.

We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. The voters of the city of Berkeley adopted the challenged ordinance which places restrictions on that marketplace. The voters may no

more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.

The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues. More recently the Court stated: “The First Amendment protects political association as well as political expression.” *Buckley v. Valeo*, [424 U.S. 1], 15 [(1976)].

The Court went on to note that the freedom of association “is diluted if it does not include the right to pool money through contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’” Under the Berkeley ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted.

There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit - or indeed any limit - on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.

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:

“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. . . .

“. . . Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), we held that a state could not prohibit corporations any more than it could preclude individuals from making contributions or expenditures advocating views on ballot measures. The *Bellotti* Court relied on *Buckley* to strike down state legislative limits on advocacy relating to ballot

measures.

Notwithstanding Buckley and Bellotti, the city of Berkeley argues that [the ordinance] is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures. It is true that when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source. Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a section] of the ordinance, which requires publication of lists of contributors in advance of the voting.

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. It is clear that [the ordinance] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.

Whatever may be the state 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 limit 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.

JUSTICE REHNQUIST concurred in a separate Opinion.

JUSTICE MARSHALL concurred in the judgment in a separate Opinion.

JUSTICE BLACKMUN and JUSTICE O'CONNOR concurred in the judgment in a separate Opinion.

JUSTICE WHITE, dissenting.

The interests which justify the Berkeley ordinance can properly be understood only in the context of the historic role of the initiative in California. From its earliest days, it was designed to circumvent the undue influence of large corporate interests on government decisionmaking. It served, as President Wilson put it, as a “gun behind the door” to keep political bosses and legislators honest. In more recent years, concerned that the heavy financial participation by corporations in referendum contests has undermined this tool of direct democracy, the voters of California enacted by initiative in 1974 the Political Reform Act, which limited expenditures in statewide ballot measure campaigns, and Berkeley voters adopted the ordinance at issue in this case. The role of the initiative in California cannot be separated from its purpose of preventing the dominance of special interests.

Perhaps neither the city of Berkeley nor the State of California can “prove” that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard.

Comments and Queries

Remember that in National Conservative Action PAC, above, the Court held “that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” There is obviously no possibility here of a quid pro quo, and the municipality’s concern about disclosure of the identity of contributors. Given that, QUERY: could the Court have decided this case any differently unless it were willing to re-visit the question of whether the government has a compelling interest in “leveling the playing field” by preventing one side of a question (or one candidate) from amassing and spending far greater resources than the other. QUERY further: is Justice White suggesting just that?

III. Public Employment

A. Patronage

President Andrew Jackson did not say “to the victor belong the spoils.” Nor, despite being the first “outside” president in twenty-eight years, did he “clean house” of federal employees to replace them with his supporters. The famous dictum is attributable to a senator whose name is otherwise unknown to history. And Jackson removed only about 2,000 out of 11,000 “civil servants.” But, “[e]ven so, a demoralizing practice was begin on a national scale. ... Scandal inevitably accompanied the new system. Men were appointed to high posts who had openly bought their posts by campaign contributions. Illiterates, incompetents, and plain crooks were given positions of public trust. ... The system at length secured such a tenacious hold that more than half a century passed before its grip could be partially loosened.” Bailey, The American Pageant, 1956, 257. Not even the Civil War interfered with it: “In passing between his office and his bedroom or the dining room, the President was obliged to struggle through the lines of office seekers, some of whom grabbed him, holding out their papers.” Leech, Reveille in Washington, 1941, 48.

Despite numerous efforts at reform, the constitutionality of the system itself was not to be challenged for over a century after the hordes of office seekers harassed Abraham Lincoln in the living quarters of the White House.

ELROD v. BURNS, 427 U.S. 347 (1976)

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE and MR. JUSTICE MARSHALL joined.

This case presents the question whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments.

In December 1970, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. At that time, respondents, all Republicans, were employees of the Cook County Sheriff's Office. They were non-civil-service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge.

It has been the practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service employees of the

Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party. Consequently, subsequent to Sheriff Elrod's assumption of office, respondents, with the exception of Buckley, were discharged from their employment solely because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.

The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.

Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson. More recent times have witnessed a strong decline in its use, particularly with respect to public employment. Indeed, only a few decades after Andrew Jackson's administration, strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act, the foundation of modern civil service. And on the state and local levels, merit systems have increasingly displaced the practice. The decline of patronage employment is not, of course, relevant to the question of its constitutionality. It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined.

The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and

ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief.

Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in *Board of Education v. Barnette*, 319 U.S. 624 (1943), by the influence of a teacher over students, “[i]f 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.” And “there can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments. *NAACP v. Button*, 371 U.S. 415, 430. The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is “at war with the deeper traditions of democracy embodied in the First Amendment.” *Illinois State Employees Union v. Lewis*, 473 F.2d, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

Particularly pertinent to the constitutionality of the practice of patronage dismissals are *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Keyishian*, the Court invalidated New York statutes barring employment merely on the basis of membership in “subversive” organizations. *Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. In *Perry*, the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise

of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly'."

Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

One interest which has been offered in justification of patronage is the need to insure effective government and the efficiency of public employees. It is argued that employees of political persuasions not the same as that of the party in control of public office will not have the incentive to work effectively and may even be motivated to subvert the incumbent administration's efforts to govern effectively. We are not persuaded. The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. Further, it is not clear that dismissal in order to make room for a patronage appointment will result in replacement by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability. At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.

Even if the first argument that patronage serves effectiveness and efficiency be rejected, it still may be argued that patronage serves those interests by giving the employees of an incumbent party the incentive to perform well in order to insure their party's incumbency and thereby their jobs. Patronage, according to the argument, thus makes employees highly accountable to the public. But the ability of officials more directly accountable to

the electorate to discharge employees for cause and the availability of merit systems, growth in the use of which has been quite significant, convince us that means less intrusive than patronage still exist for achieving accountability in the public work force and, thereby, effective and efficient government. The greater effectiveness of patronage over these less drastic means, if any, is at best marginal, a gain outweighed by the absence of intrusion on protected interests under the alternatives.

A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

It is argued that a third interest supporting patronage dismissals is the preservation of the democratic process. According to petitioners, "we have contrived no system for the support of party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services." The argument is thus premised on the centrality of partisan politics to the democratic process. Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms. But however important preservation of the two-party system or any system involving a fixed number of parties may or may not be, we are not persuaded that the elimination of patronage practice or, as is specifically involved here, the interdiction of patronage dismissals, will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.

In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking

positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods. More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms. We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief.

MR. JUSTICE STEVENS did not participate in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.

The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.

MR. CHIEF JUSTICE BURGER dissented in a separate Opinion.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds unconstitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics. This decision is

urged on us in the name of First Amendment rights, but in my view the judgment neither is constitutionally required nor serves the interest of a representative democracy. It also may well disserve - rather than promote - core values of the First Amendment. I therefore dissent.

It might well be possible to dispose of this case on the ground that it implicates no First Amendment right of the respondents, and therefore that they have failed to state a cause of action. They are employees seeking to avoid discharge - not citizens desiring an opportunity to be hired by the county without regard to their political affiliation or loyalty. Respondents' complaint acknowledges the longstanding existence of the patronage system they now challenge.

We thus have complaining employees who apparently accepted patronage jobs knowingly and willingly, while fully familiar with the "tenure" practices long prevailing in the Sheriff's Office. Such employees have benefited from their political beliefs and activities; they have not been penalized for them.

The question is whether it is consistent with the First and Fourteenth Amendments for a State to offer some employment conditioned, explicitly or implicitly, on partisan political affiliation and on the political fortunes of the incumbent officeholder. It is difficult to disagree with the view, as an abstract proposition, that government employment ordinarily should not be conditioned upon one's political beliefs or activities. But we deal here with a highly practical and rather fundamental element of our political system, not the theoretical abstractions of a political science seminar. In concluding that patronage hiring practices are unconstitutional, the plurality seriously underestimates the strength of the government interest - especially at the local level - in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights.

As indicated above, patronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable. It cannot be questioned seriously that these contributions promote important state interests.

We also have recognized the strong government interests in encouraging stable political parties and avoiding excessive political fragmentation. Through the medium of established parties the "people . . . are presented with understandable choices and the

winner in the general election with sufficient support to govern effectively,” *Storer v. Brown*, 415 U.S. 724, 735 (1974), while “splintered parties and unrestrained factionalism [might] do significant damage to the fabric of government.”

The complaining parties are or were employees of the Sheriff. In many communities, the sheriff's duties are as routine as process serving, and his election attracts little or no general public interest. In the States, and especially in the thousands of local communities, there are large numbers of elective offices, and many are as relatively obscure as that of the local sheriff or constable. Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices in particular usually attract little attention from the media, with consequent disinterest and absence of intelligent participation on the part of the public. Unless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups. In short, the resource pools that fuel the intensity of political interest and debate in “important” elections frequently “could care less” about who fills the offices deemed to be relatively unimportant. Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process. The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their “man” is elected. The activities of the latter are often the principal source of political information for the voting public. The “robust” political discourse that the plurality opinion properly emphasizes is furthered - not restricted - by the time-honored system.

Patronage hiring practices also enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political “chores” performed for citizens who otherwise may have no practical means of access to officeholders. In some communities, party organizations and clubs also render helpful social services.

It is naive to think that these types of political activities are motivated at these levels by some academic interest in “democracy” or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties. It is difficult to overestimate the contributions

to our system by the major political parties, fortunately limited in number compared to the fractionalization that has made the continued existence of democratic government doubtful in some other countries. Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.

I thus conclude that patronage hiring practices sufficiently serve important state interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees.

Patronage hiring practices have been consistent historically with vigorous ideological competition in the political "marketplace." And even after one becomes a beneficiary, the system leaves significant room for individual political expression. Employees, regardless of affiliation, may vote freely and express themselves on some political issues. The principal intrusion of patronage hiring practices on First Amendment interests thus arises from the coercion on associational choices that may be created by one's desire initially to obtain employment. This intrusion, while not insignificant, must be measured in light of the limited role of patronage hiring in most government employment. The pressure to abandon one's beliefs and associations to obtain government employment - especially employment of such uncertain duration - does not seem to me to assume impermissible proportions in light of the interests to be served.

On the assumption we must reach the constitutional issue at the behest of the respondents, I would hold that a state or local government may elect to condition employment on the political affiliation of a prospective employee and on the political fortunes of the hiring incumbent. History and long-prevailing practice across the country support the view that patronage hiring practices make a sufficiently substantial contribution to the practical functioning of our democratic system to support their relatively modest intrusion on First Amendment interests. The judgment today unnecessarily constitutionalizes another element of American life - an element certainly not without its faults but one which generations have accepted on balance as having merit. We should have heeded, instead, the admonition of Mr. Justice Holmes that "[i]f a

thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it” *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

RUTAN v. REPUBLICAN PARTY OF ILLINOIS, 497 U.S. 62 (1990)

JUSTICE BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns* and *Branti v. Finkel* [445 U.S. 507 (1980)] decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related political patronage practices - whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

On November 12, 1980, the Governor [of Illinois] issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansion, and reorganizations. The order proclaims that “no exceptions” are permitted without the Governor's “express permission after submission of appropriate requests to [his] office.”

By means of the freeze, according to petitioners, the Governor has been using the Governor’s Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency’s request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial

or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Cynthia B. Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that, since 1981, she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party.

In *Elrod*, *supra*, we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of his own party “when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party.” Four years later, in *Branti* we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod*, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of “the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one’s job.”

We first address the claims of the four current or former employees. Respondents urge us to view *Elrod* and *Branti* as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' First Amendment rights have not been infringed, because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod* and *Brant*, as both cases involved state workers who were employees at will, with no legal entitlement to continued employment. In *Perry*, we held explicitly that the plaintiff teacher’s lack of a contractual or tenure right to reemployment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

“For at least a quarter-century, this Court has made clear that, even though a person has no ‘right’ to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’ Such interference with constitutional rights is impermissible.”

Likewise, we find the assertion here that the employee petitioners had no legal entitlement to promotion, transfer, or recall beside the point. The same First Amendment concerns that underlay our decisions in *Elrod* and *Branti* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a “temporary” layoff. These are significant penalties, and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. A government's interest in securing effective employees can be met by discharging, demoting or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. Likewise, the “preservation of the democratic process” is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, “political parties are nurtured by other less intrusive and equally effective methods.” Political parties have already survived the substantial decline in patronage employment practices in this century. Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees.

Whether the four employees were in fact denied promotions, transfers, or rehire for failure to affiliate with and support the Republican Party is for the District Court to

decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution, and that the allegations of the four employees state claims for violations of the First and Fourteenth Amendments.

Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment. Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude. Decades of decisions by this Court belie such a claim. We premised *Torcaso v. Watkins*, 367 U.S. 488 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." In *Keyishian v. Board of Regents of Univ. of New York*, 385 U.S. 589, 609-610 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican . . . shall be appointed to federal office." *Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947). What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. We find no such government interest here, for the same reasons that we found the government lacks justification for patronage promotions, transfers or recalls.

JUSTICE STEVENS, concurred with a separate Opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an “appropriate requirement.” It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison*. Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil-service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

“I ain’t up on sillygisms, but I can give you some arguments that nobody can answer.

“First, this great and glorious country was built up by political parties; second, parties can’t hold together if their workers don’t get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there’ll be hell to pay.” W. Riordon, Plunkitt of Tammany Hall 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines and the Daley

Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by “party discipline,” before the demands of small and cohesive interest groups.

The choice between patronage and the merit principle - or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts - is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod v. Burns*, the Court did that. *Elrod* was limited however, as was the later decision of *Branti v. Finkel*, to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil-service reform absolute, extending to all decisions regarding government employment.

When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in *Elrod* and *Branti*. Suffice it to say that patronage was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic until *Elrod* - and has continued unabated since *Elrod*, to the extent still permitted by that unfortunate decision.

II

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the “ins,” rather than for some splinter group that has a more attractive political philosophy

but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. In the context of electoral laws, we have approved the States' pursuit of such stability and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736 (1974).

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have - on the basis of their politics, rather than their race or ethnicity - acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But, like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is necessarily desirable; nor even that it is always and everywhere arguably desirable, but merely that it is a political

arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives.

III

Even were I not convinced that Elrod and Branti were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the “restraint it places on freedoms of belief and association.” The loss of one’s current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the “coercive” effect of the former has been held always to outweigh the benefits of party-based employment decisions, the “coercive” effect of the latter should not be. We have drawn a line between firing and other employment decisions in other contexts, see *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 282 -283 (1986) (plurality opinion), and should do so here as well.

Comments and Queries

QUERY: is Rutan impelled by Elrod? As a practical matter, there will be greater problems involved in determining the motives for “promotion, transfer, recall and hiring,” than for outright dismissal. But is there any constitutional basis for the distinction? In Rutan, Justice Scalia cites only one example, Wygant, which struck down a “layoff” of a teacher in violation of a seniority provision in order to maintain “racial diversity” on a high school faculty.

It seems clear that the Elrod majority decided the case on the basis of strict scrutiny: to survive “constitutional challenge” the patronage system “must further some vital government end by a means that is least restrictive of freedom of belief and association” The dissent is less clear: “patronage hiring practices sufficiently serve important state interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees.” QUERY: is this a form of “intermediate scrutiny”? If so, why doesn’t the dissent say so? QUERY further: is Justice Scalia, dissenting in Rutan, suggesting an even less restrictive test: “it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people’s elected representatives.” If so, still further QUERY: is this a statement of the “rational basis” test and, if so, how can it be applied in a case involving a “fundamental” right without over-ruling numerous precedents, not the least of which would have to be San Antonio Independent School District v. Rodriguez, *supra*, at pp. .?

The dissents in both cases rely heavily on the desirability of a structured, two-party system. Regardless of how desirable that may be, QUERY: is this a legitimate constitutional consideration? The Constitution, after all, makes no provision for, or even reference to, political parties.

Notice Justice Powell's comment, dissenting in Elrod, that the plaintiffs are "complaining employees who apparently accepted patronage jobs .. fully familiar with the 'tenure' practices long prevailing" Recall the "Ashwander principles" by which Justice Brandeis codified and explained the rules of constitutional adjudication the Court had developed over a century of litigation. The sixth of these is that the Court "will not invalidate a statute at the instance of persons who have taken advantage of its benefits," Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). QUERY: should the suit have been dismissed on this basis. Before answering, consider that Justice Powell does not suggest this. Why? Because of the importance of the issue involved, and the desire of justices on both sides to reach the merits? Or, perhaps, because the Ashwander principles are no longer authoritative as precedent? If the latter is true, how does that relate to the ongoing controversy of "judicial activism" as opposed to "self restraint"?

B. Restrictions on Otherwise Permissible Activities

1. Political Participation

The Pendleton Act of 1883 was enacted in the furor following the assassination of President James Garfield by a disappointed office seeker. It provided for appointment to the “classified” (i.e., not political) civil service on the basis of “merit,” prohibited “financial assessments” on officeholders and established the first Civil Service Commission to administer the system. It was far from perfect, but it was a start. The Hatch Act of 1939, brought about in no small part by growing apprehension over the increasing numbers of federal employees created by “New Deal,” considerably extended the Pendleton concept. “Civil servants” were guaranteed tenure during good performance and, in return, were prohibited from engaging in various forms of political activity.

CIVIL SERVICE COMMISSION v. NATIONAL ASSOCIATION OF LETTER CARRIERS, 413 U.S. 548 (1973)

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal present[s] the single question whether the prohibition in [section] 9(a) of the Hatch Act against federal employees taking “an active part in political management or in political campaigns,” is unconstitutional on its face.

The case began when the National Association of Letter Carriers, six individual federal employees and certain local Democratic and Republican political committees filed a complaint, asserting on behalf of themselves and all federal employees that [this section] was unconstitutional on its face and seeking an injunction against its enforcement.

The constitutionality of the Hatch Act’s ban on taking an active part in political management or political campaigns has been here before. This very prohibition was attacked in [United Public Workers v. Mitchell, 330 U.S. 75 (1947)] by a labor union and various federal employees as being violative of the First, Ninth, and Tenth Amendments and as contrary to the Fifth Amendment by being vague and indefinite, arbitrarily discriminatory, and a deprivation of liberty.

We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent [federal employees] from holding a party office, working at the polls, and acting

as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

Such a decision on our part would do no more than confirm the judgment of history. Until now, the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences. The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power - or the party out of power, for that matter - using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another.

But however constitutional the proscription of identifiable partisan conduct in understandable language may be, the District Court's judgment was that [it] was both unconstitutionally vague and fatally overbroad. Appellees make the same contentions here, but we cannot agree that the section is unconstitutional on its face for either reason. As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.

Whatever might be the difficulty with a provision against taking "active part in political management or in political campaigns," the Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic, or cultural organizations exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, referendums, approval of municipal ordinances, and the like.

It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The Hatch Act by 9(a) prohibits federal employees from taking "an active part in political management or in political campaigns."

There is no definition of what "an active part . . . in political campaigns" means. The Act incorporates over 3,000 rulings of the Civil Service Commission between 1886 and 1940 and many hundreds of rulings since 1940. But even with that gloss on the Act, the critical phrases lack precision. In 1971 the Commission published a three-volume work entitled Political Activities Reporter which contains over 800 of its decision since the enactment of the Hatch Act.

The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration. That effect would not be material to the issue of constitutionality if only the normal contours of the police power were involved. On the run of social and economic matters the "rational basis" standard which *United Public Workers v. Mitchell* applied would suffice. But what may have been unclear to some in *Mitchell* should by now be abundantly clear to all. We deal here with a First Amendment right to speak, to propose, to publish, to petition Government, to assemble. Time and place are obvious limitations. Thus no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise. But it is of no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby - unless what he does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant. In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall. If Government employment were only a "privilege," then all sorts of conditions might be attached. But it is now settled that Government employment may not be denied or penalized "on a basis that infringes [the employee's] constitutionally protected interests - especially, his interest in freedom of speech." See *Perry v. Sindermann*, 408 U.S. 593, 597. If Government, as the majority stated in *Mitchell*, may not condition public employment on the basis that the employee will not "take any active part in missionary work," it is difficult to see why it may condition employment on the basis that the employee not take "an active part . . . in political campaigns." For speech, assembly, and petition are as deeply embedded in the First Amendment as proselytizing a religious cause.

Mitchell is of a different vintage from the present case. Since its date, a host of decisions have illustrated the need for narrowly drawn statutes that touch First Amendment rights. A teacher was held to be unconstitutionally discharged for sending a letter to a newspaper that criticized the school authorities. *Pickering v. Board of Education*, 391 U.S. 563, 573. We followed the same course in *Wood v. Georgia*, 370 U.S. 375, when we relieved a sheriff from a contempt conviction for making a public statement in connection with a current political controversy. As in the present case, the sheriff spoke as a private citizen and what he said did not interfere with his duties as sheriff.

Is a letter a permissible expression” of views or a prohibited “solicitation?” The Solicitor General says it is a “permissible” expression; but the Commission ruled otherwise. For an employee who does not have the Solicitor General as counsel great consequences flow from an innocent decision. He may lose his job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship imposed on many nervous people who live on narrow economic margins.

I would strike this provision of the law down as unconstitutional so that a new start may be made on this old problem that confuses and restricts nearly five million federal, state, and local public employees today that live under the present Act.

Comments and Queries

Although not clearly delineated, the dissent is arguing both that the Hatch Act is unconstitutional (“it is no concern of the Government does in his spare time”) and that the challenged section is unacceptably vague under recent case law.

With respect to the former, the majority seems to posit three “government interests”: (1) that the Government and its employees “avoid practicing political justice ... [and] appear to the public to be avoiding it”; (2) “that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps political machine,” and (3) “the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act on their own beliefs.” QUERY: which, if any, of these do you find “compelling”? Assuming one or more to be “compelling,” is the ban on political activities “narrowly tailored” to that end?

As to the vagueness claim, the minority points to the myriad of rulings by the Commission as evidence that “the critical phrases lack precision.” The majority believes

that the “procedure by which an employee in doubt ... may seek and obtain advice from the Commission” is sufficient to remedy the any vagueness. QUERY: with which do you agree?

2. Professional Advice

The “abortion issue,” perhaps the most heated since slavery, has spawned a variety of constitutional issues. We have already considered questions of access to clinics, see Madsen v. Woman’ Heath Center, Inc., supra, at pp. , and protests outside the home of service providers, see Frisby v. Schultz, supra, at pp. .

RUST v. SULLIVAN, 500 U.S. 173 (1991)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities.

I

In 1970, Congress enacted Title X of the Public Health Service Act, which provides federal funding for family planning services. The Act authorizes the Secretary to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.” Grants and contracts under Title X must “be made in accordance with such regulations as the Secretary may promulgate.” Section 1008 of the Act, however, provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”

In 1988, the Secretary promulgated new regulations designed to provide “‘clear and operational guidance’ to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.” The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a “Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of

family planning.” The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that “the project does not consider abortion an appropriate method of family planning, and therefore does not counsel or refer for abortion.”

Second, the regulations broadly prohibit a Title X project from engaging in activities that “encourage, promote or advocate abortion as a method of family planning.” Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.

Third, the regulations require that Title X projects be organized so that they are “physically and financially separate” from prohibited abortion activities.

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. Respondent is the Secretary of the Department of Health and Human Services. Petitioners challenged the regulations on the grounds that they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers.

III

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit “all discussion about abortion as a lawful option - including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy - while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.” They assert that the regulations violate the “free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients” by impermissibly imposing “viewpoint-discriminatory conditions on government subsidies,” and thus penaliz[e] speech funded with non-Title X monies. Because “Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint.”

Petitioners also assert that, while the Government may place certain conditions on the receipt of federal subsidies, it may not “discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas.”

There is no question but that the statutory prohibition contained in 1008 is constitutional. In *Maher v. Roe*, 432 U.S. 464 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. We held that the government may “make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.” The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. “[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” *Regan [v. Taxation With Representation of Washington]*, 461 U.S. 540, at 549 [1983].

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; “no funds appropriated for the project may be used in programs where abortion is a method of family planning,” and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government “suppressing a dangerous idea,” but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope.

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in this case Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v.*

Sindermann, 408 U.S. 593, 597 (1972), petitioners argue that, “even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech.”

Petitioners’ reliance on these cases is unavailing, however, because here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. The regulations govern the scope of the Title X project’s activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

In contrast, our “unconstitutional conditions” cases involve situations in which the government has placed a condition on the recipient of the subsidy, rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC v. League of Women Voters of California*, we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Under that law, a recipient of federal funds was “barred absolutely from all editorializing,” because it “is not able to segregate its activities according to the source of its funding,” and thus “has no way of limiting the use of its federal funds to all noneditorializing activities.”

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the

public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression. For example, this Court has recognized that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity." Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the

program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.

IV

We turn now to petitioners' argument that the regulations violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. We recently reaffirmed the long-recognized principle that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Webster [v. Reproductive Health Services], 492 U.S. [490], at 507 [1989]. The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected, and may validly choose to fund childbirth over abortion and "implement that judgment by the allocation of public funds" for medical services relating to childbirth, but not to those relating to abortion.

Petitioners also argue that by impermissibly infringing on the doctor/patient relationship and depriving a Title X client of information concerning abortion as a method of family planning, the regulations violate a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm. They argue that, under our decisions in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the government cannot interfere with a woman's right to make an informed and voluntary choice by placing restrictions on the patient/doctor dialogue.

In *Akron*, we invalidated a city ordinance requiring all physicians to make specified statements to the patient prior to performing an abortion in order to ensure that the woman's consent was "truly informed." Similarly, in *Thornburg*, we struck down a state statute mandating that a list of agencies offering alternatives to abortion and a description of fetal development be provided to every woman considering terminating her pregnancy through an abortion. Critical to our decisions in *Akron* and *Thornburg* to invalidate a governmental intrusion into the patient-doctor dialogue was the fact that the laws in both cases required all doctors within their respective jurisdictions to provide all pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to

the patient's decision. Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

Petitioners contend, however, that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But once again, even these Title X clients are in no worse position than if Congress had never enacted Title X. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency." [Harris v.] McRae, [448 U.S. 297], at 316 [1980].

The Secretary's regulations do not violate either the First or Fifth Amendments to the Constitution.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, with whom JUSTICE STEVENS joins as to Parts II and III, and with whom JUSTICE O'CONNOR joins as to Part I, dissenting.

I

Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law. In so doing, the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy. I conclude that the Secretary's Regulations violate the First and Fifth Amendments of our Constitution.

II

A

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. . . . The denial is 'frankly aimed at the suppression of dangerous ideas,'" quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950). This rule is a sound one, for, as the Court often has noted: "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *League of Women Voters*, 468 U.S., at 383-384. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion.

The Regulations are also clearly viewpoint-based. While suppressing speech favorable to abortion with one hand, the Secretary compels anti-abortion speech with the other. For example, the Department of Health and Human Services' own description of the Regulations makes plain that "Title X projects are required to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her wellbeing and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process."

Moreover, the Regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. Both requirements are antithetical to the First Amendment. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

The Regulations pertaining to “advocacy” are even more explicitly viewpoint-based. These provide: “A Title X project may not encourage, promote or advocate abortion as a method of family planning.” They explain: “This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes.” The Regulations do not, however, proscribe or even regulate antiabortion advocacy. These are clearly restrictions aimed at the suppression of “dangerous ideas.”

Remarkably, the majority concludes that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.” But the majority’s claim that the Regulations merely limit a Title X project's speech to preventive or preconceptional services, rings hollow in light of the broad range of non-preventive services that the Regulations authorize Title X projects to provide. By refusing to fund those family planning projects that advocate abortion because they advocate abortion, the Government plainly has targeted a particular viewpoint. The majority’s reliance on the fact that the Regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race. As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

B

The Court concludes that the challenged Regulations do not violate the First Amendment rights of Title X staff members, because any limitation of the employees’ freedom of expression is simply a consequence of their decision to accept employment at a federally funded project. But it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by

relinquishing his or her job. It is beyond question “that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.” *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234 (1977), citing *Elrod v. Burns*, 427 U.S. 347, 357-360 (1976).

“For at least a quarter-century, this Court has made clear that, even though a person has no “right” to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would, in effect, be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’” *Perry v. Sindermann*, 408 U.S., at 597.

The majority attempts to circumvent this principle by emphasizing that Title X physicians and counselors “remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project.” “The regulations,” the majority explains, “do not in any way restrict the activities of those persons acting as private individuals.” Under the majority’s reasoning, the First Amendment could be read to tolerate any governmental restriction upon an employee’s speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.

In *Abood*, it was no answer to the petitioners’ claim of compelled speech as a condition upon public employment that their speech outside the workplace remained unregulated by the State. Nor was the public employee’s First Amendment claim in *Rankin v. McPherson*, 483 U.S. 378 (1987), derogated because the communication that her employer sought to punish occurred during business hours. At the least, such conditions require courts to balance the speaker’s interest in the message against those of government in preventing its dissemination. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

In the cases at bar, the speaker’s interest in the communication is both clear and vital. In addressing the family planning needs of their clients, the physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations of

the patient and the ethical responsibilities of the medical profession demand no less. “The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.” Current Opinions, the Council on Ethical and Judicial Affairs of the American Medical Association 8.08 (1989).

The Government’s articulated interest in distorting the doctor/patient dialogue - ensuring that federal funds are not spent for a purpose outside the scope of the program - falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct. Moreover, the offending Regulation is not narrowly tailored to serve this interest. For example, the governmental interest at stake could be served by imposing rigorous bookkeeping standards to ensure financial separation or adopting content-neutral rules for the balanced dissemination of family planning and health information. By failing to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protection that the First Amendment clearly provides for this important message.

C

Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. “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.” *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

III

By far the most disturbing aspect of today's ruling is the effect it will have on the Fifth Amendment rights of the women who, supposedly, are beneficiaries of Title X programs. The majority rejects petitioners’ Fifth Amendment claims summarily. It relies primarily upon the decisions in *Harris v. McRae*, 448 U.S. 297 (1980), and *Webster v.*

Reproductive Health Services, 492 U.S. 490 (1989). There were dissents in those cases, and we continue to believe that they were wrongly and unfortunately decided. Be that as it may, even if one accepts as valid the Court's theorizing in those cases, the majority's reasoning in the present cases is flawed.

Contrary to the majority's characterization, this is not a case in which individuals seek government aid in exercising their fundamental rights. The Fifth Amendment right asserted by petitioners is the right of a pregnant woman to be free from affirmative governmental interference in her decision. *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. Those cases serve to vindicate the idea that "liberty," if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions. By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.

It is crystal clear that the aim of the challenged provisions - an aim the majority cannot escape noticing - is not simply to ensure that federal funds are not used to perform abortions, but to "reduce the incidence of abortion." As recounted above, the Regulations require Title X physicians and counselors to provide information pertaining only to childbirth, to refer a pregnant woman for prenatal care irrespective of her medical situation, and, upon direct inquiry, to respond that abortion is not an "appropriate method" of family planning.

The undeniable message conveyed by this forced speech, and the one that the Title X client will draw from it, is that abortion nearly always is an improper medical option. Although her physician's words, in fact, are strictly controlled by the Government, and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the Regulations' mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

In view of the inevitable effect of the Regulations, the majority's conclusion that "[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the government had not enacted Title X," is insensitive and contrary to common human experience. Both the purpose and result of the challenged Regulations are to deny women the ability voluntarily to decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright. The denial of this freedom is not a consequence of poverty, but of the Government's ill-intentioned distortion of information it has chosen to provide.

The substantial obstacles to bodily self-determination that the Regulations impose are doubly offensive because they are effected by manipulating the very words spoken by physicians and counselors to their patients. In our society, the doctor/patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals. One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.

The majority attempts to distinguish our holdings in *Akron* and *Thornburgh* on the post hoc basis that the governmental intrusions into the doctor/patient dialogue invalidated in those cases applied to all physicians within a jurisdiction while the Regulations now before the Court pertain to the narrow class of healthcare professionals employed at Title X projects. But the rights protected by the Constitution are personal rights. And for the individual woman, the deprivation of liberty by the Government is no less substantial because it affects few, rather than many. It cannot be that an otherwise unconstitutional infringement of choice is made lawful because it touches only some of the Nation's pregnant women, and not all of them.

JUSTICE STEVENS also dissented in a separate Opinion.

JUSTICE O'CONNOR, dissenting.

One may well conclude, as JUSTICE BLACKMUN does in Part II, that the regulations are unconstitutional. I do not join Part II of the dissent, however, for the same reason that I do not join Part III. This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with “great gravity and delicacy” when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment. In this case, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation.

Comments and Queries

The majority argues that Perry is not controlling because “the government is not denying a benefit to anyone, but is instead insisting that public funds be spent for the purposes for which they were authorized.” QUERY: isn’t this tautological since, by requiring that funds be spent only for authorized purposes, it is denying a benefit (abortion counseling) to women seeking medical services under Title X?

QUERY further: isn’t the majority’s real argument that, while it would be “easier” for a woman if she could obtain this benefit, the government is under no obligation to provide it? Is there merit in this argument? After all, the federal government is under no constitutional obligation to provide pre-natal services to the poor. It could, if the law making process so desired, repeal Title X entirely. The dissent’s response to this argument is that it is “insensitive and contrary to human experience.” It is, almost certainly, “insensitive,” but QUERY: is this a constitutional standard? And QUERY further: in what way is it contrary to “common human experience”?

Also QUERY: isn’t the real problem with the majority position that the government, having “chosen” to finance a confidential, professional consultation between physician and patient, cannot ethically interfere with, or attempt to determine the outcome of, that relationship? But does that ethical obligation, if it exists, rise to the level of a constitutional command? Put more bluntly, can the government, consistent with the First Amendment, provide a “limited” professional consultation and tell the doctor and the patient to “take it or leave it”? If so, QUERY: does it make a difference that the doctor undoubtedly understands the limited nature of the relationship, but the patient very likely does not?

Notice the majority’s effort to avoid this question by saying “[n]othing in [the regulation] requires a doctor to represent as his own any opinion that he does in fact not hold.” But QUERY: doesn’t the regulation require a doctor not to represent as his own an opinion he does hold? If so, how does that affect the majority’s argument?

Notice the dissent's attempt to bring the regulation within the "compelled speech" cases because the "physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning." But is this accurate? The majority characterizes the phrase as "[o]ne permissible response," and the doctor could, in any event, simply decline to discuss the subject.

Lastly, consider the dissent's claim that "[u]nder the majority's reasoning, the First Amendment could be read to tolerate any government restriction upon an employee's speech so long as that restriction is limited to the funded workplace. That is a dangerous proposition, and one the Court has rightly rejected in the past." QUERY: do the cases cited in support of this proposition really support it? In Rankin, a data entry clerk in a constable's office had been dismissed for saying, after hearing in the workplace of the attempt on President Reagan's life: "if they go for him again, I hope they get him." The Court concluded that the comment could not be considered threat against the president, and ordered her reinstatement. The other citations are more problematic. Pickering ordered the reinstatement of a teacher who had been discharged for publishing criticism of her school board and administration, some of which was factually incorrect, in a local newspaper. Abood dealt with the constitutionality of requiring non-members of a teacher's union to pay a "service fee" equivalent to membership dues. (The Court ruled that the non-member could be required to pay that percentage of the fee that financed "collective-bargaining, contract-administration, and grievance-adjustment purposes," but not that "to the support of an ideological cause he may oppose.")

3. "Outside" Compensation

The opportunity to earn additional income from "outside employment" has, since the beginning of the Republic, attracted the interest of government employees, high and low. In some cases, this has added immeasurably to the store of knowledge and literature. On many occasions, however, it has provided an opportunity for special interests to enhance the income of friendly officials and, in some cases, outright corruption.

UNITED STATES v. NATIONAL TREASURY EMPLOYEES UNION, 514 U.S. 1002
(1995)

JUSTICE STEVENS delivered the opinion of the Court.

In 1989 Congress enacted a law that broadly prohibits federal employees from accepting any compensation for making speeches or writing articles. The prohibition applies even when neither the subject of the speech or article nor the person or group paying for it has

any connection with the employee's official duties. We must decide whether that statutory prohibition comports with the Constitution's command that "Congress shall make no law . . . abridging the freedom of speech." We hold that it does not.

II

Two unions and several career civil servants employed full-time by various Executive departments and agencies filed suit to challenge the constitutionality of the honoraria ban. The record contains a number of affidavits describing respondents' past activities that the honoraria ban would now prohibit. A mail handler employed by the Postal Service in Arlington, Virginia had given lectures on the Quaker religion for which he received small payments that were "not much, but enough to supplement my income in a way that makes a difference." An aerospace engineer employed at the Goddard Space Flight Center in Greenbelt, Maryland had lectured on black history for a fee of \$100 per lecture. A microbiologist at the Food and Drug Administration had earned almost \$3,000 per year writing articles and making radio and television appearances reviewing dance performances. A tax examiner employed by the Internal Revenue Service in Ogden, Utah had received comparable pay for articles about the environment.

III

Federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas. They include literary giants like Nathaniel Hawthorne and Herman Melville, who were employed by the Customs Service; Walt Whitman, who worked for the Departments of Justice and Interior; and Bret Harte, an employee of the mint. Respondents have yet to make comparable contributions to American culture, but they share with these great artists important characteristics that are relevant to the issue we confront.

Even though respondents work for the Government, they have not relinquished "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 568 (1968). They seek compensation for their expressive activities in their capacity as citizens, not as Government employees. They claim their employment status has no more bearing on the quality or market value of their literary output than it did on that of Hawthorne or Melville. With few exceptions, the content of respondents'

messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

In *Pickering* and a number of other cases we have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.

Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.

Although [the statute] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991). Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.

The ban imposes a far more significant burden on respondents than on the relatively small group of lawmakers whose past receipt of honoraria motivated its enactment. The absorbing and time-consuming responsibilities of legislators and policymaking executives leave them little opportunity for research or creative expression on subjects unrelated to their official responsibilities. Such officials often receive invitations to appear and talk about subjects related to their work because of their official identities. In contrast, invitations to rank-and-file employees usually depend only on the market value of their messages. The honoraria ban is unlikely to reduce significantly the number of appearances by high-ranking officials as long as travel expense reimbursement for the speaker and one relative is available as an alternative form of remuneration. In contrast,

the denial of compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output.

The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976). We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne. The honoraria ban imposes the kind of burden that abridges speech under the First Amendment.

IV

Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify [the statute] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it. Instead, the Government submits that the ban comports with the First Amendment because the prohibited honoraria were "reasonably deemed by Congress to interfere with the efficiency of the public service."

The Government's underlying concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful, but the Government cites no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16. The Government relies here on limited evidence of actual or apparent impropriety by legislators and high-level executives, together with the purported administrative costs of avoiding or detecting lower-level employees' violations of established policies.

Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence. Congress could not, however, reasonably extend that assumption to all federal employees below Grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles.

The fact that [the statute] singles out expressive activity for special regulation heightens the Government's burden of justification. As Justice Brandeis reminded us, a “reasonable” burden on expression requires a justification far stronger than mere speculation about serious harms. “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion). The Government has not persuaded us that [the statute] is a reasonable response to the posited harms.

JUSTICE O'CONNOR, concurred in the judgment in part and dissented in part.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The ban neither prohibits anyone from speaking or writing, nor does it penalize anyone who speaks or writes; the only stricture effected by the statute is a denial of compensation.

In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), we evaluated the constitutionality of New York's “Son of Sam” convicted criminal's receipt of income generated by works that described his crime. We concluded that the law implicated First Amendment concerns because it “impose[d] a financial disincentive only on speech of a particular content.” Because the Son of Sam law was content based, we required the State to demonstrate that the regulation was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. We determined that the State had failed to meet its burden because the statute was overbroad. Unlike the law at issue in *Simon & Schuster*, the honoraria ban is neither content nor viewpoint based. As a result, the ban does not raise the specter of Government control over the marketplace of ideas. To the extent that the honoraria ban implicates First Amendment concerns, the proper standard of review is found in our cases dealing with the Government's ability to regulate the First Amendment activities of its employees.

A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We have emphasized, however, that “the State’s interests as an employer in regulating the speech of its employees ‘differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.’” The proper resolution of these competing interests requires “‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”

In conducting this balance, we consistently have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern.

Applying these standards to the honoraria ban, I cannot say that the balance that Congress has struck between its interests and the interests of its employees to receive compensation for their First Amendment expression is unreasonable.

The Court relies on cases involving restrictions on the speech of private actors to argue that the Government is required to produce “evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16.” The Court recognizes, however, that we “have consistently given greater deference to government predictions of harm used to justify restriction on employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.”

The Court concedes that in light of the abuses of honoraria by its Members, Congress could reasonably assume that “payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence,” but it concludes that Congress could not extend this presumption to federal employees below grade GS-16. The theory underlying the Court's distinction - that federal employees below grade GS-16 have negligible power to confer favors on those who might pay to hear them speak or to read their articles - is seriously flawed. Tax examiners, bank examiners, enforcement officials, or any number of federal employees have substantial power to confer favors even though their compensation level is below Grade GS-16. Congress was not obliged to draw an infinitely filigreed statute to deal with every subtle distinction between various groups of employees.

Because there is only a limited burden on respondents' First Amendment rights, Congress reasonably could have determined that its paramount interests in preventing impropriety and the appearance of impropriety in its work force justified the honoraria ban.

Comments and Queries

With respect to employees of the executive branch, the following are excluded from the honoraria ban: "an artistic, athletic or other such skill or talent ... reading a part in a play or delivering a sermon ... [works of] fiction, poetry, lyrics, or script ... teaching a course involving multiple presentations at an accredited program or institution." Interestingly, these exclusions would have permitted General Lew Wallace to receive compensation for writing the classic "Ben Hur" while serving as the federal Governor of the Colorado Territory.

The majority opinion raises, again, the "right to read and hear." Is this an independent, substantive right? Can it expand on the right of another to speak on a subject which might otherwise be prohibited? If so, on what subject(s)? If none can be articulated, isn't the "right to receive" simply redundant except, perhaps, to confer standing on a party who might otherwise lack it? Notice, in that regard, the Court's citation of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.

The dissent argues that "[b]ecause there is only a limited burden of respondents' First Amendment rights, Congress could have determined that its paramount interests in preventing impropriety and the appearance of impropriety in its work force justified the honoraria ban." QUERY: is this strict scrutiny analysis? Or some other traditional First Amendment analysis? Or an effort to re-introduce a "rational basis" test into First Amendment jurisprudence? If the last, QUERY: is that really a good idea? Or is it just loose language in a dissenting opinion?

IV. Newsgathering

It was the British parliamentarian Charles James Fox (1749-1806) who coined the phrase “the Fourth Estate” when, looking up the reporters seated in the gallery of the House of Commons, he observed that the press, in its own way, exercised as much power as any of the other three “Estates,” then Lords, Bishops and Commons. As a practical matter that remains true in England but, in a nation without a written constitution, it must rely on the political process for its preservation. In the United States, the freedom and independence of the press is, of course, expressly guaranteed by the First Amendment.

There, are, however limits to that independence. As the Court summarized in Cohen v. Cowles Media Co. 501 U.S. 663, 669-670: “The press may not with impunity break and enter an office or dwelling to gather news. ... The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 -579 (1977). Similarly, the media must obey the National Labor Relations Act, Associated Press v. NLRB, 301 U.S. 103 (1937), and the Fair Labor Standards Act, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-193 (1946); may not restrain trade in violation of the antitrust laws, Associated Press v. United States, 326 U.S. 1 (1945); Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969); and must pay nondiscriminatory taxes. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 581 -583 (1983). It is therefore beyond dispute that “[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.” Associated Press v. NLRB, *supra*, at 132-133. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”

Two issues, however, have been and remain hotly contested.

A. Confidentiality

The federal government and all states have enacted laws providing for the confidentiality of “communication” between doctor and patient, attorney and client, clergyman and “penitent.” The theory is that public health, the justice system and repentance of “sin” will be enhanced by encouraging the truthful exchange of information between them. The press has long sought a similar “privilege,” either statutory or constitutional.

BRANZBURG v. HAYES, 408 U.S. 665 (1972)
(Together with In re Pappas and United States v. Caldwell)

Opinion of the Court by MR. 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.

I

Branzburg v. Hayes brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner’s by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about \$5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers. Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana. A state trial court judge ordered petitioner to answer these questions.

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Kentucky. The

article reported that in order to provide a comprehensive survey of the “drug scene” in Frankfort, petitioner had “spent two weeks interviewing several dozen drug users in the capital city” and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury “to testify in the matter of violation of statutes concerning use and sale of drugs,” petitioner Branzburg moved to quash the summons; the motion was denied, although an order was issued protecting Branzburg from revealing “confidential associations, sources or information” but requiring that he “answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him].”

In re Pappas originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group’s headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3 p. m. He then asked for and received permission to re-enter the area. Returning at about 9 o’ clock, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid, which Pappas, “on his own,” was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had occurred in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there.

United States v. Caldwell arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena duces tecum was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther

Party concerning the aims, purposes, and activities of that organization. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

II

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. 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.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that “[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.” *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. In *Zemel v. Rusk* [381 U.S. 1 (1965)], for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction “render[ed] less than wholly free the flow of information concerning that country.” The ban on travel was held constitutional, for “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”

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. The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States. Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. Hence, the grand jury's authority to subpoena witnesses is not only historic, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege.*

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us,

we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert - and no one does in these cases - that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsmen before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests.

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

"[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it

should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

The requirements of those cases which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." If the test is that the government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling

assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others - because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing

their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true -- that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries -- prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials. These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

*Jeremy Bentham vividly illustrated this maxim:

“Are men of the first rank and consideration - are men high in office - men whose time is not less valuable to the public than to themselves - are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.” 4 The Works of Jeremy Bentham 320-321 (J. Bowring ed. 1843).

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.

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

MR. JUSTICE DOUGLAS, dissenting.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury, it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment must yield to the Government's asserted need to know a reporter's unprinted information.

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 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.

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.

I

The reporter’s constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution’s protection of a free press because the guarantee is “not for the benefit of the press so much as for the benefit of all of us.”

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-

government. The press “has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences” *Estes v. Texas*, 381 U.S. 532, 539.

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, and a right to receive printed matter.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality -- the promise or understanding that names or certain aspects of communications will be kept off the record -- is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power - the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process - will either deter sources from divulging information or deter reporters from gathering and publishing information.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called “news” is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of “newsmakers.”

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public.

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship."

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics and impairing his resourcefulness as a reporter if he discloses confidential information.

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never

before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." And to perform these functions the grand jury must have available to it every man's relevant evidence.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, the Fourth Amendment, and the evidentiary privileges of the common law.

Such an interest must surely be the First Amendment protection of a confidential relationship. As noted there, this protection does not exist for the purely private interests of the newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship. Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information 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.

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space."

Comments and Queries

Following this decision, "numerous bills to establish a journalists' privilege were introduced in state legislatures and in Congress. While absolute immunity proposals did not fare well, over half the states have enacted press "shield" clause providing at least a qualified privilege against revelation of journalists' sources." Sullivan & Ginther, First Amendment Law, 2nd., 2003, 471.

Notice the majority's reference to the fact that police informants "enjoy no constitutional protection." A police officer can be forced to reveal the identity of informants, and the informant can be compelled to provide relevant testimony. QUERY: would it be anomalous for a reporter to enjoy a greater constitutional protection than law enforcement personnel? Before answering, consider that a prosecutor can almost always relieve the police of the duty to testify by negotiating a plea bargain with the defendant or, even, dismissing the criminal charges.

Consider also the practical problem, posed by the majority, that "it would be necessary to define those categories of newsmen who qualified for the privilege." QUERY: would a "reporter" for the National Enquirer qualify? A columnist for Hustler Magazine? A "desk top publisher" of a newsletter sent to subscribers who were, say, members of the American National Socialist Party or the Klu Klux Klan? On what basis would a principled distinction be drawn between them? Notice that in Houchins v.

KQED, Inc., immediately below, the District Court ordered the jail authorities to provide special access to “responsible representatives’ of the news media.” QUERY: by what criteria, and on what constitutional basis, could a court determine which media representatives are “responsible”?

Of the four dissenters, only Justice Douglas would sustain an “absolute privilege.” The “qualified privilege,” articulated by the other three, would require a reporter to testify only if the government can show a “compelling and overriding interest in the information” which cannot be obtained in any other way. QUERY: as between these views, which has the stronger constitutional foundation?

Since Branzburg, two significant cases have continued the precedent that the press is subject to laws of “general applicability.” Cohen v. Cowles Media Co., cited in the headnote, held that a newspaper could be held liable in damages for disclosing the identity of an informant to whom it has promised confidentiality. And Zurcher v. Stanford Daily News, 436 U.S. 547 (1978), upheld the validity of a search warrant issued for a “press room” to obtain photographs that would reveal the identity of persons who had assaulted police officers during a demonstration at a hospital. “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.” At p. 565.

B. Access

The press, and especially the broadcast and television media, have long argued that as “the eyes and ears of the public,” they have a special right of access to public activities and facilities. See Richmond Papers, Inc. v. Virginia, supra, at pp. .

HOUCHINS v. KQED, INC., 438 U.S. 1 (1978)

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

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 filed suit. 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. 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.

In support of the request for a preliminary injunction, respondents presented testimony and affidavits stating that other penal complexes had permitted media interviews of inmates and substantial media access without experiencing significant security or administrative problems. They contended that the monthly public tours at Santa Rita failed to provide adequate access to the jail for two reasons: (a) once the scheduled tours had been filled, media representatives who had not signed up for them had no access and were unable to cover newsworthy events at the jail; (b) the prohibition on photography and tape recordings, the exclusion of portions of the jail from the tours, and the practice of keeping inmates generally removed from view substantially reduced the usefulness of the tours to the media.

In response, petitioner admitted that Santa Rita had never experimented with permitting media access beyond that already allowed; he did not claim that disruption had been caused by media access to other institutions. He asserted, however, that unregulated access by the media would infringe inmate privacy, and tend to create "jail celebrities," who in turn tend to generate internal problems and undermine jail security. He also contended that unscheduled media tours would disrupt jail operations.

After considering the testimony, affidavits, and documentary evidence presented by the parties, the District Court preliminarily enjoined petitioner from denying KQED news personnel and "responsible representatives" of the news media access to the Santa Rita facilities, including Greystone, "at reasonable times and hours" and "from preventing KQED news personnel and responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full

and accurate coverage of the Santa Rita facilities.” The Court of Appeals 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. The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.

Grosjean v. American Press Co. [297 U.S. 233 (1936)] and Mills v. Alabama [384 U.S. 214 (1966)] emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. But an analysis of those cases reveals that the Court was concerned with the freedom of the media to communicate information once it is obtained; neither case intimated that the Constitution compels the government to provide the media with information or access to it on demand. Pell v. Procunier [417 U.S. 817 (1974)] and Saxbe v. Washington Post Co. [417 U.S. 843 (1974)] also assumed that there is no constitutional right of access. In those cases the Court declared, explicitly and without reservation, that the media have “no constitutional right of access to prisons or their inmates beyond that afforded the general public,” Pell, 417 U.S., at 834; Saxbe, 417 U.S., at 850, and on that premise the Court sustained prison

regulations that prevented media interviews with inmates. The right to receive ideas and information is not the issue in this case. The issue is a claimed special privilege of access, a right which is not essential to guarantee the freedom to communicate or publish.

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.

Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment. Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire. Public bodies and public officers, on the other hand, may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known.

Petitioner cannot prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions. Respondents are free to interview those who render the legal assistance to which inmates are entitled. They are also free to seek out former inmates, visitors to the prison, public officials, and institutional personnel, as they sought out the complaining psychiatrist here. Following the reports of the suicide at the jail involved here, the County Board of Supervisors called for a report from the County Administrator; held a public hearing on the report, which was open to the media; and called for further reports when the initial report failed to describe the conditions in the cells in the Greystone portion of the jail.

Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Until the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.

MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring in the judgment.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors. Accordingly, I agree substantially with what the opinion of THE CHIEF JUSTICE has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view “equal access” as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

At the time of the District Court's decision, members of the public were permitted to visit most parts of the Santa Rita jail, and the First and Fourteenth Amendments required the Sheriff to give members of the press effective access to the same areas. The Sheriff evidently assumed that he could fulfill this obligation simply by allowing reporters to sign up for tours on the same terms as the public. I think he was mistaken in this assumption, as a matter of constitutional law.

In two respects, however, the District Court's preliminary injunction was overbroad. It ordered the Sheriff to permit reporters into the Little Greystone facility and it required him to let them interview randomly encountered inmates. In both these respects, the

injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, and thus enlarged the scope of what the Sheriff and Supervisors had opened to public view.

Because the preliminary injunction exceeded the requirements of the Constitution in these respects, I agree that the judgment must be reversed. But I would not foreclose the possibility of further relief for KQED on remand. In my view, the availability and scope of future permanent injunctive relief must depend upon the extent of access then permitted the public, and the decree must be framed to accommodate equitably the constitutional role of the press and the institutional requirements of the jail.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

Respondent KQED, Inc., has televised a number of programs about prison conditions and prison inmates, and its reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison, and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding that the “shocking and debasing conditions which prevailed [at Santa Rita] constituted cruel and unusual punishment for man or beast as a matter of law.”

In *Pell v. Procunier*, the Court stated that “newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.” But the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny.

Here, the broad restraints on access to information regarding operation of the jail that prevailed on the date this suit was instituted are plainly disclosed by the record. The

public and the press had consistently been denied any access to those portions of the Santa Rita facility where inmates were confined and there had been excessive censorship of inmate correspondence. Petitioner's no-access policy, modified only in the wake of respondents' resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses.

The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas. In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry.

For that reason information gathering is entitled to some measure of constitutional protection. As this Court's decisions clearly indicate, however, this protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

The question is whether petitioner's policies, which cut off the flow of information at its source, abridged the public's right to be informed.

The answer to that question does not depend upon the degree of public disclosure which should attend the operation of most governmental activity. Such matters involve questions of policy which generally must be resolved by the political branches of government. Moreover, there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy. For example, the public and the press are commonly excluded from "grand jury proceedings, our own conferences, [and] the meetings of other official bodies gathered in executive session" *Branzburg v. Hayes*, 408 U.S., at 684 ; *Pell v. Procunier*, 417 U.S., at 834. In addition, some functions of government - essential to the protection of the public and indeed our country's vital interests - necessarily require a large measure of secrecy, subject to appropriate legislative oversight. In such situations the reasons for withholding information from the public are both apparent and legitimate.

In this case, however, “[r]espondents do not assert a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials.” They simply seek an end to petitioner’s policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.

The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are they public institutions, financed with public funds and administered by public servants, they are an integral component of the criminal justice system. The citizens confined therein are temporarily, and sometimes permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a “public trial.” It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation. While a ward of the State and subject to its stern discipline, he retains constitutional protections against cruel and unusual punishment, a protection which may derive more practical support from access to information about prisons by the public than by occasional litigation in a busy court.

It follows that if prison regulations and policies have unconstitutionally suppressed information and interfered with communication in violation of the First Amendment, the District Court has the power to require, at least temporarily, that the channels of communication be opened more widely than the law would otherwise require in order to let relevant facts, which may have been concealed, come to light.

Comments and Queries

Notice the District Court ordered not only that KQED, but other “responsible representatives of the media,” be granted special access to the jail. QUERY: by what

criteria, and on what constitutional basis, could a court determine which media representatives are “responsible”?

Notice also that the dissent does not dispute the Sheriff’s claim that “unregulated access by the media would infringe inmate privacy, and tend to create ‘jail celebrities,’ who in turn tend to generate internal problems and undermine jail security.” QUERY: do these concerns seem credible? QUERY further: does it matter if, as Chief Justice Burger concludes, “the media have no special right of access .. different from or greater than that accorded the public generally”?

The dissent relies, in part, on the First Amendment’s protection of “not only the dissemination but also the receipt of information and ideas.” A footnote explains: “Admittedly, the right to receive or acquire information is not specifically mentioned in the Constitution. But ‘the protection of the Bill of Rights goes beyond the specific guarantees to protect from ... abridgment those equally fundamental personal rights necessary to make the express guarantees meaningful. ... The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.’” *Lamont v. Postmaster General*, 381 U.S., at 308 (Brennan, J., concurring). It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.” Which brings us back to the question asked before in these pages: is the “right to receive” an independent, substantive right? Does it enlarge upon the right of “speakers” to provide information they would otherwise be prohibited from providing? If so, what information? For the first time, here, an answer is suggested: information that would be obtained by increased access to a public facility. But QUERY: if there is such a right, why isn’t it a right of the public, generally, instead of “its eyes and ears” which can, after all, choose how much of what they see and hear will be transmitted to the public? Put another way, what is the basis for saying that the public has a constitutional right to receive only such information as the media, based upon its right of special access, chooses to provide? Or is it possible that the “right to receive” is a right of the media and not the public? What could be the constitutional basis for such a claim?

Consider, lastly, Justice Stewart’s belief that “[t]he Constitution does no more than assure the public and the press equal access once the government has opened its doors. ... [but] the concept of equal access must be accorded more flexibility in order to accommodate the practical distinction between the press and the general public.” How does this coincide with the “special seating” arrangements for the media sanctioned in Richmond Newspapers, Inc. v. Virginia, *supra*, at pp. ?

APPENDIX “A”

The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
To constitute Tribunals inferior to the supreme Court;
To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
To provide and maintain a Navy;
To make Rules for the Government and Regulation of the land and naval Forces;
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;
To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II

Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having

the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

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

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Amendments to the Constitution of the United States of America

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the several states, pursuant to the Fifth Article of the original Constitution.

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice- President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice- President shall act as President, as in the case of the death or other constitutional disability of the President--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [1865]

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868]

Section 1.

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

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI 1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1917]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [1919]

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

Amendment XX [1933]

Section 1.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5.

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI [1933]

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers

and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1982]

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.